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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' REPLY BRIEF ON APPEAL

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At oral argument below, the Gelman defendants conceded that in the "extreme" case where an IME doctor set out to deny, in every instance, "any valid injury that could be proximately caused by whatever it is we're looking at," the doctor's conduct would give rise to a claim for common law fraud. A484-85. Yet the analysis urged by the defendants in this Court would, if accepted, produce the opposite result: even a doctor who gleefully boasted of rigging the game on every IME, DME and records review would be immune from fraud claims, lest the edifice of civil justice come crumbling down. The plaintiffs respectfully submit that the Gelman defendants got it right the first time.

The undisputed record contains overwhelming evidence of a massive fraud. The Court has before it 75 of Dr. Gelman's IME reports spanning a period of seven years. Each report was placed in the record by the plaintiffs. Every single one of the 75 reports unequivocally declares the insurance company the winner, and the injured claimant the loser. Dr. Gelman, meanwhile, chose to place precisely zero reports into the record, though he doubtless has hundreds (if not thousands) of his own reports at hand. Even the most unsophisticated layperson, wholly unversed in the law, would understand that this is fraud.

Taking the complaint's well-pled allegations as true — or taking into account the "100% hit rate" in the 75 Gelman reports, and simply adding a dash of common sense — it is clear that Dr. Gelman has built a $13 million empire of

corruption. He has corrupted the insurance claims-handling process. He has corrupted the practice of medicine in the State of Delaware. And he has visited this corruption on an army of ordinary, unwitting Delaware citizens who caome before him in a state of physical and emotional vulnerability.[1]

The defendants ask too much of this Court. They seek a radical expansion of witness immunity that would apply the doctrine, not just to claims of reputational injury, but to all conceivable claims of any kind. In the case of plaintiffs Ruth Adams and Sharon Riddick, they seek to apply the doctrine where the purported "witness" never even served as a witness. They seek license for unscrupulous doctors to corrupt the claims-handling process with impunity, endangering crucial social safety nets upon which Delaware citizens rely every hour of every day — from those who operate motor vehicles, to those who occupy motor vehicles, to pedestrians struck by motor vehicles, to those who work for Delaware employers. They seek to recast fraud as an injury to reputation — a shock that would reverberate throughout the insurance industry, which traditionally treats fraud as non-fortuitous conduct (and therefore uninsurable), while explicitly extending indemnity and defense obligations to claims of reputational injury. They seek a fundamental dilution of common law fraud, under which the concept of

[1] For eleven detailed examples of Dr. Gelman's misconduct ***in addition to*** those reflected in the 75 IME reports and the plaintiffs' own encounters with the doctor, see the complaint at paragraph 14, A25-32.

"misrepresentation" includes "not only words spoken or written ***but also any other conduct*** that amounts to an assertion not in accordance with the truth." Restatement (Second) of Torts § 525 cmt. b (1977) (emphasis added).[2] They even seek to overturn the controlling procedural standard, asking this Court to treat the plaintiffs' well-pled allegations as a factually baseless, *ad hominem* "whispering campaign," *Spence v. Funk* and the 75 IME reports notwithstanding.

Dr. Gelman says that what these plaintiffs "are really seeking to do here" is intimidate IME doctors and tilt the playing field in favor of claimants. Not so. First, the facts here are extreme. Unless an IME doctor has (like Dr. Gelman) overwhelmingly slanted his or her reports in favor of insurance companies over the course of many years, prospective plaintiffs will have no real chance of success in cases like this one; and honest doctors have nothing to fear. Second, prosecuting a case of this kind will prove labor-intensive and expensive. Ordinary claimants will rarely be in a position to pursue such cases under an hourly-fee arrangement, so they will be pursued (if at all) on a contingency fee basis. Plaintiffs' lawyers will

[2] Consistent with the Restatement's definition of "misrepresentation", "words ***or conduct*** asserting the existence of the fact constitute a misrepresentation if the fact does not exist." *Id.* (emphasis added). Given the standards that govern an IME, an IME doctor conveys by his conduct — by the very act of undertaking an IME — that the examination will ***not*** be rigged. *See* American Medical Association, *Standards for Independent Medical Examinations*, http://www.aimehi.com/PDFs/IME%20standards%20for%20AIMEHI%20web%20site.pdf, at 6 (last visited March 20, 2016) ("[I]t is imperative that the [Independent Medical] Examiner demonstrate the *highest* possible standards of ethics, objectivity and impartiality") (emphasis in original).

thus be incentivized to file such suits only where (as here) the facts are extreme and the evidence is strong — cases in which, to put it bluntly, the offending doctor deserves to be sued. But it would be a gross insult to the Delaware medical community to assume that the deplorable conduct alleged here is being duplicated by other Delaware doctors on anything like a widespread basis. Third, as Dr. Gelman's financial condition confirms, conducting IMEs is a highly lucrative practice — just as, for example, performing surgeries is lucrative. Hundreds of medical malpractice cases have been prosecuted in Delaware courts over the years, and though no doctor enjoys being sued, surgical practices continue to flourish. Honest IME doctors will not abandon a generous income stream because of this single, isolated lawsuit.

The parade of horribles is thus marching in the opposite direction. The outcome of this case, however it is decided, poses no threat of witness intimidation. But if word spreads that a physician of Dr. Gelman's reputation has been granted absolute immunity from civil liability, ***and*** collected $13 million in the bargain, Delaware will see more Dr. Gelmans — in all likelihood, many more — and Delaware doctors will have no meaningful incentive to continue conducting IMEs in an honest and ethical manner (as they do now, with rare exceptions).

I. WITNESS IMMUNITY DOES NOT APPLY

A. Witness Immunity Is Limited to Claims of Reputational Injury

The Chancery Court's reported decision in *Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC*, 22 A.3d 710 (Del. Ch. 2011) (authored by this Court's current Chief Justice) offers a thoughtful analysis of the policy rationale and appropriate reach of witness immunity. The Chancery Court began that analysis "by noting that the [plaintiffs] overstate the policy rationale for the privilege." *Paige* at 720. The court continued:

> At its core, the privilege is designed to encourage candid and full testimony in court, to have parties resolve their disputes peaceably, to let a result issue, and then move on. Having collateral litigation follow about the defamatory nature or emotionally-injurious effect of testimony in litigation is seen as inefficiently redundant and not, on balance, worth it in light of other existing safeguards promoting truth-telling in the original litigation, and the reality that although coming with the imperfection of any human-made determination, the outcome of the original litigation will tend to suggest which side's version of the truth the fact-finder adopted. This policy balance, ***which is itself contestable***, would be upset by going further and immunizing threats to take future wrongful action if a party does not settle. Rather, the 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. (emphasis added; footnotes omitted). The defendants argue that though this Court may consider the outcome in *Paige*, it should disregard the reasoning by which that

outcome was reached: "[T]he holding in *Paige*, where the court declined to apply immunity to a non-defamation action, should be limited to its extreme and very specific facts." Answering brief at 20. Defendants would thus revise the last sentence of the quoted matter above to read something like this:

> Rather, the 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 — ***provided, however,*** that the facts are identical to the very specific facts of this particular case; for if they are not identical to those specific facts, all bets are off.

Like the plaintiffs in *Paige*, Dr. Gelman "loses sight of the fact that the reason to encourage full-throated advocacy is to facilitate a fair adjudication of the underlying claims." *Paige* at 721. When the plaintiffs in *Paige* attempted "to use the cover of the privilege to make threats," the Chancery Court correctly concluded that the purpose of witness immunity would "hardly [be] served" by such an outcome. Need it really be said that the underlying rationale of witness immunity (the facilitation of fair adjudication) would not be served by deploying the immunity to facilitate fraud?

Equally important is the Chancery Court's observation in *Paige* that the balance struck by witness immunity is "itself contestable[.]" This reflects a thoughtful recognition that whenever immunity from civil liability is extended, a risk of unredressed (and unredressable) harm is created. That risk may not militate in

favor of abrogating the immunity; but it strongly militates against expanding the immunity beyond its traditional reach. Thus, the underlying rationale for witness immunity is indeed "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." *Paige* at 720.

B. Delaware Courts Do Not Merely Apply Witness Immunity to Claims of Reputational Injury; They Limit Witness Immunity to Such Claims

The defendants argue that the fact that Delaware courts ***apply*** witness immunity to claims for defamation and reputational injury does not imply a ***limitation*** of the immunity to such claims. That argument cannot be squared with the relevant Delaware precedents. In *Short v. News-Journal Co.*, 212 A.2d 718 (Del. 1965), this Court explained witness immunity thusly:

> The law of defamation embodies the public policy that, generally, individuals must be protected so as to enjoy their good reputations unimpaired by defamatory statements.
>
> ***
>
> There is, however, a counter public policy requiring that, in certain situations, a paramount public interest permits speaking and writing freely and without restraint by the possibility of defamation action (*sic*). In such situations, the law recognizes certain privileges and immunities from liability. The defense of privilege in defamation cases "rests upon the . . . idea, that conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social

> importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation."

Short, 212 A.2d at 719-20 (internal quotation omitted). A decade later, the Superior Court described the evolution of the privilege:

> The English authorities adher[e] to a rule that judges, counsel, parties and witnesses to an action will be absolutely exempt from liability stemming from any alleged defamations made in the course of judicial proceedings. The American courts have adopted a corresponding doctrine with qualifications. The matter alleged to be defamatory must at least be pertinent and material to the action.

Tatro v. Esham, 335 A.2d 623, 625-26 (Del. Super. Ct. 1975). In 1982 the U.S. District Court for the District of Delaware foreclosed attempts to avoid the privilege by simply recasting defamation claims as claims for emotional distress or invasion of privacy: "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." *Hoover v. Van Stone*, 540 F. Supp. 1118, 1124 (D. Del. 1982). The following year, the Superior Court described the privilege just as it had been earlier described in *Short* and *Tatro*: "The common law rule protecting statements of judges, parties, witnesses and attorneys offered in the course of judicial proceedings from a cause of action in defamation is well-recognized in this jurisdiction." *Nix v. Sawyer*, 466 A.2d 407, 410 (Del. Super. Ct. 1983) (citing, *inter alia*, *Short* and *Tatro*). Roughly a decade later, this Court approved the

reasoning of *Hoover*, holding that artful pleaders cannot properly avoid the privilege simply by recasting claims of reputational injury under labels other than defamation. *Barker v. Huang*, 610 A.2d 1341, 1348-49 (Del. 1992) (quoting *Hoover*). This consistent line of authority is not, as the defendants would have it, the product of happenstance. It is not by mere coincidence that Delaware courts have repeatedly applied witness immunity, decade after decade, to claims of reputational injury. Rather (and as shown above), Delaware courts have repeatedly ***defined*** the privilege in terms of reputational injury; while the Chancery Court in *Paige* and the Superior Court in this case have expressly ***limited*** the privilege to claims of reputational injury.

The defendant's counter with the district court's decisions in *AGC Networks, Inc. v. Relevante, Inc.*, C.A. No. 14-308-LPS, 2015 WL 1517419 (D. Del. March 31, 2015) and *Hurst v. State Farm Mut. Auto. Ins. Co*., C.A. No. 10-1001-GMS, 2012 WL 426018 (D. Del. Feb. 9, 2012). *AGC*, they say, involved "no injury to reputation claim." Answering brief at 22. But this is mistaken. In *AGC* the plaintiff accused the defendants of a scheme to steal the company's customers, suppliers, distributors and employees. *AGC*, slip op. at *1. After filing its complaint, AGC sent letters to former customers informing them of the litigation and asking that they preserve potentially relevant electronic data. *Id.* Relevante asserted a counterclaim for "tortious interference with prospective business

activities," alleging that "by sending the Preservation Letters, Plaintiffs intentionally and wrongfully interfered with Defendant's business relationships or expectancies with those third parties." *Id.* In other words, the substance of Relevante's grievance with AGC was the harm done to Relevante's business reputation by AGC's alerting the contested-for customers, suppliers, etc., of AGC's allegations of dishonest conduct. In holding that the Preservation Letters were subject to the privilege, the district court spoke explicitly in terms of reputational injury, and quoted this Court's discussion in *Barker* of "recasting" reputational injury claims under other labels. *AGC*, slip op. at *2-3 (quoting *Barker*). The defendants likewise claim that *Hurst* extended the privilege beyond the limits announced in *Paige*. But the plaintiff in *Hurst* alleged injury by virtue of the defendants' public disclosure of his "personal information." *Hurst*, slip op. at *2. In upholding the privilege, *Hurst* relied ***solely*** on *Barker*'s prohibition on "recasting" reputational injury claims under other labels. *Id.* at *8 (quoting *Barker*). *Hurst* is thus entirely consistent with *Paige*'s limitation of the privilege to "only defamation and related torts arising from derogatory statements alleged to be harmful to the suing party's reputation or psychic well-being." *Paige* at 720.

In short, Delaware law limits witness immunity to claims involving reputational injury or public embarrassment. The defendants' attempt to extend the privilege beyond those limits should be rejected.

C. Fraud Claims Neither Allege Nor Implicate Reputational Injury

The defendants argue that the plaintiffs' fraud claims are claims of reputational injury. Dr. Gelman is being sued, they say, because he "excited unpleasant feelings" against the plaintiffs, and made "derogatory statements" about their injuries (whatever that means). To be clear: Dr. Gelman is not being sued for insulting anyone's physical injuries, nor for "exciting unpleasant feelings." This explains why the defendants cite no authority for the proposition that fraud involves reputational injury. Stated simply, this is an action for fraud, not a theater of the absurd.

D. Witness Immunity Should Not Apply to Statements Made in the Course of Ordinary Insurance Claims-Handling

Dr. Gelman argues that since 45 of the 75 IME reports show that an attorney was involved at the time the report was requested, "a large percentage of Dr. Gelman's reports were likely for litigation, a context in which even Plaintiffs admit an IME/DME doctor would be entitled to immunity." Answering brief at 13. There are several problems with this argument. First, as shown above, witness immunity does not apply to fraud claims. Second, the argument underscores the merit in the plaintiffs' analogy to the meritless claims of work product immunity that insurance companies so often invoke: *See, we got a lawyer involved in our claims-handling, so our claim file is not discoverable.* The fact that a lawyer's name appears on a Gelman-authored IME report does not transform garden-variety claims handling (that is, the insurer's ordinary course of business) into a judicial proceeding, any

more than the appearance of that same lawyer's name in a claim file vests the file with work product immunity. This is true even though insurance claims (including claims for which an IME is commissioned) sometimes ripen into lawsuits. Finally, when the defendants admit that the IME process is "often the very basis for a lawsuit," answering brief at 14, they confirm that the conduct alleged here must necessarily foment large numbers of needless lawsuits — lawsuits that would have been avoided had Dr. Gelman simply done his job honestly. This result is utterly at odds with the purpose of witness immunity.

E. Witness Immunity Should Not Apply Where the Speaker Was Never a Witness

Under *Barker*, witness immunity does not apply to "statements made outside of the course of judicial proceedings . . . ." *Barker*, 610 A.2d at 1345. None of the challenged conduct in this lawsuit occurred in any judicial proceeding. With respect to plaintiffs Adams and Riddick, Dr. Gelman never appeared as a witness, either live or by deposition. It is likewise undisputed that as to all three plaintiffs, Dr. Gelman conducted his examinations/reviews prior to the insurer's reaching a coverage determination, and ***as a means of informing the insurer's coverage determination***. The offending conduct was therefore not a part of any judicial proceeding, but (again) simply a part of the ordinary course of claims-handling and claims investigation.

II. THE PLAINTIFFS' FRAUD CLAIMS SHOULD BE UPHELD

A. An Actor's Conduct Can Constitute Misrepresentation

Section 525 of the Restatement is titled "Liability for Fraudulent Misrepresentation." Comment b reads as follows:

> *b. Misrepresentation defined.* "Misrepresentation" is used in this Restatement to denote not only words spoken or written but also any other conduct that amounts to an assertion not in accordance with the truth. Thus, words or conduct asserting the existence of a fact constitute a misrepresentation if the fact does not exist.

Restatement (Second) of Torts § 525 cmt. b (1977). As the plaintiffs have shown, IMEs, DMEs and medical records reviews are supposed to be conducted honestly; and both the AMA's published standards and Delaware's statutory licensing scheme require physicians to conduct them honestly. The insurer's implied covenant of good faith and fair dealing likewise makes it imperative that these processes be free of conscious bias and deliberate slanting. Thus, the very act of conducting an IME, etc., implies the physician's intent to act with honesty and professionalism. If a physician holds a contrary intent, and conceals that intent from the claimant, he is guilty of misrepresentation by conduct. In addition, this Court has recognized that parties may be liable for fraud by virtue of "misrepresentations of implied fact" — the precise species of misrepresentation alleged in the complaint. *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 115-16 (Del. 2006).

B. A Physician Always Has a Special Relationship With Anyone He Physically Examines for Any Medical Purpose

Under settled Delaware law, "fraud does not consist merely of overt misrepresentations," and "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). 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 engaged in the concealment of material facts.

The defendants argue that a claim of deliberate concealment can only lie where the actor has a duty to speak. Under Delaware law, a duty to speak arises where the parties have a special relationship or a confidential relationship. *Matthews Office Designs, Inc. v. Taub Investments*, 647 A.2d 382, 382 (Del. 1994) (Table). The relationship between Dr. Gelman and the plaintiffs involved both. For example, the highest courts of New York and Michigan have recognized that an IME gives rise to a limited physician-patient relationship. *Bazakos v. Lewis*, 911 N.E.2d 847, 850 (N.Y. 2009); *Dyer v. Trachtman*, 679 N.W.2d 311, 316 (Mich. 2004). The National

Institutes of Health and the American Medical Association agree.[3] Whether or not one characterizes this duty as fiduciary in nature, it should be clear that any degree of physician-patient relationship is a special relationship. Nor can the defendants credibly dispute that the relationship between Dr. Gelman and the plaintiffs was confidential in nature: Dr. Gelman was not free to broadcast the plaintiffs' private medical information on the network news. Dr. Gelman's relationship with the plaintiffs was thus a special relationship ***and*** a confidential relationship. He was therefore under a duty to speak.

C. Claimants May Justifiably Rely on a Fair and Honest IME Process

The plaintiffs have shown that the AMA's published standards, the common law, and the relevant licensing statutes all require that IMEs, DMEs and records reviews be conducted with utmost honesty. It is therefore inarguable that the plaintiffs, and the public at large, are justified in expecting such honesty from these claims-handling processes. As noted above, the insurer's duty of good faith and fair dealing likewise requires that IMEs, etc., be fair and impartial.

The defendants say that the plaintiffs could not have justifiably relied on the fairness of the process because, as a contractual and statutory matter, they had no choice but to submit. Not so. The duty of good faith and fair dealing would not

[3] *See, e.g., Independent Medical Examinations: Facts and Fallacies*, http://www.ncbi.nlm.nih.gov/pubmed/19787008 (last visited April 2, 2015); *Bazakos*, 911 N.E.2d at 850.

allow an insurer to force a claimant to present his or her person for intimate physical examination by an avowed fraud. *Cf. Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 444 (Del. 2005) (insurer's duty of good faith includes a duty "not to take advantage of the [parties'] unequal positions in order to become a secondary source of injury to the insured") (internal quotation omitted). It should be emphasized, too, that insurers ***affirmatively rely*** on IME results to defeat bad-faith claims. *See Enrique v. State Farm Mut. Auto. Ins. Co.*, 2015 WL 6330920 (Del. Super. Ct. Oct. 14, 2015), Op. at *4 (noting that "State Farm relied on an IME in the current case for proof that the damages suffered by Enrique may have been related to a preexisting condition.") But the insurance industry cannot have it both ways. It cannot offer up IME results as evidence of the reasonable justification for their claim denials, while their IME doctors argue that claimants are not entitled to rely on the integrity of the IME process.

D. The Plaintiffs Pled Fraud With Sufficient Particularity

Addressing the particularity standard prior to the U.S. Supreme Court's holdings in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) — in other words, under the same standard set forth in *Spence v. Funk* — the Third Circuit recognized that particularity in pleading is not formulaic. *Seville Indus. Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 791 (3d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985). The particularity

requirement "also takes into account whether 'the facts lie more in the knowledge of the opposing party than of the pleading party.'" *NACCO Indus. v. Applica, Inc*., 997 A.2d 1, 26-27 (Del. Ch. 2009) (internal quotation omitted). Moreover, the particularity standard is relaxed when the plaintiff pleads fraudulent concealment or omission. *Naparala v. Pella Corp.*, 106 F. Supp.3d 715, 725 (D.S.C. 2015). Under this relaxed standard — or under any reasonable measure of particularity — the plaintiffs' highly detailed complaint has placed Dr. Gelman on notice of the precise misconduct with which he is charged, and the reasons why that conduct is morally unacceptable. The complaint apprises Dr. Gelman of the specific examinations and reviews at issue; the point in time and the factual setting in which those examinations and reviews took place; the precise nature of the alleged misconduct; and the way in which that misconduct caused the plaintiff's injury. Notwithstanding, should this Court conclude that the plaintiffs' fraud claims lack particularity in any respect, the plaintiffs should be permitted to amend their complaint to cure the perceived deficiency. The importance of the issues to the plaintiffs and the public is too great to see this case dismissed because of a procedural technicality.

III. THE DEFENDANTS' AUTHORITIES ARE UNAVAILING

Space does not permit a point-by-point refutation of the IME-related cases on which the defendants rely. By way of example, however, we note the concurring

opinion in *Wilson v. Bernet*, 625 S.E.2d 706 (W. Va. 2005), which defendants cite at page 8 of their answering brief:

> I write separately to note that this Court's opinion decidedly does NOT create a blanket civil liability "exoneration" or "immunity" for experts who engage in criminal or similarly outrageous conduct, and to injure others by that misconduct.
>
> ***
>
> For example, under this Court's opinion in the instant case, the late Fred Zain, West Virginia's "poster boy" of corrupt experts . . . would be civilly liable to his victims.

Wilson, 625 S.E.2d at 716 (Starcher, J., concurring) (citation omitted). Perhaps each of the 50 states has its own Dr. Gelman.

CONCLUSION

For the reasons stated above, and for the reasons stated in the plaintiffs' opening brief, the Superior Court's judgment should be reversed.

Respectfully submitted,

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