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Case Number 54,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RUTH ADAMS, SHARON RIDDICK and ALAN ROSENTHAL,	)	
Plaintiffs below/appellants,	)	No. 54, 2016
v.	)	On Appeal From the Superior Court of the State of Delaware
ANDREW J. GELMAN, D.O. and ANDREW J. GELMAN, D.O., P.A.,	)	C.A. No. N15C-06-030 MMJ [CCLD]
Defendants below/appellees.	)	

APPELLANTS' OPENING BRIEF ON APPEAL

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March 21, 2016
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NATURE OF THE PROCEEDINGS

This is an action for fraud. It arises from the defendant Andrew J. Gelman's conduct of "independent medical exams," "defense medical exams" and "medical records reviews" at the behest of insurance companies. It alleges that (i) Dr. Gelman is a prolific source of such exams and reviews, and of the written opinions that result from them; (ii) these opinions are invariably shaped by Dr. Gelman to serve the insurance company's pecuniary interest, at the expense of the injured claimant; (iii) operating in this manner, Dr. Gelman has amassed a personal fortune by serving as Delaware's most reliable source of pro-insurer medical opinions; and (iv) each of the plaintiffs has been victimized by Dr. Gelman's systematic and unethical behavior.

Plaintiffs Ruth Adams, Sharon Riddick and Alan Rosenthal commenced this action on June 2, 2015. On August 6, 2015 Dr. Gelman and his medical practice (collectively, the "Gelman defendants") moved to dismiss, relying primarily on the doctrine of witness immunity — despite the fact that witness immunity applies only to claims of reputational injury, and the plaintiffs have alleged no such claims. On January 28, 2016 the Superior Court granted the Gelman defendants' motion. *See Adams v. Gelman*, 2016 WL 373738 (Del. Super. Ct. Jan. 28, 2016) (Ex. A). The plaintiffs now take this appeal, challenging the Superior Court's rulings on witness immunity and the plaintiffs' fraud count.

SUMMARY OF ARGUMENT

1. Though the Superior Court correctly found that absolute witness immunity is limited to claims involving injury to reputation, the court nonetheless applied the doctrine to the plaintiffs' claims of common law fraud — claims that have nothing to do with reputational injury. *Cf. Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC*, 22 A.3d 710, 720 (Del. Ch. 2011) (declining to extend witness immunity beyond "defamation and related torts arising from derogatory statements alleged to be harmful to the suing party's reputation or psychic well-being.") The Superior Court thus erred in treating fraud claims as claims of reputational injury.

2. The Superior Court erred in dismissing the plaintiffs' fraud claims. Its first error was in requiring an affirmative misrepresentation as a prerequisite for pleading fraud, when (as this Court has previously held) "fraud does not consist merely of overt misrepresentations," but "may also occur through deliberate concealment of material facts . . . ." *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1983). Its second error was in effectively relieving independent medical examiners of any duty to avoid widespread and systematic fraudulent conduct. Its final error was treating the lack of an affirmative misrepresentation as a failure to plead with particularity.

STATEMENT OF FACTS

A. The Parties

Plaintiff Ruth Adams is a resident of Wilmington, Delaware, and a retired pediatric oncology nurse. In April 2014 her medical records were reviewed by Dr. Gelman at the behest of an auto insurance company, and in connection with injuries she sustained in an auto collision. Plaintiff Sharon Riddick likewise resides in Wilmington. In May 2013 she was examined by Dr. Gelman at the behest of an auto insurer company, in connection with injuries she sustained in an auto collision. Plaintiff Alan Rosenthal, also a Wilmington resident, was examined by Dr. Gelman in May 2013 and October 2013 at the behest of his employer, Amazon.com, Inc., in connection with work-related injuries. Compl. ¶¶2-4 (A18).

Defendant Andrew J. Gelman is an orthopedist licensed to practice medicine in the State of Delaware. On information and belief the unlawful acts imputed to him by the complaint were undertaken by him in both his personal capacity, and through his incorporated medical practice, co-defendant Andrew J. Gelman, D.O., P.A., a Delaware corporation. A19.

B. Dr. Gelman's History of Misconduct

i. Examples From Prior Proceedings

Among the Delaware doctors who regularly conduct IMEs, DMEs and medical records reviews at the behest of insurance companies, no physician has a

worse reputation for pro-insurer and anti-claimant bias than Dr. Gelman. Delaware lawyers within the plaintiffs' personal injury bar and claimants' workers' compensation bar treat Dr. Gelman as a sort of baseline for such bias, so that other Delaware doctors suspected of such bias are described as "not as bad as Gelman" or "almost as bad as Gelman" or (in rare cases) "another Gelman." *See* Compl. ¶13 (A24-25). Dr. Gelman's reputation within the Delaware medico-legal community is not undeserved. For example:

The* Phillips *Case. In *Phillips v. Pris-MM, LLC*, 2009 WL 3022117 (Del. Super. Ct. Sept. 21, 2009) the plaintiff Dorothy Phillips claimed that she suffered a wrist injury in a slip and fall. Dr. Gelman was retained to conduct a DME of Ms. Phillips. His unprofessional conduct was described by the Superior Court in detail:

> The plaintiff in this case attempted to discuss [certain] patient forms she was asked to fill out with the nurse-receptionist. Rather than explain why Dr. Gelman needed the completed forms to conduct a DME, she told the plaintiff to "discuss it with the doctor." Then, before plaintiff could even attempt to do just that, Dr. Gelman chastised plaintiff, refused to look at her x-rays, refused to review the forms with her to acquire whatever information he needed to conduct the DME, and refused to examine her. He did all this at approximately 3:25 p.m., when her exam was not even scheduled to begin until 3:30 p.m. *** Rather than scolding plaintiff and treating her like a schoolgirl who failed to turn in an assignment, Dr. Gelman could have simply explained his need for the information sought in the forms and then allowed plaintiff a few additional minutes to complete the forms (since she was early) or asked for the questions and recorded her answers. He did neither. Instead, he chastised plaintiff and stormed

> out of the examination room before the time her exam was scheduled to begin.

Phillips, Letter Op. at *3 (Ex. B).

The* Watson *IAB Proceeding. *Watson v. Christiana Care Health Serv.*, Hearing No. 1276498, was a workers' compensation claim that came before the IAB in 2010. Dr. Gelman was retained to perform a DME of the claimant Brenda Watson. His improper conduct was described by the IAB as follows:

> After the DME, Dr. Gelman requested through counsel that Claimant undergo a diagnostic test to aid him in forming an opinion about Claimant's condition. Claimant consented to undergoing the diagnostic test. On December 1, 2009 when Claimant was submitting the films from the diagnostic test, Claimant contends that Dr. Gelman improperly initiated conversation with her regarding her workers' compensation claim without obtaining prior approval from Claimant's counsel. It is undisputed that during such conversation, Dr. Gelman requested that Claimant immediately undergo another DME. Claimant telephoned her counsel and someone from her counsel's office instructed Claimant not to submit to the DME. Claimant contends that Dr. Gelman exerted great pressure on her to immediately undergo the DME. Claimant's counsel represented that Dr. Gelman's level of pressure caused Claimant to cry and shake. Claimant remained sufficiently mentally strong and did not submit to the improper request for the DME.
>
> When a claimant is represented by counsel, an employer's medical expert does not have the right to engage in conversation with or to examine a claimant without prior consent by the claimant's counsel. Such conduct by Dr. Gelman is unacceptable, is improper and is unjust.

Watson, Order at 1-2 (A10-11). The IAB prohibited Dr. Gelman from using

information obtained during "his improper and wrongful direct communications with Claimant" in his opinions. A11. The IAB further warned that "[s]hould Dr. Gelman repeat similar conduct, the Board will report Dr. Gelman to the Delaware Board of Medical Practice." A11, n.1.[1]

ii. Dr. Gelman's Reports, Circa 2008-2015

The plaintiffs seek to redress a massive fraud, years in the making, by which Dr. Gelman feeds sham medical reports into the machinery of insurance claims handling. As the complaint alleges:

> Dr. Gelman's pro-insurer medical opinions are a certain enough and predictable enough phenomenon that the plaintiffs herein can (and do) allege with confidence that were [the] Court to permit civil discovery of every IME report, DME report and records review conducted by Dr. Gelman over the course of the past ten years, virtually every written opinion rendered by Dr. Gelman would be one that advanced and supported (or attempted to advance and support) the insurer's pecuniary interests.

Compl. ¶24 (A38). At its core, then, this lawsuit is about Dr. Gelman's reports; and those reports are integral to the complaint. As such, Dr. Gelman's IME/DME reports may be considered on a motion to dismiss. *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320 (Del. 2004) (on a motion to dismiss the Court may consider documents that are "integral" to the complaint). Accordingly, the plaintiffs assembled and placed in the record below (without objection) a collection

[1] For additional examples, see the plaintiffs' complaint at paragraph 14, A25-32.

of 75 IME/DME reports authored by Dr. Gelman between 2008 and 2015. These reports were provided by Delaware lawyers who regularly represent claimants in personal injury and workers' compensation claims. The complete collection is set forth in the accompanying Appendix at pages A108 through A561 and A459 to A481. By way of example only, we offer the following excerpts:

> **Michael Garnett**
>
> Today's physical examination reveals an odorous 59-year-old right hand dominant black male who stands 5'9" and weighs 184 pounds.
>
> ***
>
> Mr. Garnett's symptoms in part are attributable to the apparent accepted disease process at the C5-6 and/or C6-7 levels. Other subjective complaints may be supported by MR imaging identifying degenerative changes at the C2-3, C3-4 and C4-5 levels.
>
> **Edwin Ortiz**:
>
> Mr. Ortiz has . . . been been treated for rib fractures and the prognosis with regards to such is excellent. *** The argument to be made is that Mr. Ortiz aggravated the underlying pathology and has since been treated. *** Mr. Ortiz is not currently totally disabled.
>
> **Andrew Higgins**:
>
> Andrew Higgins is either an incredibly poor historian or he presents today with a selective representation with regards to the onset of his symptoms. *** Mr. Higgins' historical representation as appreciated at this time, is not at all credible. *** I would not be able to attribute any

> impairment towards Mr. Higgins as a result of the forklift incidents of March, 2012.
>
> **Fernando Rodriguez**:
>
> Fernando Rodriguez is either a very poor historian or has selective memory with regards to the care and diagnosis for which he has treated over the years. *** The credibility of Mr. Rodriguez's representation at this time, is to be questioned. *** I would not be able to relate any of the treatment towards Mr. Rodriguez's employment . . . .
>
> **Carmen Ball**:
>
> Carmen Ball, here today, exhibited numerous expressions of anger, annoyance and disrespectfulness. *** With regards to the mechanism of trauma . . . that which may have occurred would be consistent with a right hip or gluteal contusion. *** Ms. Ball is capable of returning to full time employment.
>
> **Elissa Moore**:
>
> Ms. Moore presented at 12:48 for a scheduled evaluation at 12:30 and she did not provide personal identification. Ms. Moore was able to leave the facility and she later presented with proper identification. It was noted that she drove to this location without a driver's license.

A478, A480; A116, A117; A118, A121, A122; A127-28; A138-39; A141.

The problems with Dr. Gelman's approach should be obvious. First, it is unethical for him to suggest "the argument to be made" for purposes of defeating a claim for benefits. Nor does he have any business commenting on a claimant's credibility (which, oddly, he appears to equate with a claimant's ability to recall

years of medical history in chronological detail). Whether a claimant acted "disrespectfully," or suffers from body odor, or arrived at the examiner's office 18 minutes late, or drove to the exam without her driver's license — all these observations are utterly gratuitous, and bear no connection to the science of medicine. Finally (and most damningly) we note that:

- The 75 reports were not cherry-picked. They constitute the complete collection of "Gelman" reports that plaintiffs' counsel was able to obtain in advance of the Superior Court's January 2016 opinion.[2]
- Every last one of the 75 reports is overwhelmingly favorable to the insurer's pecuniary interests, and correspondingly unfavorable to claimants.
- Because Dr. Gelman's reports are integral to the complaint, the Gelman defendants were free to submit below any of the doctor's reports that might refute the plaintiffs' allegations of routine and systematic fraud. Though Dr. Gelman has been writing such reports for well over a decade, the defendants placed precisely zero such reports into the record below.

C. The Plaintiffs' Encounters With Dr. Gelman

i. Plaintiff Ruth Adams' Encounter With Dr. Gelman

Plaintiff Ruth Adams suffered a torn rotator cuff injury in a July 2012 auto collision. After a conservative course of treatment failed to rectify the problem,

[2] *See* Certification of John S. Spadaro at ¶3 (A107). *See also* A459-81 (supplementing the record below with three additional IME reports, for a total of 75).

her treating physician recommended surgery; and Ms. Adams underwent a surgical repair of the torn rotator cuff in September 2013. Because the rotator cuff tear was clearly caused by the July 2012 collision, Ms. Adams' own auto insurer paid for the surgery as a covered claim under her PIP coverage. A38-39.

As permitted under long-settled Delaware law, Ms. Adams pursued a third-party personal injury claim for recovery against the at-fault driver, who was insured for auto liability by State Farm. In or about April 2014 State Farm retained Dr. Gelman to conduct a medical records review in connection with Ms. Adams' condition, the ostensible purpose being to assist State Farm in placing a dollar value on Ms. Adams' personal injury claim. A39.

Approximately three years prior to Ms. Adams' July 2012 auto accident, Ms. Adams suffered symptoms of bilateral shoulder pain. This prior shoulder pain was successfully addressed in two visits to Ms. Adams' care provider and a single course of physical therapy. Therefore, over the course of the next three years or so, Ms. Adams reported no further complaints of shoulder pain. In addition, though her medical records show that she visited her primary care physician with great frequency during this period of roughly three years, the records reveal no evidence of shoulder-related complaints. By contrast, Ms. Adams reported an immediate onset of shoulder pain from the July 2012 auto collision. A39-40.

Predictably, Dr. Gelman opined that Ms. Adams' torn rotator cuff was a pre-existing condition brought on by the aging process, and not caused by the July 2012 collision — despite the fact that Ms. Adams had reported no complaints of shoulder pain for a three-year period leading up to the collision; despite the fact that the July 2012 collision triggered an immediate onset of symptoms; and despite the fact that Ms. Adams' surgeon, who was not limited to merely reviewing medical records but actively treated and even operated on Ms. Adams, concluded that her rotator cuff tear was caused by the collision. A40.

Following Dr. Gelman's report on the medical records review, a State Farm adjuster telephoned Ms. Adams' lawyer to discuss settlement of her personal injury claim against State Farm's insured. The adjuster began the conversation by stating, "Don't shoot the messenger." A40. The adjuster went on to state that he had been instructed to commission a medical records review by Dr. Gelman; and that based on Dr. Gelman's conclusions, State Farm would pay Ms. Adams just $5,000 as compensation for her injuries. The adjuster further stated that, in his own opinion, Ms. Adams' personal injury claim was worth much more than $5,000. A40-41.

ii. Plaintiff Sharon Riddick's Encounter With Dr. Gelman

Plaintiff Sharon Riddick was injured in an auto collision in November 2000. She suffered a cervical disc herniation and received conservative treatment, responding well to physical therapy. In 2006 she developed pain from lifting

heavy objects at work, and again completed a successful course of physical therapy. Over the ensuing six years or so, she required no significant treatment for orthopedic injuries. A41.

On August 12, 2012 Ms. Riddick was rear-ended while stopped at a traffic light. The 2012 collision triggered a variety of symptoms, including bilateral shoulder pain, back pain, wrist pain and numbness in her fingers. When these symptoms did not respond to conservative treatment, her treating orthopedist, Bruce J. Rudin, M.D., ordered a cervical MRI for diagnostic purposes. According to Dr. Rudin, Ms. Riddick's cervical MRI was "markedly abnormal" with "disc herniations at C3-4, C4-5 and C5-6 with [spinal] cord compression at C4-5 and C5-6 and an area of myelomalacia behind the body of C4-5."[3] These results led Dr. Rudin to recommend surgery for Ms. Riddick. A41. Hoping to avoid surgery, Ms. Riddick secured a second opinion from Kennedy Yalamanchili, M.D. Dr. Yalamanchili found "evidence of significant spinal cord compression including signal change involving the substance of the spinal cord," which he regarded as "[o]f great concern." Consequently, Dr. Yalamanchili agreed that Ms. Riddick needed spinal surgery. A41-42. On August 22, 2013 Dr. Rudin performed spinal surgery on Ms. Riddick, including an anterior cervical discectomy with fusion at vertebral levels C4-C5 and C5-C6. A42.

[3] Myelomalacia is a softening of the spinal cord, usually caused by inadequate blood supply.

Ms. Riddick's PIP insurer, State Farm, retained Dr. Gelman to conduct an IME. Predictably, he concluded that the pathology reflected by Ms. Riddick's cervical MRI was merely part of "an underlying disease process" that antedated Ms. Riddick's August 2012 auto collision. He offered no explanation as to why Ms. Riddick's severe cervical symptoms emerged immediately after being rear-ended at a traffic light. A42.

By letter dated July 3, 2013, State Farm denied PIP coverage to Ms. Riddick for a broad range of treatments that were made necessary by the August 2012 collision, including Ms. Riddick's spinal surgery. In reaching this adverse coverage determination, State Farm expressly relied on Dr. Gelman's IME report, including Dr. Gelman's conclusion that Ms. Riddick had reached maximum medical improvement. A42-43.

Because State Farm, acting in reliance on Dr. Gelman's opinions, refused to pay medical expenses arising from her August 2012 collision, Ms. Riddick was forced to seek an arbitration proceeding before the Department of Insurance. On May 21, 2014 the arbitration panel awarded $71,679.45 to Ms. Riddick, finding Dr. Gelman's opinions "unpersuasive." A43.

iii. Plaintiff Alan Rosenthal's Encounter With Dr. Gelman

In January 2013 plaintiff Alan Rosenthal was employed by Amazon.com, Inc. For the most part, his job duties involved unloading trucks and placing the

unloaded products in a warehouse. As part of these duties, Mr. Rosenthal was routinely required to position jacks under heavy pallets and maneuver them to different locations within the warehouse. A43.

On January 29, 2013, while in the course and scope of his employment, Mr. Rosenthal was unloading trucks that were parked on a downward grade. The last of the pallets to be removed from the trucks were difficult to extract because they had to be pulled uphill by Mr. Rosenthal, using only his arms, his legs and the pallet jack. A43. While trying to pull a pallet uphill, Mr. Rosenthal was suddenly and violently jerked to the right, apparently because of debris that interfered with the pallet's movement. The weight of the pallet and the force of its sudden shifting then forced Mr. Rosenthal in a semicircle back to the left. A43-44. Later the same day, Mr. Rosenthal's right knee began to ache. Though in considerable pain, Mr. Rosenthal completed the workday. He also worked the following day, though coworkers questioned him on why he was dragging his right leg. Mr. Rosenthal was off from work for the next three days as part of his usual work schedule. A44.

When Mr. Rosenthal returned to work, his supervisors noticed the difficulty in his movements and asked him what had happened. Mr. Rosenthal told his supervisors about his workplace accident, and was referred by them to Amcare, his employer's medical care center. The Amcare medical staff scolded Mr. Rosenthal for not reporting his injury sooner. A44.

On February 10, 2013, with Mr. Rosenthal limping severely, the Amcare medical staff told Mr. Rosenthal that Amcare could no longer treat him due to the apparent severity of his knee injury. Mr. Rosenthal was ultimately referred to a specialist who ordered an MRI. The MRI revealed two separate tears in the meniscus of Mr. Rosenthal's right knee. A44.

Mr. Rosenthal was scheduled for a surgical repair of his meniscus tears when he learned that his employer had commissioned a defense medical examination by Dr. Gelman. Predictably, Dr. Gelman opined that Mr. Rosenthal's meniscus tears were caused by the aging process, and not by his January 2013 workplace accident. Relying on Dr. Gelman's opinion, Mr. Rosenthal's employer denied workers' compensation benefits for Mr. Rosenthal's surgery. This resulted in a prolonged delay in the surgery, during which Mr. Rosenthal suffered severe and unnecessary pain. A45.

Dr. Gelman's conduct forced Mr. Rosenthal to seek relief from the IAB. On January 21, 2014, the IAB ruled in Mr. Rosenthal's favor, finding that his proposed surgery was reasonable, necessary, and causally related to his workplace accident. Its decision was highly critical of Dr. Gelman's conduct:

> The Amcare notes . . . support Claimant's version of the events that he injured his right knee on January 29th while performing work consistent with what he described for the Board. That Dr. Gelman had not reviewed the Amcare notes prior to rendering his causation opinion and that ***he would not budge on that opinion*** despite the

> fact that the Amcare report supported the pallet incident as Claimant described was not persuasive to the Board. *** The Board also did not find Dr. Gelman persuasive in his ***unrelenting view*** that pulling a heavy pallet with a pallet jack essentially only involves stress on the arms and that this activity would not be competent to cause a knee injury.
>
> ***
>
> The Board found [Mr. Rosenthal's treating physicians] to be much more persuasive than Dr. Gelman, who ***appeared determined not to waver in his opinion even though presented with evidence to the contrary***. The Board did not find Dr. Gelman's opinion persuasive that Claimant had a coincidental onset of knee symptomatology while performing his work activities that was completely unrelated to those activities.

A45-47.

D. Dr. Gelman's Reward

On information and belief, the insurance industry has paid Dr. Gelman over $13 million in exchange for opinions he has rendered in connection with IMEs, DMEs and medical records reviews. A33.

ARGUMENT

I. BECAUSE NONE OF THE CLAIMS AT ISSUE INVOLVE INJURY TO REPUTATION, THE SUPERIOR COURT ERRED IN ITS APPLICATION OF WITNESS IMMUNITY

A. Question Presented

Did the Superior Court err in granting Dr. Gelman absolute witness immunity where (as the court acknowledged) such immunity is strictly limited to claims involving injury to reputation, and none of the claims pled by the plaintiffs involve reputational injury? *See* A90-98 (arguing the inapplicability of witness immunity below).

B. Scope of Review

This Court reviews *de novo* a trial court's grant of a motion to dismiss. *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas*, S.A., 34 A.3d 1074, 1078 (Del. 2011). In conducting its review, the Court accepts as true the well-pled allegations of the plaintiffs' complaint. *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978). The Court also draws every reasonable inference in the plaintiffs' favor. *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005). If the plaintiffs can recover under any conceivable set of circumstances susceptible of proof, the Superior Court's dismissal of the complaint must be reversed. *Spence*, 396 A.2d at 968.

C. Merits of Argument

i. The Plaintiffs Do Not Allege Reputational Injury

In its decision below the Superior Court correctly characterized the limited reach of witness immunity: "Delaware courts have not limited absolute immunity strictly to defamation claims. Instead, absolute immunity is limited to claims that involve injury to reputation." *Adams v. Gelman*, 2016 WL 373738 (Del. Super. Ct. Jan. 28, 2016), Op. at *3 (Ex. A) (citing, *inter alia*, *Hoover v. Van Stone*, 540 F. Supp. 1118, 1120, 1124 (D. Del. 1982)). From that noncontroversial premise the court immediately proceeded to the conclusion that "Dr. Gelman has absolute immunity for his pre-litigation medical examinations and reports, and for his testimony regarding [plaintiff] Rosenthal's two DMEs to the IAB." *Id.* Yet the court never explained which (if any) of the plaintiffs' claims involve reputational injury, or how it came to view them as involving reputational injury.

More to the point, the plaintiffs' fraud claims do not involve reputational injury. Rather, Ms. Adams alleges that Dr. Gelman's fraudulent conduct resulted in her being "denied fair and timely compensation for the injuries she suffered in her July 2012 auto collision." A49. Ms. Riddick alleges that as a result of Dr. Gelman's conduct, she "was denied timely payment of covered Personal Injury Protection benefits for which substantial premiums had been paid." A51. Mr. Rosenthal alleges that "[a]s a result of the biased, dishonest and pro-insurer

medical opinions that Dr. Gelman supplied to Amazon.com, Inc. as part of the (fraudulent) DME process, [he] was denied timely payment of covered workers' compensation benefits; was forced to delay a reasonable and necessary surgery; and suffered severe, needless and avoidable pain." A52-53. Reputational injury has nothing to do with these theories of recovery. *And see Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1983) (discussing the elements of common law fraud).

Indeed, to the plaintiffs' knowledge, no court in or out of Delaware has ever characterized common law fraud as an injury to reputation. By treating fraud claims as claims of reputational injury, the decision below represents a radical (though unexplained) expansion of witness immunity. *Cf. Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC*, 22 A.3d 710, 720 (Del. Ch. 2011) ("[T]he policy rationale for the [witness immunity] privilege is best served by limiting the privilege's scope to only defamation and related torts arising from derogatory statements alleged to be harmful to the suing party's reputation or psychic well-being.") Not incidentally, the decision below also provides IME and DME doctors with license to engage in fraud on a massive scale. This Court should reverse, and restore the common law limits that heretofore applied to witness immunity.

ii. Absolute Witness Immunity Should Be Narrowly Construed to Promote, Rather Than Frustrate, the Fair Adjudication of Disputes

Witness immunity "protects from actions for defamation statements of judges, parties, witnesses and attorneys offered in the course of judicial proceedings . . . ." *Barker v. Huang*, 610 A.2d 1341, 1345 (Del. 1992). Though Delaware courts have not limited the doctrine strictly to defamation claims, they have limited it to claims that (like defamation) involve injury to reputation. As *Barker* explains, this modest extension of the doctrine's reach is necessary to prevent artful pleaders from making an end-run around the doctrine simply by recasting claims of reputational injury under labels other than defamation:

> In *Hoover v. Van Stone*, the United States District Court for the District of Delaware, interpreting Delaware law, granted summary judgment of the defendants' counterclaim. The counterclaim charged plaintiff with defamation, tortious interference with contractual relationships, abuse of process, and barratry, arising from plaintiff's disclosure to certain of defendants' customers of the existence of the suit and details underlying the complaint. *** The court stated:
>
> "Defendants argue that even if the absolute privilege bars an action for defamation, it does not preclude the prosecution of the three other counts contained in the counterclaim. These counts, however, are all predicated on the very same acts providing the basis for the defamation claim. Application of the absolute privilege solely to the defamation count, accordingly, would be an empty gesture indeed, if, because of artful pleading, the plaintiff could still be forced to defend itself against the same conduct regarded as defamatory. ***"

***

> The absolute privilege would be meaningless if the simple recasting of the cause of action from "defamation" to "intentional infliction of emotional distress" or "invasion of privacy" could void its effect.

Barker, 610 A.2d at 1348-49 (quoting *Hoover v. Van Stone*, 540 F. Supp. 1118, 1120, 1124 (D. Del. 1982)).

It is fitting and reasonable for courts to guard against the type of artful pleading that was (unsuccessfully) deployed in *Barker* as a means of avoiding witness immunity. That necessary safeguard, however, should not be used as a springboard to expanding the privilege. Instead, this Court should adopt the Chancery Court's analysis in *Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC*, 22 A.3d 710 (Del. Ch. 2011).

In *Paige* a hedge fund sued its sole outside investor. Prior to the onset of litigation, the hedge fund's manager (who also served as attorney for the fund) sent a heated letter to the investor, seeking to persuade it to accede to the manager's settlement demands. The letter warned the investor against seeking relief through the courts, and threatened a course of action that would have purposely breached the manager's fiduciary duties to the investor and harmed the investor's financial interests. Eventually the hedge fund sued for a judicial declaration limiting the terms under which the investor could withdraw from the fund. The investor counterclaimed; and in support of its counterclaims, it sought to introduce in

evidence the fund manager's threatening letter. *Paige*, 22 A.3d at 712-15. The hedge fund moved to exclude the letter from evidence based on absolute witness immunity. Denying the motion, the Chancery Court offered a thoughtful analysis of the purpose and boundaries of the immunity.

As a threshold matter, *Paige* expressed skepticism of efforts to apply witness immunity outside of formal judicial settings:

> Traditionally, the absolute litigation privilege was only applicable to statements made during the course of judicial proceedings, but there are a substantial number of jurisdictions that have recognized the utility in extending the privilege to cover communications made in advance of anticipated litigation. *** That said, for reasons the reader can discern from this decision, there is also a sound argument for confining the absolute litigation privilege to statements made in the formal judicial setting, which has truth-promoting safeguards that make the cost-benefit argument for the privilege an easier one to justify.

Paige, 22 A.3d at 716-17. Asked to "choose between a more traditional application of the absolute litigation privilege or a broad extension of that privilege," *Paige* sided squarely with tradition: "[T]he policy rationale for the privilege is best served by limiting the privilege's scope to only defamation and related torts arising from derogatory statements alleged to be harmful to the suing party's reputation or psychic well-being." *Id.* at 720.[4]

[4] Though the plaintiffs relied heavily on *Paige* in the briefing below, the Superior Court made no mention of the case in its decision.

The policy rationale to which *Paige* refers seeks to promote the fair adjudication of disputes. *See Hoover v. Van Stone*, 540 F. Supp. 1118, 1122 (D. Del. 1982) (purpose of absolute witness immunity is "to facilitate the flow of communication between persons involved in judicial proceedings and, thus, to aid in the complete and full disclosure of facts necessary to a fair adjudication.") To use witness immunity as a shield against claims of fraud — particularly in the context here, where insurers and employers may rely heavily on the fruits of that fraud in legal proceedings — is antithetical to the immunity's rationale. It promotes the creation of fraudulent evidentiary records in personal injury cases and workers' compensation disputes, and thus frustrates fair adjudication. As was stated in *Paige*,

> The public interest served by shielding participants in judicial proceedings from being collaterally sued for defamation or related torts based on the adverse reputational or emotional effect of their testimony on others does not extend to allowing a party to use the privilege to block the introduction of a litigation-related communication in which that party threatens to engage in potentially tortious behavior if the recipient does not surrender to its demands.

Paige, 22 A.3d at 712. By the same token, the public interest served by witness immunity should not offer cover to Dr. Gelman's calculated, widespread campaign of insurance fraud.

iii. Because the Challenged Conduct Arose in the Ordinary Course of Insurance Claims Handling, Witness Immunity Should Not Apply

This Court has explained precisely what witness immunity is, and what it is not: "The absolute privilege is a common law rule, long recognized in Delaware, that protects from actions for defamation statements of judges, parties, witnesses and attorneys offered in the course of judicial proceedings so long as the party claiming the privilege shows that the statements issued as part of a judicial proceeding and were relevant to a matter at issue in the case." *Barker v. Huang*, 610 A.2d 1341, 1345 (Del. 1992). The privilege does not apply to "statements made outside of the course of judicial proceedings . . . ." *Id.*

The offending conduct here arose not in the course of judicial proceedings, but in the ordinary course of insurance claims handling. The Gelman defendants confirm this, albeit unwittingly. At page 16 of their opening brief below, they say that "pursuant to the insurance contract/worker's compensation statute," Ms. Riddick and Mr. Rosenthal "were required to submit to an examination by a physician of the insurer's choice." At the following page they say again that Ms. Riddick and Mr. Rosenthal attended their IME/DMEs "because they were obligated to do so under contract and [the workers' compensation] law."[5] The Riddick and Rosenthal examinations were thus undertaken in the ordinary course of the insurer-insured

[5] The Gelman defendants' opening brief below can be found on the Superior Court's electronic docket at Transaction ID 57663963.

relationship. The fact that this relationship occasionally sours, culminating in litigation, does not transform an ordinary IME or DME into a litigation event.[6]

Settled law regarding work product protection makes this clear: though insurance companies sometimes seek to withhold their claim files from discovery under claims of work product, courts recognize that insurers are required, both contractually and under claims-handling statutes, to investigate claims in the ordinary course of business. Professor Allan Windt's insurance coverage treatise explains:

> Federal Rule of Civil Procedure 26(b)(3) and most state procedural rules extend a qualified privilege to materials prepared in anticipation of litigation, but not to materials prepared in the ordinary course of business. The difficulty posed by an insurer's claims file is that it can be viewed as either or both.
>
> ***
>
> The purpose of the work product privilege is to give a qualified immunity to documents prepared "because of the prospect of litigation." As a result, if a document either (a) would have been prepared by the insurer regardless of the existence of potential future litigation, or (b) should have been prepared by the insurer regardless of the existence of potential future litigation, ***by virtue of the company's responsibility to the insured to exercise due care before denying liability***, the document should not be extended any immunity. An insurer's claims file falls within that description.

[6] To be sure, an IME or DME can be commissioned in the course of pending litigation, and as a means of supporting an already-existing coverage determination; but those are not the facts of this case, and nothing in the complaint suggests otherwise.

ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES § 9.19 (5th ed. 2007) (citations omitted; emphasis added). State and federal courts agree: "[I]t can hardly be said that the evaluation of a routine claim from a policyholder is undertaken in anticipation of litigation, even though litigation often does result from denial of a claim." *Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co.*, 61 F.R.D. 115, 118 (N.D. Ga. 1972). *See also Hall v. Goodwin*, 775 P.2d 291, 295 (Okla. 1989) (work product inapplicable to documents generated in the ordinary course of insurance business); Fed. R. Civ. P. 26(b)(3) advisory committee's note ("Materials assembled in the ordinary course of business . . . are not under the qualified immunity provided by this subdivision.")

The Superior Court extended witness immunity to Dr. Gelman's conduct here based on its finding that his IMEs, DMEs and records reviews were "germane" to prospective or pending litigation. But just as courts decline to treat the ordinary course of insurance claims-handling as conduct "in anticipation of litigation" — notwithstanding that insurance claims sometimes ripen into litigation — this Court should not treat Dr. Gelman's conduct as "germane" to litigation.

A liberal reading of the complaint (to which the plaintiffs are properly entitled) shows that Dr. Gelman evaluated Ms. Adams' medical records and provided his report, and State Farm relied on the report in reaching a coverage determination, all in the ordinary course of the insurer-insured relationship. For

example, the Gelman defendants do not deny that State Farm was obligated to investigate the facts and value of Ms. Adams' claim as part of their ordinary contractual duties to their insured, the at-fault driver. *See Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 264 (Del. 1995) ("Where an insurer fails to investigate or process a claim or delays payment in bad faith, it is in breach of the implied obligations of good faith and fair dealing underlying all contractual obligations.") Moreover, the complaint alleges that Dr. Gelman conducted his records review in April 2014. By contrast, the Court may take judicial notice that Ms. Adams did not sue the at-fault driver until June 16, 2014. *See* A13-16 (Ms. Adams' complaint against State Farm's insured). Indeed, had Ms. Adams been content to accept State Farm's paltry $5,000 settlement offer, there would have been no (post-records-review) litigation. Equally important, the complaint does not allege that Dr. Gelman ever provided sworn testimony of any kind in connection with Ms. Adams' claim — and discovery will confirm that ***no such testimony exists***.

The same analysis applies to the claims of Ms. Riddick and Mr. Rosenthal. State Farm was contractually and statutorily required to investigate Ms. Riddick's Personal Injury Protection claim, and it commissioned an IME as part of that investigation — that is, as part of the ordinary course of business. Here again, the complaint does not allege that Dr. Gelman ever provided sworn testimony in

connection with Ms. Riddick's claim, and discovery will confirm that ***no such testimony exists***. As for Mr. Rosenthal's claim, Dr. Gelman did ultimately testify before the IAB; but he conducted his DME long before any quasi-judicial proceedings were initiated, as part of the employer/insurer's contractually-mandated duty to investigate Mr. Rosenthal's claim. *See* Compl. ¶¶45-52 (A45-46) (setting forth the relevant chronology). *And see Commonwealth Constr. Co. v. Endecon, Inc.*, 2009 WL 609426 (Del. Super. Ct. March 9, 2009), Mem. Op. at *6 (where plaintiff contended that his cause of action arose prior to statements made in the course of giving testimony, claim could not be dismissed on the basis of witness immunity) (Ex. C).

In short, IMEs and DMEs may arise in the course of pending judicial proceedings; but more commonly (and under the facts here), they are deployed as commonplace tools in the day-to-day investigation of insurance claims, as part of the insurer's ordinary contractual obligations. The conduct challenged here falls in the latter category, and arose in the ordinary course of insurance company business. Witness immunity should not apply.

II. THE SUPERIOR COURT ERRED IN DISMISSING THE PLAINTIFFS' FRAUD CLAIMS

A. Question Presented

Did the Superior Court err in dismissing the plaintiffs' fraud claims where (i) controlling precedent recognizes that common law fraud may arise from the concealment of material facts; (ii) the plaintiffs were justified in expecting Dr. Gelman to deal with them in an honest and ethical manner; and (iii) the plaintiffs' 130-paragraph provided Dr. Gelman with a painstakingly detailed account of the conduct with which he is charged? *See* A98-100 (arguing the viability of the fraud claims and the particularity of the pleading).

B. Scope of Review

This Court reviews *de novo* a trial court's grant of a motion to dismiss. *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas*, S.A., 34 A.3d 1074, 1078 (Del. 2011).

C. Merits of Argument

i. Because the Plaintiffs Pled Dr. Gelman's Deliberate Concealment of Material Facts, the Superior Court Erred in Dismissing Their Fraud Claims

At the outset of oral argument below, the trial judge posed to the Gelman defendants a pointed and crucial question:

> THE COURT: Well, let me posit something to you. I mean, I'm going to take you to some popular culture, if you've read the book and subsequent movie "The Client"

> in which the evidence in that case was that the insurance company had a policy manual that says deny all claims, if we had a situation here where there was an agreement between the doctor and whoever was hiring the doctor to perform an IME or DME, that said we're not going to find any valid injury that could be proximately caused by whatever it is we're looking at, wouldn't that fall within actions that could be a cause of action under these theories?
>
> MR. BALAGUER: I think in that extreme example there would be a cause of action for fraud, outright fraud by agreement between the parties. ***

A484-85. Defense counsel was quick to add that in his view, the plaintiffs had alleged nothing like the facts posited by the court's question (an assertion with which we strongly disagree). But the quoted portion of counsel's response was candid and correct — though the question was one that even those untrained in the law could answer with ease. Obviously, any IME doctor who sets out to reach predetermined, pro-insurer conclusions in virtually every case is engaged in a calculated fraud. And in fact, the plaintiffs' complaint alleges precisely such conduct. *See* A17-18, A24-53.

Notwithstanding, the Superior Court held that the complaint fails to state a claim for fraud because "[u]nder Delaware law, '[t]here is normally no duty to speak absent a fiduciary or contractual relationship.'" *Adams v. Gelman*, Op. at *4 (quoting *S&R Assoc., L.P. v. Shell Oil Co.*, 725 A.2d 431, 440 (Del. Super. Ct. 1998)). This analysis misapprehends the settled law of fraud.

This Court has stated that "fraud does not consist merely of overt misrepresentations," but "may also occur through deliberate concealment of material facts, ***or*** by silence in the face of a duty to speak." *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1983) (emphasis added). By allowing the plaintiffs to believe that (i) the medical aspects of their claims would be fairly evaluated; (ii) their claims would be evaluated without improper interference from Dr. Gelman; and (iii) they could submit to examination without fear of a "rigged game," Dr. Gelman concealed material facts. Under *Stephenson*, then, it was not necessary for the plaintiffs to plead the existence, on Dr. Gelman's part, of a duty to speak. IME doctors enjoy no special license to defraud those whom they examine.

ii. Claimants May Justifiably Rely on an IME Doctor's Honesty

The Superior Court apparently concluded that because all three plaintiffs were aware of the identity of Dr. Gelman's paymasters — each of them sources of insurance — there was no reason for Dr. Gelman to do anything other than conceal his fraud. Indeed, the Superior Court appeared to conclude that the predetermined, pro-insurer outcomes of Dr. Gelman's efforts should have been assumed by all concerned. *Adams v. Gelman*, Op. at *4 (Ex. A). This rather jaded analysis ignores an IME doctor's professional and ethical obligations, encourages fraud on the court, and constitutes an open invitation to widespread fraud.

The Superior Court has recognized that IMEs are ***supposed*** to be "scientific rather than adversarial" encounters. *Phillips v. Pris-MM, LLC*, 2009 WL 3022117 (Del. Super. Ct. Sept. 21, 2009), Letter Op. at *3 (Ex. B). *And see Iberia Med. Ctr. v. Ward*, 53 So.3d 421, 433 (La. 2010) (observing that "an IME is supposed to be unbiased") (internal quotation omitted). The American Medical Association's *Standards for Independent Medical Examinations* are unequivocal on this subject:

> The Examiner is *Independent*, and must arrive at his/her own diagnosis and opinions, independently of the referring source, remuneration, other's opinions, or personal bias.
>
> ***
>
> In addition to the qualifications above, it is imperative that the Examiner demonstrate the *highest* possible standards of ethics, objectivity and impartiality. Personal bias, prejudice, slanting or partiality cannot be tolerated. Indications of bias disqualify the Independent Medical Examination as a useful document.[7]

Consistent with these standards, Delaware's licensing provisions make any physician engaged in "unprofessional conduct" subject to professional discipline, including the revocation of his or her license. 24 *Del. C.* § 1731(a). The statute defines "unprofessional conduct" to include "[t]he use of any false, fraudulent, or forged statement . . . or the use of any fraudulent, deceitful, dishonest, or unethical practice . . . in connection with the practice of medicine," as well as "[a]ny

[7] *See* http://www.aimehi.com/PDFs/IME%20standards%20for%20AIMEHI%20web%20site.pdf, at 2, 6 (emphasis in original) (last visited March 20, 2016).

dishonorable, unethical, or other conduct likely to deceive, defraud, or harm the public . . . ." *Id.* §1731(b)(1) and (3). Nor should it be overlooked that to the extent Dr. Gelman's fraudulent opinions find their way into judicial proceedings, they threaten a fraud upon the court. *See Schmeusser v. Schmeusser*, 559 A.2d 1294, 1298 (Del. 1989) (expert's knowing misrepresentations constituted a fraud upon both the Family Court and the adversary, and "affected the public interests by its occurrence in a judicial proceeding.") *See also Choina v. E.I. du Pont de Nemours & Co.*, C.A. No. 89-4571, 1996 WL 200279, slip op. at *1 (E.D. La. April 25, 1996) (where "plaintiff's expert had falsified his report data thereby committing fraud on the Court, the Court overturned [a] June 1995 jury verdict in favor of plaintiff and set a new trial date . . .") (Ex. D).

The fact that all experts are susceptible (as all humans are susceptible) to bias is no reason to ignore a calculated, systematic campaign of fraud — any more than the fact that no human is perfectly honest can justify perjury. The legal and ethical bar should be set at least as high for physicians as it is for laypeople.

iii. The Plaintiffs' 53-Page Complaint Gave Dr. Gelman Fair Notice of the Conduct With Which He is Charged

The sole basis for the Superior Court's conclusion that the plaintiffs failed to plead fraud with sufficient particularity was its finding that "[p]laintiffs have failed to allege with specificity a false representation made by Dr. Gelman." *Adams v. Gelman*, Op. at *4 (Ex. A). As noted above, however, fraud does not require an

affirmative misrepresentation; rather, fraud may consist of the deliberate concealment of material facts. *Stephenson*, 462 A.2d at 1074. In addition, all the traditional requirements of Superior Court Civil Rule 9(b) — allegations of the point in time at which the plaintiffs' IME, DME and records review were conducted, the nature of the facts concealed by Dr. Gelman, Dr. Gelman's identity, and "what [Dr. Gelman] intended to gain" by the concealment — appear in painstaking detail in the plaintiffs' 130-paragraph complaint. *See* A18, A24-52. *And cf. Abby Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006) (addressing the requirements of particularized pleading). The suggestion that the plaintiffs' fraud claim lacks particularity beggars belief.

CONCLUSION

For the reasons set forth above, plaintiffs below/appellants Ruth Adams, Sharon Riddick and Alan Rosenthal respectfully request that the judgment below be reversed.

Respectfully submitted,

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