9-19-2014

Colafranceschi v. Briley Respondent's Brief Dckt. 41742

IN THE SUPREME COURT OF THE STATE OF IDAHO

MARK D. COLAFRANCESCHI, Appellant, vs. SHAWN BRILEY, ASHLEY ROBINSON Respondents.	Case No. 41742 RESPONDENT'S BRIEF

RESPONDENT SHAWN BRILEY'S RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho,
In and for the County of Valley, Honorable Gerald F. Schroeder, Senior Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case.

The nature of the case is a civil complaint filed by Mark Colafranceschi ("Cola") against Ashley Robinson ("Robinson"), Shawn Briley ("Briley"), and Kim Batt-Lincoln ("Lincoln"). Cola alleged that all three were involved, to varying degrees, in conducting child custody evaluations in two cases in Valley County between Cola and his ex-wife (Durena F. Schoonover) and former girlfriend (Susan E. Ericson).

Judge Henry Boomer appointed Robinson to conduct the evaluations in both cases, captioned *Colafranceschi v. Schoonover*, Valley County Case No. CV-2010-312C and *Colafranceschi v. Ericson*, Valley County Case No. CV-2006-521C. Robinson was appointed to conduct the evaluations in early February 2011, and filed both on April 18, 2011.

At the time of the evaluations, Robinson was a Licensed Master of Social Work. Briley, a Licensed Clinical Social Worker, was her peer supervisor. The District Court granted Lincoln's motion to dismiss the First Amended Complaint against her. Cola has not appealed that decision.

The primary question presented by Cola's appeal is whether Robinson and Briley are protected by quasi-judicial immunity for their alleged involvement in conducting the child custody evaluations. (Briley adopts Robinson's "Issues Presented on Appeal." Briley will seek costs if she prevails on appeal.) The general rule is that court appointed social workers, psychologists and like individuals, who assist in making child custody determinations, are

immune from suit under the doctrine of quasi-judicial immunity which appears to have been first recognized in Idaho in *McKay v. Owens*, 130 Idaho 148, 150, 937 P.2d 1222, 1224 (1997).[1]

Below, Cola argued that Robinson obtained her appointments by misrepresenting her qualifications to Judge Boomer. Cola never alleged that Briley was involved in making any representations to Judge Boomer to secure Robinson's appointment.

Before the District Court, Cola relied on a single unreported decision from Minnesota, *Jeffrey Kuberka v. Anoka Mediation, Inc.*, A05-2490, Minnesota Court of Appeals Unpublished, January 2, 2007, to argue that pre-appointment conduct falls outside the scope of quasi-judicial immunity. That is Cola's sole substantive citation in his brief on appeal.

This Court should not undo the protections provided to court appointed child custody evaluators by quasi-judicial immunity. It is an important doctrine that protects social workers and others from suit in the undeniably contentious setting of child custody disputes.

While Cola seems to suggest an exception to the doctrine in the case of "pre-appointment fraud," such an exception would destroy the general rule.

B. Course of Proceedings.

Cola's opening brief's "Course of Proceedings" section is inadequate. Briley joins in Robinson's "Procedural History," and offers the following in that regard.

Cola filed his Verified Complaint and Demand For Jury Trial in Valley County on November 16, 2012. (R, Vol. I, p. 9.) On December 6, 2012, Cola filed his Amended Verified Complaint and Demand for Jury Trial. (R, Vol. I, p. 35.) On December 12, 2012, Cola moved

[1] While that case involved the appointment of a guardian ad litem, its logic applies to the circumstances presented by a case involving a court appointed social worker such as Robinson, and that social worker's peer supervisor, such as Briley.

to disqualify Judge Thomas Neville without cause (R, Vol. I, p. 53), which Judge Neville granted on December 20, 2012, with a notation at the bottom of Cola's motion. (*See id.*) The Idaho Supreme Court then appointed Judge Gerald F. Schroeder to replace Judge Neville. (R, Vol. I, pp. 140-41.)

On December 24, 2012, Defendant Kim Batt-Lincoln ("Batt-Lincoln") filed a motion to dismiss Cola's First Amended Complaint for failure to state a claim under I.R.C.P. 12(b)(6). Judge Schroeder granted that motion on April 30, 2013, having heard the motion on April 15, 2013. (R., Vol. II, p. 287.)

On February 12, 2013, Briley filed her Answer to Amended Complaint and Demand for Jury Trial. (R., Vol. I, p. 129.) On January 16, 2013, Defendant Robinson filed her Motion to Dismiss under I.R.C.P. 12(b)(6). On April 4, 2013, Briley filed her motion to dismiss under I.R.C.P. 12(b)(6). The basis for both motions was the doctrine of quasi-judicial immunity, though, Briley also argued that her alleged conduct was protected by the litigation privilege.

Judge Schroeder heard the motions to dismiss of Batt-Lincoln, Robinson, and Briley on April 15, 2013. (Tr., p. 16.) As noted, Judge Schroeder granted Batt-Lincoln's motion to dismiss, and entered judgment on her behalf. (R., Vol. II, p. 290.) Cola has not appealed that order.

Judge Schroeder also granted Robinson's motion to dismiss, but gave Cola the opportunity to file another amended complaint to specifically allege that Robinson fraudulently obtained her appointment as a child custody evaluator in the *Schoonover* and *Ericson* matters. Cola filed his Second Amended Complaint and Demand for Jury Trial on April 25, 2013. (R., Vol. I, p. 142.)

Robinson filed her Renewed Motion to Dismiss on May 6, 2013. (R., Vol. III, p. 422.) Briley filed her Renewed Motion to Dismiss on May 31, 2013. Hearing on both motions was before Judge Schroeder on June 17, 2013. (Tr, p. 69.) Judge Schroeder dismissed Cola's Second Amended Verified Complaint, with prejudice, on September 16, 2013. (R., Vol. II, p. 296.) Cola moved for reconsideration of the dismissal (R., Vol. II, p. 300), which Briley and Robinson opposed. (R., Vol. III, p. 435; R, Vol. II, p. 442 (joinder by Robinson in Briley's opposition).) Judge Schroeder denied the motion for reconsideration on November 5, 2013 (R., Vol. II, p. 307), and entered judgment on behalf of Robinson and Briley on November 5, 2013. (R., Vol. II, p. 309 and 311.)

Cola filed his notice of appeal on December 13, 2013. (R., Vol. II, p. 313.)

C. Concise Statement of Facts.

Robinson is a Licensed Master of Social Work. (R., p. 143, ¶ 3.) On February 1, 2011, Valley County Magistrate Henry R. Boomer in *Schoonover* entered an Amended Order for Child Custody Evaluation and ordered Robinson to complete a child custody evaluation in that case. (R., pp. 145-146.) On February 7, 2011, Valley County Magistrate Henry R. Boomer in *Ericson* entered an Amended Order for Child Custody Evaluation and ordered Robinson to complete a child custody evaluation in that case. (R., p. 171.) In both *Ericson* and *Schoonover* the parties, including Colafranceschi, entered into a written *Informed Consent For Participants* agreement with Robinson. The Agreement confirmed that child custody evaluation had been ordered by the Court and that Robinson did not work for either parent. (R., pp. 173-197.)

Cola alleged that Robinson (not Briley) solicited Judge Boomer to appoint her. (R., Vol. I, p. 153, ¶ 2.)

Cola claimed Robinson misrepresented her qualifications to Judge Boomer to gain the appointment. (R., Vol. I, p. 146, ¶ 13.) Additionally, Cola claimed Robinson told Judge Boomer that she had done these types of studies before. (R., Vol. 1, pp. 145-146, ¶ 12.) Cola claimed, without citation, that qualifying as an expert to do the work Judge Boomer ordered Ms. Robinson to do requires completion of multiple ("@20") home studies, which Ms. Robinson had not done. (R., Vol. I, p. 151, ¶ 34.)

In both *Ericson* and *Schoonover*, Robinson conducted an investigation for the purpose of making written child custody and visitation recommendations to the Court. Robinson's evaluation(s) included interviews with the parents and children; observations of the children with each parent; interviews of other members of each parent's household; a review of documents and collateral interviews of individuals who were identified by the parents. (R., pp. 198-240.)

Cola claimed that Ms. Briley "intentionally and willfully" interfered with the "Home Study process" by "not revealing her part" of the Home Study to Cola "before, during and after the home study, and acting in a dual relationship." (R., Vol. I, p. 158, ¶ 61.) He also claims that Briley had "inappropriate contact and communication with Schoonover during the evaluation process" and was biased against him. (R., Vol. I, p. 158, ¶¶ 62-63.)

Cola identified a report prepared by Ms. Robinson that "even though it was not allowed into evidence in the 2012 hearing it was admitted in 2011."[2] (R., Vol. I, p. 159, ¶ 69.) He claims it "profoundly" affected him, and that the opinion and findings of Ms. Robinson "also influenced and negatively affected Craig Beaver's report and findings." (*Id.*) Last, he claimed that

[2] Judge Boomer admitted the report at the *Schoonover* child custody hearing on April 28, 2011. After Judge Boomer's decision was vacated, Judge Comstock refused to admit the report or qualify Ms. Robinson as an expert.

Robinson was allowed to testify "to the issues she had investigated and did provide testimony" on August 29, 2012, and that she testified "in a strong biased manor [sic] against plaintiff." (R., Vol. I, p. 159, ¶ 70.) Plaintiff learned that same day during Ms. Robinson's testimony that she had been under Ms. Briley's "supervision." (R., Vol. I, p. 18, ¶ 71.)

Judge Boomer's decision in Ericson was reheard by Judge Comstock on August 28 and August 29, 2012. (R., p. 160, ¶75.) Following testimony, Judge Comstock ruled that Robinson was not qualified as an expert, excluding her report from evidence. (R., p. 150, ¶30.) Judge Comstock is quoted as stating:

> I have some experience with the AFCC model standards. I know there is some concern about folks that get into forensic custody evaluation who start doing that without the careful supervision with someone that has handled these before. She has handled them before in the context of dependency proceedings but not in any private civil cases involving post-divorce, or divorce or custody modification or initial custody cases it's a different analysis it's a different type of recommendation. The end result is different because of the legal standards that differ between dependency proceedings and child custody law.

Plaintiff's Second Amended Verified Complaint asserts two causes of action, one for malpractice (R., Vol. 1, p. 163), the other for defamation. (R., Vol. I, p. 164.) Read in its entirety, all of the facts alleged in the Second Amended Verified Complaint in support of the claim of Malpractice (R., Vol. I, pp. 163-164) relate to Robinson's performance, conduct, and qualifications as a court appointed child custody evaluator. Likewise, all facts alleged in support of the claim of Defamation (R., Vol. I, pp. 164-165) relate to the contents of the written Child Custody Evaluations or Robinson's testimony as a child custody witness at the August, 2012 hearing in *Ericson.*

All allegations contained in the Second Amended Verified Complaint relate to Ms. Robinson's opinions in the Child Custody Evaluations and her testimony in Court. The Second

Amended Verified Complaint contains no allegations of either malpractice or defamation outside of the two underlying child custody court proceedings.

II. ARGUMENT

A. Briley is Protected by Quasi-Judicial Immunity.

The doctrine of quasi-judicial immunity protects court appointed professionals from suit. For those involved in child custody disputes, such as a guardian ad litem or social worker, the protection is crucial, as the contentious matter of child custody disputes is fertile ground for litigation against those involved in the process.

The doctrine of common law judicial immunity is an ancient one in the common law. *See Acevedo by Acevedo v. Pima County Adult Prob. Dept.*, 142 Ariz. 319,321,690 P.2d 38,40 (1984).

> The rule is that judges of courts of general jurisdiction are not liable in a civil action for damages for their judicial acts, even when such acts are in excess of their jurisdiction or are alleged to have been done maliciously or corruptly. *Bradley v. Fisher*, 80 U.S. 335 (13 Wall. 335), 20 L.Ed. 646 (1871); *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978).

Courts have expanded the judicial immunity doctrine to include non-judicial officers, including child custody evaluators, who perform functions at the court's direction.

Whether a particular officer is protected by judicial immunity depends upon the nature of the activities performed and the relationship of those activities to the judicial function. *Ashbrook v. Hoffman,* 617 F.2d 474, 476 (7th Cir. 1980). The underlying policy of encouraging uninhibited judgment is served by removing the possibility that "a non-judicial officer who is delegated judicial duties in aid of the court [will] be a 'lightning rod for harassing litigation' aimed at the court." *Ashbrook v. Hoffman, supra*, 617 F.2d at 476 (citations omitted).

The Idaho Supreme Court recognized the doctrine of quasi-judicial immunity in *McKay v. Owens*, 130 Idaho 148, 150,937 P.2d 1222, 1224 (1997). In *McKay*, the Court decided that an attorney appointed by the court as a minor's guardian ad litem was immune from suit for malpractice. In applying quasi-judicial immunity, the court applied a "functional approach" to determine if the guardian ad litem performed a function which was related to the judicial process.

> We have not previously considered this question in Idaho, but we note that the "arm of the court" analysis stems from an analysis employed by the United States Supreme Court. That Court stated that it has "applied a 'functional approach' . . . which looks to 'the nature of the function performed, not the identity of the actor who performed it.'" *Buckley v. Fitzsimmons*, 509 U.S. 259, 269, 113 S.Ct. 2606, 2613, 125 L.Ed.2d 209 (1993) (citations omitted). Therefore, the question becomes whether a guardian ad litem, acting under I.C. § 5-306, is functioning as an arm of the court.

McKay, 130 Idaho at 156, 937 P.2d at 1230 (1997).

In applying the "functional analysis" to a guardian's duties the Court found that the guardian's duty under I.C. § 5-306 is to consider all of the alternatives and give its recommendation to the Court based on what will be best for the ward. Therefore, the guardian can be seen as an "agent of the court." (Citations omitted)). *McKay*, 130 Idaho at 157,937 P.2d at 1231 (1997).

The *McKay* Court noted that a guardian ad litem is an officer of the court, whose duty is to act in furtherance of the best interests of the child. *McKay*, 130 Idaho at 157, citing *Tindell v. Rogosheske*, 428 N.W.2d 386, 387 (Minn. 1988) (citations omitted). In that role the guardian must be free to engage in a "vigorous and autonomous representation of the child." Most important, immunity is "necessary to avoid harassment from disgruntled parents who may take issue with any or all of the guardian's actions." *Id.*

The *McKay* Court also cited with approval other authorities noting the potential "intimidating wrath and litigious penchant of disgruntled parents" that can "warp judgment that is crucial to vigilant loyalty for what is best for the child. . . ." *Id.* 130 Idaho at 157-158.

The *McKay* Court's analysis as to why the attorney serving as a guardian ad litem in that case was entitled to absolute quasi-judicial immunity was brief, noting that the case well illustrated that the rule allowed the guardian to advocate for the best interests of the child, not the parents. *Id.*, 130 Idaho at 158. The Court noted, "[i]t is absolutely essential that guardians are free to make such a determination [as to the settlement value of a claim], without fear that a parent, seeking a larger award or settlement amount, will later sue the guardian for legal malpractice." *Id.*

Last, *McKay* also noted that application of immunity did not leave the parents without recourse. The attorney was still subject to the Idaho Rules of Professional Conduct, the court could remove the guardian if he or she was not performing his duties, the parents could object to the settlement, the parents could take a contrary position to the guardian's, or the parents could appeal any court decision. *Id.*[3]

The policy rationale of *McKay* applies to protect both Robinson and Briley. Briley was Robinson's peer supervisor, and her alleged involvement arises solely out of Robinson's appointment to conduct child custody evaluations in the *Schoonover* and *Ericson* matters under Idaho Code § 32-717. That code section requires the Court to determine the "best interests" of the child in determining custody. A social worker, such as Robinson, must be able to do her

[3] All steps that can be taken within the context of the underlying action, rather than a subsequent civil action before a different judge.

work, prepare reports, and testify without the fear of retribution from a parent upset with her conclusions.

This is the case even though one parent may have a colorable claim that the social worker was negligent, or even acted with malice, in performing his or her duties. *See, e.g., Parker v. Dodgion*, 971 P.d 496 (Utah 1998) (holding quasi immunity shielded psychologist who performed tests in custody case from negligent testing claim); *Howard v. Drapkin*, 222 Cal.App.3d 843, 271 Cal.Rptr. 893 (1990) (holding psychologist involved in child custody protected from claim of fraud by one parent).[4]

Last, as *McKay* teaches, Cola is not without remedies in the *Schoonover* and *Ericson* matters, should he be so entitled under the rules. There is no authority for the proposition that the many complaints Cola makes entitle him to relief under either a malpractice or defamation theory. Cola seems motivated primarily by the fact that in the custody hearings before Judge Comstock, Robinson did not ultimately qualify as an expert in the *Erickson* matter and her testimony was excluded. Foundational objections of the type apparently sustained by Judge Comstock under I.R.E. 702 are frequently made, sometimes successfully, other times not. There

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[4] Other courts have uniformly protected court-appointed social workers, psychologists, and similar professionals, in child custody disputes. *See, e.g., Meyers v. Contra Costa County Dept. of Social Serv s.*, 812 F.2d 1154, 1159 (9th Cir.1987) (counselors appointed by a family conciliation court to mediate custody and visitation disputes); *Williams v. Rapperport,* 699 F.Supp. 501, 508 (D.Md.1988) (psychiatrist and psychologist performing court-ordered custody evaluations), *aff'd*, 879 F.2d 863 (4th Cir.1989), *cert. denied*, 493 U.S. 894, 110 S.Ct. 243, 107 L.Ed.2d 193 (1989); *Hathcock v. Barnes*, 25 P.3d 295, 297 (Okla.Civ.App.2001) (psychologist appointed by the court to assist in making a custody determination); *Diehl v. Danuloff*, 242 Mich.App. 120, 618 N. W.2d 83, 90 (Mich.Ct.App.2000) (court- appointed psychologist); *Lavit v. Superior Court*, 173 Ariz. 96, 839 P.2d 1141, (Ariz.Ct.App.1992) (court-appointed psychologist); *Howard v. Drapkin*, 222 Cai.App.3d 843, 847,271 Cai.Rptr. 893 (1990) (psychologist); *LaLonde v. Eissner*, 405 Mass. 207, 539 N.E.2d 538, 542 (Mass.1989) (court-appointed psychiatrist).

is no basis to provide a cause of action arising out of the issue of an expert's qualifications in a child custody matter.

Absolute quasi-judicial immunity should apply in the instant matter to prevent Cola from turning a dispute over the qualifications of a child custody expert into something actionable in a separate lawsuit.

This Court should be leery of creating a rule that would essentially allow parties to sue court appointed experts who are ultimately found unqualified to testify by a judge under I.R.E. 702. Such a rule would be an open invitation to litigate, in a subsequent action, what clearly should be addressed in the action in which the expert's testimony is offered.

B. Defects in Appointment Do Not Result in Loss of Immunity.

Cola attempts to avoid application of the quasi-judicial immunity doctrine by asserting that Robinson misrepresented her qualifications pre-appointment, and therefore is not protected by immunity. (Appellant's Opening Brief, p. 3 ("Plaintiff claims that if misrepresentation of qualifications exists immunity does not exist.")

Cola's argument is predicated on a single unpublished decision from the Minnesota Court of Appeals. *See Kuberka v. Anoka Mediation, Inc.*, 2007 WL 3525. In *Kuberka*, the Minnesota Court of Appeals affirmed the decision of a district court to deny a summary judgment motion made on immunity grounds primarily based upon the existence of a genuine issue of material fact regarding misrepresentations in the appointment of a custody evaluator. *Id.* at *3. In particular, the court expressed concern about "whether Brandvold misrepresented her qualifications to the court and the Kuberkas" prior to her appointment. *Id.*

However, Cola has not asserted any claim for misrepresentation or fraud against Robinson or Briley. Instead, his only two causes of action are for malpractice and defamation, both of which are predicated on activities taken by her during the course of Robinson's appointment. Thus, Cola has stated no viable cause of action against Robinson or Briley.

Moreover, unlike the unpublished *Kuberka* decision, the decision in *La Serena Properties v. Weisbach*, 112 Cal. Rptr.3d 597 (2010), examining the question of whether an arbitrator who allegedly deliberately concealed a conflict in order to secure consent to serve as an arbitrator precluded the application of the immunity, provides far greater guidance on the scope of immunity. In *La Serena*, the Court rejected a claim attempting to defeat immunity on claimed defects in appointment, discussing other authority, and noting:

> As to appellants' argument that the arbitral immunity should not be applied because the failure to disclose occurred, before the decision making process began, this same contention was made by the plaintiff in *Olson, supra*, 85 F.3d 381. The court rejected the argument concluding that "[t]he appointment of arbitrators is a necessary part of arbitration administration, however, and thus is protected by arbitral immunity." (*Id.* at p. 383.)
>
> This rationale is compelling and equally applicable here. While disclosures take place before the arbitrator's appointment becomes final, and certainly before the commencement of the arbitration itself, it is an integral part of the arbitration process. Indeed, the rules and statutes governing the disclosures by arbitrators make it clear that such disclosures are to occur when the arbitrator is "proposed." Similarly, judges are expected to make the disclosures required of them before the adjudicative function of the courts begin. (Rothman, California Judicial Conduct Handbook (3d ed. 2007) Appen. F, pp. 4–6.) Indeed, we have been reminded recently that a judge's disqualification "occurs when the facts creating disqualification arise, not when disqualification is established. [Citations.]" (*Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 776, 37 Cal.Rptr.3d 718.) Therefore, any claimed misconduct by the arbitrator in association with the failure to make a required disclosure at the inception of his or her selection was sufficiently associated with the arbitration process itself to justify the application of arbitral immunity.

La Serena Properties v. Weisbach, 186 Cal. App. 4th 893, 905, 112 Cal. Rptr. 3d 597, 605 (2010).

Thus, the *La Serna* Court considered the appointment process (and any defects therein) to be within the scope of the immunity. The same would be true in the context of the appointment of a court-appointed evaluator, which, as a matter of process, requires an initial evaluation by the Court as to the appropriateness of an individual for appointment.

This Court's decision in *McKay* does not suggest avenues to sue individuals appointed by the Court because of alleged defects at any time during the appointment and service of that individual. To the contrary, ensuring that the cloak of immunity also includes the appointment process ensures that the ultimate goal intended by the Idaho Supreme Court can be achieved: "It is absolutely essential that guardians are free to make such a determination, without fear that a parent, seeking a larger award or settlement amount, will later sue the guardian for legal malpractice." *McKay v. Owens*, 130 Idaho 148, 158, 937 P.2d 1222, 1232 (1997).

Allowing the kind of "creative pleading" warned of in *La Serena* would invite chaos in the form of lawsuits against court-appointed individuals based simply upon bare allegations of defects in the appointment process arising out of the evaluator's qualifications as stated orally or in a curriculum vitae.

Accordingly, to the extent Cola's allegations are directed to the appointment process, the scope of the quasi-judicial immunity still applies, and Robinson and Briley remain immune from suit.

C. **Even Were There an Exception to Immunity Recognized in Idaho, Plaintiff Fails to Plead Appropriate Facts in Support of Such an Exception Against Briley.**

Assuming this Court were to craft a pre-appointment exception to the doctrine of quasi-judicial immunity, there are no facts alleged against Briley that would fit here within the exception, as Cola does not allege that she was part of the appointment process. According to Cola, Robinson solicited Judge Boomer (R., p. 144, ¶ 3) and met with Judge Boomer (*Id.* at ¶ 4).

Cola has not alleged any pre-appointment misrepresentations by Briley. Accordingly, he has no case against her arising out of pre-appointment conduct. The only pled pre-appointment fact against Briley is that she was Robinson's peer supervisor.

D. **Briley is Protected by the Litigation Privilege.**

The "testimonial" or "litigation privilege" gives witnesses and others participating in a judicial proceeding immunity from damages sought in a later civil suit. 86 Corpus Juris Secondum Torts § 36. It applies to attorneys as well as witnesses and neutral court appointed experts. *Id.* (citations omitted).

The Idaho Supreme Court notes that the privilege is "deeply rooted" in the common law doctrine that attorneys are immune from civil suits for defamation or libel when they arise out of communications made in the course of judicial proceedings. *Taylor v. McNichols*, 149 Idaho 826, 836, 243 P.3d 642, 652 (2010). The privilege is predicated on the "long-established principle that the efficient pursuit of justice requires that attorneys and litigants must be permitted to speak and write freely in the course of litigation without the fear of reprisal through a civil suit for defamation or libel." *Id.*

Importantly, the privilege is not restricted to testimony at trials, but extends to "every proceeding of a judicial nature before a court or official clothed with judicial or quasi-judicial

power." *Id.*, 149 Idaho at 837, 243 P.3d at 653 (citation omitted). Statements are absolutely protected, i.e., even statements made "maliciously" and with "knowledge of ... falsity" are protected. *Id.* (citation omitted).

Last, Idaho has specifically extended the privilege to not only testimony, but to statements and conduct made prior to, or in preparation of, a judicial proceeding. *Id.* While *Taylor* was limited to statements made by attorneys adverse to opposing parties, certainly the privilege applies to others as well, including court appointed experts and witnesses. Throughout its opinion the *Taylor* court cited various cases making such holdings with approval. *See, e.g., Taylor*, 149 Idaho at 837, 243 P.3d at 653, citing *Loigman v. Township Committee of Middleton*, 185 N.J. 566, 889 a.2d 426, 435 (2006) (noting that in New Jersey the litigation privilege protects attorneys from defamation and a host of other tort related claims) and *Rainier's Dairies v. Raritan Valley Farms*, 19 N.J. 552, 117 A.2d 889, 895 (1995) (applying privilege to a litigant, noting extension to claims other than defamation).

This Court should hold that Briley's alleged involvement is protected by the litigation privilege. All allegedly actionable conduct, reporting, and testimony, were made in the context of the two child custody matters in which Cola was (and continues to be) involved.

If Robinson's reports and writings are protected by the litigation privilege, then Briley's mere involvement as Robinson's peer supervisor is protected as well.

III. CONCLUSION

There is no reason to undermine quasi-judicial immunity and the litigation privilege. Cola has always had the opportunity to make his case in the underlying child custody matters.

There is no reason to permit a separate lawsuit to litigate the same foundational evidentiary issues under I.R.E. 702 before a different judge.

DATED this 19th day of September, 2014.

ELAM & BURKE, P.A.

By: _____
Joshua S. Evett, Of the firm
Attorneys for Respondent Shawn Briley

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of September, 2014, I caused a true and correct copy of the foregoing document to be served as follows:

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Joshua S. Evett

4842-6773-3022, v. 1