STATE OF MICHIGAN
IN THE SUPREME COURT

KENNETH M. MOGILL and MOGILL, POSNER & COHEN,

Appellants,

v.

ESTATE OF DIANA LYKOS VOUTSARAS, by KATHLEEN M. GAYDOS, Personal Representative,

Appellee.

SC: 159107

COA: 340714

Ingham CC: 16-000263-NM

APPELLANTS' JOINT APPENDIX OF EXHIBITS TO

APPELLANTS KENNETH M. MOGILL AND MOGILL, POSNER & COHEN'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL FROM DECISION OF THE MICHIGAN COURT OF APPEALS

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EXHIBIT 1

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

JUSTIN B. HAYES,
PERSONAL REPRESENTATIVE OF THE
ESTATE OF DIANA LYKOS VOUTSARAS a/k/a
DIANA M. VOUTSARAS

Plaintiff,

Case No: 16- 263 -NM

Hon. JOYCE DRAGANCHUK

vs.

GARY L. BENDER,
RICHARD A. CASCARILLA,
LINDSAY NICOLE DANGL,
VINCENT P. SPAGNUOLO,
MURPHY & SPAGNUOLO, P.C.,
KENNETH M. MOGILL,
MOGILL, POSNER & COHEN,
KERN G. SLUCTER,
GANNON GROUP, A PROFESSIONAL CORPORATION

Defendants.
_____/

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_____/

CERTIFICATE

A civil action between these parties or other parties arising out of the transaction or occurance as alleged in the complaint has been previously filed in the Ingham County Probate Court. The action is no longer pending. The docket number and the judge assigned to the action are 15-1718-CZ and Hon. Richard J. Garcia.

COMPLAINT FOR LEGAL MALPRACTICE, NEGLIGENCE AND BREACH OF CONTRACT

Justin B. Hayes, Personal Representative of the Estate of Diana Lykos Voutsaras a/k/a Diana M. Voutsaras (Plaintiff) says for his complaint:

PARTIES, JURISDICTION, VENUE

1. Plaintiff is the Personal Representative of the ESTATE DIANA M. VOUTSARAS (Estate) that is pending in Ingham County Probate Court.
2. Diana M. Voutsaras (Voutsaras) died in January 2015.
3. Defendant GARY L. BENDER is an attorney licensed to practice law in the State of Michigan and is a resident of Ingham County Michigan (Bender).
4. Bender is a licensed real estate broker with Michigan License Number 6504369553.
5. Defendant RICHARD A. CASCARILLA is an attorney licensed to practice law in the State of Michigan and is a resident of Ingham County Michigan (Cascarilla).
6. Defendant LINDSAY NICOLE DANGL is an attorney licensed to practice law in the State of Michigan and is a resident of Ingham County Michigan (Dangl).
7. Defendant VINCENT P. SPAGNUOLO is an attorney licensed to practice law in the State of Michigan and is a resident of Ingham County Michigan (Spagnuolo).
8. Defendant MURPHY & SPAGNUOLO, P.C. is a professional corporation with its registered agent located at 4572 S Hagadorn Road, Suite 1, Ingham County, East Lansing, MI 48823 (M & S).
9. Defendant KENNETH M. MOGILL is an attorney licensed to practice law in the State of Michigan and is a resident of Oakland County Michigan (Mogill).
10. Defendant MOGILL, POSNER & COHEN is a Michigan partnership with its principal office at 27 E Flint Street, Suite 2, Lake Orion, Oakland County, Michigan 48362 (MPC).

11. Defendant KERN G. SLUCTER is an individual residing in Eaton County, Michigan (Slucter).

12. Defendant GANNON GROUP, A PROFESSIONAL CORPORATION, is a professional corporation with its registered agent at 6635 Creyts Road, Dimondale, Eaton County, Michigan 48821 (Gannon).

13. The amount in controversy exceeds $25,000 exclusive of costs, interest and attorney fees.

14. This Court has subject matter jurisdiction.

15. This Court is an appropriate venue for this matter because the negligent acts and breaches of contract by the Defendants complained of occurred in Ingham County Michigan and all of the Defendants reside or conduct business in Ingham County.

GENERAL ALLEGATIONS

16. Bender and Cascarilla maintained an "Of Counsel" relationship with M & S at all times relevant to the matters alleged in this complaint.

17. Dangl and Spagnuolo were employed by M & S at all times relevant to the matters alleged in this complaint.

18. Mogill is a partner in MPC.

19. Slucter was employed by Gannon at all times relevant to the matters alleged in this complaint.

20. Gannon is a "professional corporation" incorporated to provide one or more services in a learned profession, whether or not it is providing other professional services.

21. In April 2014, Voutsaras was sued by Gallagher Investments, LLC in Ingham County Circuit Court, File Number 14-0462-CK, to collect a deficiency arising out of a 2013 forclosue of a commercial mortgage securing payment of a promissory note made by Voutsaras and held by Gallagher Investments, LLC (Litigation).

22. In May 2014, Voutsaras retained Bender, Cascarilla, Dangl, Spagnuolo and M & S as her attorneys in the Litigation (Attorneys).

23. In May 2014, the Attorneys advised Voutsaras, as part of their litigation strategy, to file a Counter-Complaint against Gallagher Investments, LLC and file Third Party Complaints against Byron P. Gallagher, Jr., the Gallagher Law Firm, PLC and Accord Management, LLC.

24. The Counter-Complaint against Gallagher Investments, LLC was based on various claims including fraud and breach of contract.

25. The Third Party Complaint against Byron P. Gallagher, Jr. and Accord Management, LLC was based on various claims associated with real estate broker licenses held by Byron P. Gallagher, Jr. and Accord Management, LLC.

26. The Third Party Complaint against Byron P. Gallagher, Jr. and The Gallagher Law Firm, PLC was based on various claims associated with legal malpractice of Byron P. Gallagher, Jr. and The Gallagher Law Firm, PLC.

27. In October 2014, Voutsaras, on the advice of the Attorneys, retained Mogill and MPC to provide expert opinions and legal advice as to legal professional standards relating to Byron P. Gallagher, Jr. and the Gallagher Law Firm, PLC.

28. In October 2014, Voutsaras, on the advice of the Attorneys, retained Slucter and Gannon to provide expert opinions on real estate broker standards relating to Byron P. Gallagher, Jr. and Accord Management, LLC.

29. Mogill and MPC provided expert opinions and legal advice to the Attorneys for the benefit of Voutsaras and Voutsaras relied on the expert opinions and legal advice in the Litigation (Mogill Opinions).

30. Slucter and Gannon provided expert opinions to the Attorneys for the benefit of Voutsaras and Voutsaras relied on the expert opinions in the Litigation (Slucter Opinions).

31. On January 21, 2015, the Litigation was resolved in favor of Gallagher Investments, LLC, Byron P. Gallagher, Jr., the Gallagher Law Firm, PLC and Accord Management, LLC, as prevailing parties, after the Court granted Motions for Summary Disposition, including the subsequent taxation of costs against Voutsaras.

COUNT I – LEGAL MALPRACTICE – THE ATTORNEYS

32. Plaintiff incorporates the previous paragraphs.

33. Bender had an attorney-client relationship with Voutsaras and was her attorney in connection with the Litigation.

34. Cascarilla had an attorney-client relationship with Voutsaras and was her attorney in connection with the Litigation.

35. Dangl had an attorney-client relationship with Voutsaras and was her attorney in connection with the Litigation.

36. Spagnuolo had an attorney-client relationship with Voutsaras and was her attorney in connection with the Litigation.

37. M & S had an attorney-client relationship with Voutsaras and was her law firm in connection with the Litigation.

38. The Attorneys owed a duty to Voutsaras to exercise that knowledge, skill, ability, and care ordinarily possessed and exercised by a reasonably prudent attorney in the same or similar circumstances, and further to act in good faith and in the best interest of Voutsaras.

39. The Attorneys owed a duty to Voutsaras to exercise that knowledge, skill, ability, and care ordinarily possessed and exercised by a reasonably prudent attorney in the same or similar

circumstances and to have done in connection with the Litigation what a reasonably prudent attorney would have done in the same or similar circumstances.

40. The Attorneys owed a duty to Voutsaras to exercise that knowledge, skill, ability, and care ordinarily possessed and exercised by a reasonably prudent attorney in the same or similar circumstances and not to have done in connection with the Litigation what a reasonably prudent attorney would have not have done in the same or similar circumstances.

41. The Attorneys breached their duties to Voutsaras by failing to:

A. fully investigate the facts and law applicable to the Litigation;

B. provide competent representation;

C. act with reasonable diligence and promptness;

D. charge a reasonable fee;

E. not represent Spiro Voutsaras because their representation of Spiro Voutsaras was directly adverse to Voutsaras;

F. not bring or defend a proceeding unless there is a basis for doing so that is not frivolous;

G. to communicate all settlement discussions immediately to Voutsaras;

H. expedite the Litigation; and

I. to ensure that supervisory authority over nonlawyers was maintained so that their conduct is compatible with the professional obligations of the Attorneys to Voutsaras.

42. The Attorneys only communicated with Spiro Voutsaras with regard to the Litigation even though Voutsaras was also their client.

43. The Attorneys never informed Voutsaras that Byron P. Gallagher, Jr. advised Bender at the beginning of the Litigation that he would accept a very reasonable settlement amount.

44. The Litigation could have been resolved for a settlement amount of $25,000 in May 2014 based on Byron P. Gallagher, Jr.'s conversation with Bender.

45. Bender indicated to Byron P. Gallagher, Jr. that Voutsaras would never pay any amount to settle the Litigation.

46. The Litigation resulted in liability to Voutsaras in the amount of $160,000 plus costs, interest and attorney fees (Liability).

47. A Settlement Agreement was entered into providing for installment payments for a reduced amount of the Liability to be made by Spiro Voutsaras who is now in default of the terms of the Settlement Agreement.

48. The Attorneys knew that Voutsaras was suffering from a terminal illness during their representation of Voutsaras.

49. In December 2014, the Attorneys advised Spiro Voutsaras, husband of Voutsaras and a co-defendant in the Litigation, that the defenses, counterclaims and third party claims recommended and asserted by the Attorneys in the Litigation would not succeed (see Exhibit A).

50. The Attorneys' advice in Exhibit A should have been given to Voutsaras as part of the Attorneys' initial analysis of the claims and defenses in May 2014.

51. The Attorneys' advice in Exhibit A was delayed until December 2014, as intentional misconduct of the Attorneys, so that the Attorneys could charge an excessive fee to their clients to the great detriment of Voutsaras because the money paid to the Attorneys over

the course of the Litigation could have been used to fund a full settlement of the Litigation in May 2014.

52. As a result of the Attorneys' acts and neglects alleged above, Voutsaras has suffered pecuniary loss, emotional distress, humiliation, embarrassment, and exemplary damages.

WHEREFORE, Voutsaras requests a judgment for her damages together with costs, interest and attorney fees.

COUNT II –NEGLIGENCE OF MOGILL AND MPC

53. Plaintiff incorporates the previous paragraphs.

54. In October 2014, Mogill and MPC were retained by the Attorneys on behalf of Voutsaras, to provide opinions on the subjects of State bar ethics and professional responsibility relating to Byron P. Gallagher, Jr. and the Gallagher Law Firm, PLC to (a) the Attorneys to support their litigation strategy and (b) the Court in the form of expert witness testimony. Copies of correspondence and documents related to the contracts alleged in this Complaint are not attached because they are in the possession of Defendants pursuant to MCR 2.113(F)(1)(b).

55. Spiro Voutsaras, on behalf of himself and Voutsaras, paid a $2,500 retainer to Mogill.

56. Mogill and MPC provided expert opinions to the Attorneys and Voutsaras (Mogill Opinions).

57. Mogill and MPC knew or should have known that the Attorneys and Voutsaras would rely on the Mogill Opinions in connection with strategy in the Litigation.

58. The Mogill Opinions are based on facts that were not true.

59. The Mogill Opinions are based on standards that are not applicable.

60. Voutsaras relied on the Mogill Opinions in the Litigation in forming litigation strategy.

61. Mogill and MPC owed a duty to Voutsaras to exercise that knowledge, skill, ability, and care ordinarily possessed and exercised by an expert in the same or similar circumstances, and further to act in good faith and in the best interest of Voutsaras.

62. Mogill and MPC breached their duties to Voutsaras by failing to:

A. Fully investigate the facts required for the Mogill Opinions;

B. Understand the standards that were applicable; and

C. Provide competent opinion.

63. As a result of the acts and neglects of Mogill and MPC alleged above, Voutsaras has suffered pecuniary loss, emotional distress, humiliation, and embarrassment.

WHEREFORE, Plaintiff requests a judgment for damages together with costs, interest and attorney fees.

COUNT III –NEGLIGENCE OF SLUCTER AND GANNON

64. Plaintiff incorporates the previous paragraphs.

65. In October 2014, Slucter and Gannon were retained by the Attorneys on behalf of Voutsaras, to provide opinions on the issue of whether Byron P. Gallagher, Jr. and Accord Management, LLC owed any duties to Spiro Voutsaras, and if so, whether those duties were breached to (a) the Attorneys to support their litigation strategy and (b) the Court in the form of expert witness testimony. Copies of correspondence and documents related to the contracts alleged in this Complaint are not attached because they are in the possession of Defendants pursuant to MCR 2.113(F)(1)(b).

66. Spiro Voutsaras, on behalf of himself and Voutsaras, paid a $2,500 retainer to Slucter and Gannon.

67. Slucter and Gannon provided expert opinions to the Attorneys and Voutsaras (Slucter Opinions).

68. Slucter and Gannon knew or should have known that the Attorneys and Voutsaras would rely on the Slucter Opinions in connection with strategy in the Litigation.

69. The Slucter Opinions are based on facts that were not true.

70. The Slucter Opinions are based on standards that are not applicable.

71. Voutsaras relied on the Slucter Opinions in the Litigation in forming litigation strategy.

72. Slucter and Gannon owed a duty to Voutsaras to exercise that knowledge, skill, ability, and care ordinarily possessed and exercised by an expert in the same or similar circumstances, and further to act in good faith and in the best interest of Voutsaras.

73. Slucter and Gannon breached their duties to Voutsaras by failing to:

A. Fully investigate the facts required for the Slucter Opinions;

B. Understand the standards that were applicable; and

C. Provide competent opinions.

74. As a result of the acts and neglects of Slucter and Gannon alleged above, Voutsaras has suffered pecuniary loss, emotional distress, humiliation, and embarrassment.

WHEREFORE, Plaintiff requests a judgment for damages together with costs, interest and attorney fees.

COUNT IV –BREACH OF CONTRACT – THE ATTORNEYS

75. Plaintiff incorporates the previous paragraphs.

76. Voutsaras and the Attorneys had a contract under which the Attorneys agreed to provide appropriate legal services to Voutsaras and charge Voutsaras a reasonable fee for the legal services. Copies of correspondence and documents related to the contracts alleged in this

Complaint are not attached because they are in the possession of Defendants pursuant to MCR 2.113(F)(1)(b).

77. The Attorneys breached the contract by not providing appropriate legal services.

78. The Attorneys breached the contract by charging an unreasonable fee.

79. Voutsaras has been damaged by the breach.

WHEREFORE, Plaintiff requests a judgment for damages together with costs, interest and attorney fees.

COUNT V –BREACH OF CONTRACT – MOGILL AND MPC

80. Plaintiff incorporates the previous paragraphs.

81. Voutsaras and Mogill and MPC had a contract under which Mogill and MPC agreed to provide appropriate legal advice and opinions to Voutsaras and charge Voutsaras a reasonable fee. Copies of correspondence and documents related to the contracts alleged in this Complaint are not attached because they are in the possession of Defendants pursuant to MCR 2.113(F)(1)(b).

82. Alternatively, Voutsaras was the third party beneficiary of a contract between Spiro Voutsaras and Mogill and MPC under which Mogill and MPC agreed to provide appropriate legal advice and opinions to Voutsaras and charge Voutsaras a reasonable fee.

83. Mogill and MPC breached the contract by not providing appropriate legal advice and opinions.

84. Mogill and MPC breached the contract by charging an unreasonable fee.

85. Voutsaras has been damaged by the breach.

WHEREFORE, Plaintiff requests a judgment for damages together with costs, interest and attorney fees.

COUNT VI –BREACH OF CONTRACT – SLUCTER AND GANNON

86. Plaintiff incorporates the previous paragraphs.

87. Voutsaras and Slucter and Gannon had a contract under which Slucter and Gannon agreed to provide appropriate opinions to Voutsaras and charge Voutsaras a reasonable fee. Copies of correspondence and documents related to the contracts alleged in this Complaint are not attached because they are in the possession of Defendants pursuant to MCR 2.113(F)(1)(b).

88. Alternatively, Voutsaras was the third party beneficiary of a contract between Spiro Voutsaras and Slucter and Gannon under which Slucter and Gannon agreed to provide appropriate opinions to Voutsaras and charge Voutsaras a reasonable fee.

89. Slucter and Gannon breached the contract by not providing appropriate opinions.

90. Slucter and Gannon breached the contract by charging an unreasonable fee.

91. Voutsaras has been damaged by the breach.

WHEREFORE, Plaintiff requests a judgment for damages together with costs, interest and attorney fees.

Dated: March 30, 2016

Steven Mark Feigelson (P70735)
Attorney for Plaintiff

Jennifer Berkompas

From: Gary Bender
Sent: Monday, December 15, 2014 4:59 PM
To: 'svoutsaras@sigmarep.com'
Cc: Rick Cascarilla
Subject: Withdrawal

Spiro, this confirms your telephone call of a few minutes ago. You advised me that you changed your mind regarding the settlement that we negotiated on your behalf and you authorized last Friday. We have repeatedly advised you that in light of the status and probability of success on the merits, you should compromise the $160,000 claim against you as best you can or face a judgment and order awarding Gallagher the whole amount including his attorney fees and costs going forward. Today you advised that the timing is all wrong for you that you had to hire a business consultant, replace a staff person, arrange for your kids' college, and address Diana's situation. You indicated that it didn't feel right. I agreed with you that it isn't right, but you have limited options in our opinion. I asked you what you believe we should do as your attorneys and you indicated that you didn't know. I again explained to you that if a judgment is entered against you, Gallagher can garnish and attach your Sigma checks. He can also seize any other personal property that you may own. Rick also explained this on the telephone last week to you. Your tax attorney advised you in our conference call last week to have us negotiate the best reduced amount on the judgment as possible and get out. He thought if we memorialized this in a judgment that this actually would assist you in your offer in compromise. I told him that planned to talk with him today which is what you advised me last Friday. I asked you if you called him today and you indicated no that every time we or you talk with him it costs you more money.

Two weeks ago, we indicated our interest in withdrawing in light of your refusal to follow our advice and pay fees due. You implored us to stay on the case and negotiate a settlement which you approved last Friday and which we did. You said if only we do that, you would be satisfied. And, as you know you recently backed out of the settlement. Since you are unable to direct us further, we are filing a motion to withdraw as your counsel. You should immediately seek a substitute attorney. Time is of the essence.

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EXHIBIT
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EXHIBIT 2

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

JUSTIN B. HAYES, PERSONAL REPRESENTATIVE OF THE ESTATE OF DIANA LYKOS VOUTSARAS aka DIANA M. VOUTSARAS,

Plaintiff,

v.

GARY L. BENDER, RICHARD A. CASCARILLA, LINDSAY NICOLE DANGL, VINCENT P. SPAGNUOLO, MURPHY & SPAGNUOLO, P.C., KENNETH M. MOGILL, MOGILL, POSNER & COHEN, KERN G. SLUCTER, GANNON GROUP, A PROFESSIONAL CORPORATION,

Defendants.

Case No. 16-263-NM
Hon. Joyce Draganchuk

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DEFENDANTS KENNETH M. MOGILL AND MOGILL, POSNER & COHEN'S MOTION FOR SUMMARY DISPOSITION AND BRIEF IN SUPPORT

Defendants Kenneth M. Mogill and Mogill, Posner & Cohen, pursuant to MCR 2.116(C)(7) and (C)(8), state as follows for their Motion for Summary Disposition:

MOTION

1. This case arises from a collection action and third-party legal malpractice action ("Underlying Litigation") that was pending before Judge Clinton Canady III in Ingham County in 2014 through 2015. Spiro and Diana Voutsaras, the defendants and third-party plaintiffs in the Underlying Litigation, saw their legal malpractice claim dismissed and ultimately judgment was entered against them in the collection case.

2. Unfortunately, Diana Voutsaras passed away from a terminal illness in January 2015.

3. On December 30, 2015, Plaintiff filed this follow-on legal malpractice suit, alleging that the attorneys for Spiro and Diana Voutsaras intentionally withheld from their clients the fact that their defenses and third-party claim were meritless, in order to inflate their legal fees by working up a hopeless case.

4. Separately, Plaintiff alleges that the expert witnesses in the Underlying Litigation, including one of the preeminent authorities on legal ethics in Michigan, Kenneth Mogill, provided "unsatisfactory" opinions and therefore were negligent and breached alleged contracts with Diana Voutsaras.

5. Fatal to Plaintiff's claims against Mr. Mogill is that the Michigan Supreme Court has held that witnesses are absolutely immune from civil liability arising out of their testimony or related evaluations.

6. Moreover, as a witness, Mr. Mogill's only duty owed was to the Court. He owed no duty to Diana Voutsaras as a matter of law.

7. Further, Plaintiff has failed to plead that Mr. Mogill's opinion caused Diana Voutsaras to lose the third-party legal malpractice claim, given that Plaintiff contends that the claim had no chance of succeeding in any event

8. Finally, Plaintiff's breach of contract claim fails to comply with MCR 2.113(F), and should be dismissed, accordingly.

9. Assuming *arguendo* that the facts Plaintiff has pled in his complaint are all true, which they are not, he has nevertheless failed to state an actionable claim under Michigan law. Mr. Mogill and his law firm are therefore entitled to summary disposition on all of the claims against them.

Wherefore, for the reasons stated herein, Kenneth M. Mogill and Mogill, Posner & Cohen respectfully request that this Honorable Court enter an order dismissing the claims against them with prejudice for failure to state a claim.

BRIEF IN SUPPORT

I. INTRODUCTION

Litigation shall not beget litigation simply because a losing litigant is dissatisfied with the testimony of a witness. Testimony is more likely to be forthcoming, open and honest where a witness does not have to fear a subsequent lawsuit related to his testimony. These precepts underlie Michigan's witness immunity doctrine which, under longstanding Supreme Court precedent, provides that witnesses are absolutely immune from civil liability arising out of their testimony or related evaluations.

Here, Plaintiff's decedent's underlying legal malpractice case was dismissed. Plaintiff now has filed a follow-on legal malpractice case, alleging among other things that he is not satisfied with witness Kenneth Mogill's expert opinion. The allegations against Mr. Mogill are paradigmatic of the policy reasons that support broad witness immunity. Namely, the effect of Plaintiff's argument would be endless litigation involving the same issues, and to discourage witnesses from testifying in cases where their expertise is crucial to the trier of fact.

In fact, Plaintiff's complaint fails to plead a viable cause of action against Mr. Mogill, and he should be dismissed from this case with prejudice.

II. FACTS AS ALLEGED

A. Underlying Collection Action and Third-Party Legal Malpractice Action.

Spiro Voutsaras and his late wife, Plaintiff's decedent Diana Voutsaras, were sued by Gallagher Investments in April of 2014. *See* Complaint at ¶ 21. The Underlying Litigation arose from the foreclosure of a commercial mortgage securing payment of a promissory note made by Mr. and Mrs. Voutsaras. *See* Complaint at ¶ 21. Mr. and Mrs. Voutsaras retained the Murphy & Spagnuolo law firm ("Murphy & Spagnuolo") to represent them in connection with the Underlying Litigation. *See* Complaint at ¶ 22.

In May 2014, Mr. and Mrs. Voutsaras filed a counter complaint against Gallagher Investments, and a third-party complaint against a number of parties, including the Gallagher Law Firm. *See* Complaint at ¶ 23. The third-party claim against the Gallagher Law Firm sounded in legal malpractice. *See* Complaint at ¶ 26. At the time, Murphy & Spagnuolo allegedly knew that Gallagher Investments would accept a settlement offer of $25,000 from Mr. and Mrs. Voutsaras to globally resolve the case. *See* Complaint at ¶ 45. Plaintiff alleges that Murphy & Spagnuolo rebuffed the settlement demand and continued to litigate the case. *See* Complaint at ¶ 46.

In October of 2014, in connection with the third-party legal malpractice claim, Mr. and Mrs. Voutsaras retained Kenneth Mogill, one of the foremost authorities on legal ethics in Michigan, to provide his expert opinion as to whether the Gallagher Law Firm had committed certain ethical violations in its dealings with Mr. and Mrs. Voutsaras. *See* Complaint at ¶ 55.

In December 2014, Murphy & Spagnuolo allegedly advised Mr. and Mrs. Voutsaras that their defenses and third-party claim lacked merit and would not succeed. *See* Complaint at ¶ 50. The Underlying Litigation was resolved against Mr. and Mrs. Voutsaras in January of 2015, including summary disposition on their third-party claim.[1] *See* Complaint at ¶ 31. Ultimately, Mr. and Mrs. Voutsaras were

[1] Unfortunately, Mrs. Voutsaras passed away from a terminal illness around the same time. *See* Complaint at ¶ 2.

liable to Gallagher Investments in the amount of $160,000 plus costs, interest and attorney fees. *See* Complaint at ¶ 47.

B. Plaintiff's Follow-On Legal Malpractice Action.

On December 30, 2015, Plaintiff filed the instant lawsuit against Murphy & Spagnuolo and the expert witnesses in the Underlying Litigation. Plaintiff claims that Murphy & Spagnuolo should have told Mrs. Voutsaras "as part of [its] initial analysis of the claims and defenses in May 2014," that their defenses and third-party claim would not succeed. *See* Complaint at ¶ 51. Instead, Plaintiff claims that Murphy & Spagnuolo **intentionally** withheld this fact in order to drive up its attorney fees by working up a hopeless case. *See* Complaint at ¶ 52. Plaintiff claims that the case would have settled for $25,000 in May of 2014, had Murphy & Spagnuolo not withheld this fact. *See* Complaint at ¶¶ 45; 52.

Plaintiff's complaint also contains two counts against Mr. Mogill – that he was negligent and that he breached an alleged contract with Mrs. Voutsaras to provide his expert opinion. Both of these claims fail as a matter of law.

III. ARGUMENT.

A. Applicable summary disposition standards.

MCR 2.116(C)(7) provides that a motion for summary disposition may be raised on the ground that a claim is barred because of immunity granted by law. When reviewing a motion under MCR 2.116(C)(7), the court must accept all well-pleaded factual allegations as true and construe them in favor of the nonmovant to determine whether any factual development could provide a basis for recovery. *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999). The court must consider any pleadings, affidavits, depositions, admissions, or other documentary evidence that has been submitted by the parties, although the moving party is not required to file supportive material. *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000). If the material facts are not in dispute, whether a claim is barred by immunity is a

question for the court to decide as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119, 597 NW2d 817 (1999).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Id.* All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the non-movant. *Id.* However, mere conclusions, unsupported by allegations of fact, will not suffice to state a cause of action. *Eason v Coggins Memorial Christian Methodist Episcopal Church,* 210 Mich App 261, 263, 532 NW2d 882 (1995); *Golec v Metal Exchange Corp,* 208 Mich App 380, 528 NW2d 756 (1995), *aff'd* 453 Mich 149, 551 NW2d 132 (1996). Here, Plaintiffs' conclusory claims against Mogill fail as a matter of law.

B. Michigan's witness immunity doctrine bars all of Plaintiff's claims against Mr. Mogill, which must be dismissed pursuant to MCR 2.116(C)(7).

Plaintiff claims, in Counts II and V respectively of his complaint, that Mr. Mogill is liable in negligence and breach of contract for providing an unsatisfactory expert opinion. *See* Complaint at ¶¶ 63; 84. Michigan law is clear, however, that witnesses are absolutely immune from civil liability arising out of their testimony or related evaluations. The only exception is where a witness' testimony is not relevant, material or pertinent to the issue being tried. Here, there is no allegation that Mr. Mogill's opinion was not relevant, material or pertinent.

The Michigan Supreme Court, in *Maiden v Rozwood*, 461 Mich at 134, stated that witnesses "are wholly immune from liability for the consequences of their testimony or related evaluations." *Maiden* featured two consolidated cases, one of which involved allegations of negligence against the defendant medical examiner whose testimony at a probable cause hearing caused the plaintiff to be wrongfully charged with and jailed for the murder of his wife and daughter. The Court affirmed the dismissal of the negligence claim **on the pleadings**, holding that the allegations were barred by Michigan's witness immunity doctrine:

> [W]itnesses who testify during the course of judicial proceedings enjoy quasi-judicial immunity. This immunity is available to those serving in a

> quasi-judicial adjudicative capacity as well as those persons other than judges without whom the judicial process could not function. Witnesses who are an integral part of the judicial process are wholly immune from liability for the consequences of their testimony or related evaluations. Statements made during the course of judicial proceedings are absolutely privileged, provided they are relevant, material, or pertinent to the issue being tried. Falsity or malice on the part of the witness does not abrogate the privilege. The privilege should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation. [*Id.* (internal quotations and citations omitted).]

The Court, in the next paragraph, explained that sound policy reasons support broad witness immunity:

> Witness immunity is also grounded in the need of the judicial system for testimony from witnesses who, taking their oaths, are free of concern that they themselves will be targeted by the loser for further litigation. Absent perjury of a character requiring action by the prosecuting attorney, the testimony of a witness is to be weighed by the factfinder in the matter at bar, not by a subsequent jury summoned to determine whether the first lawsuit was tainted. [*Id.* at 135; quoting *Daoud v De Leau*, 455 Mich 181, 202-03; 565 NW2d 639 (1997).]

In a similar vein, the Court of Appeals in *Couch v Schultz*, 193 Mich App 292, 294–95; 483 NW2d 684 (1992) (decided on the pleadings), stated:

> In this case, we are concerned with the absolute privilege for statements made during the course of judicial proceedings. Statements made by witnesses during the course of such proceedings are absolutely privileged, provided they are relevant, material, or pertinent to the issue being tried. The immunity extends to every step in the proceeding and covers anything that may be said in relation to the matter at issue, including pleadings and affidavits. The judicial proceedings privilege should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation. [Citations omitted.]

Various attempts to distinguish the witness immunity line of cases have failed. For example, in *Otero v Warnick*, 241 Mich App 143; 614 NW2d 177 (2000) (decided on the pleadings), the Court of Appeals extended *Maiden* to hold that absolute immunity applies even where a defendant witness' evaluation was performed, and his opinion was developed, out of court. In *Denhof v Challa*, 311 Mich App

499; -- NW2d -- (2015) (decided on the pleadings), the Court recently explained that falsity, malice and gross negligence do not abrogate witness immunity. In *Recchia v Board of Regents of the University*, unpublished per curiam opinion of the Michigan Court of Appeals, decided February 25, 2000 (Docket Nos. 214885, 214901) (decided on the pleadings) (attached hereto as **Exhibit 1**),[2] the Court rejected the plaintiff's public policy argument against immunity for expert witnesses:

> Plaintiff's argument, noting the significant damage that can result when negligence produces incorrect conclusions, is appealing in many ways. However, havoc and destruction in many forms result from so many types of judicial proceedings. In *Maiden, supra,* in which two cases were consolidated on appeal... the plaintiff had sued the county medical examiner for a medical conclusion he reached in a homicide investigation that resulted in the plaintiff being charged with the murder of his wife. The charges against the plaintiff were dismissed only after another pathologist and an otolaryngologist contradicted the medical examiner's damning and incorrect conclusion. As evidenced by that case, the courts have extended witness immunity to professionals accused of negligence that resulted in harm equal to if not worse than that complained of by plaintiff.
>
> **In sum, witness immunity has been granted by the courts in Michigan without regard to the particular circumstances of the case. It has not been chipped away by the courts carving out exceptions**. [Citations omitted and emphasis added.]

On the basis of this absolute immunity, Michigan courts have affirmed dismissals of claims involving defamation, *Couch, supra*, negligence, *Maiden, supra*, false imprisonment and battery, *Dabkowski v Davis*, 364 Mich 429; 111 NW2d 68 (1961), and tortious interference, *Meyer v Hubbell*, 117 Mich App 699; 324 NW2d 139 (1982). The same result is warranted here.

C. Mr. Mogill owed a duty to the Court, not to Mrs. Voutsaras. Accordingly, Count II – for negligence – should be dismissed pursuant to MCR 2.116(C)(8).

Setting aside Michigan's witness immunity doctrine, Mr. Mogill still owed Mrs. Voutsaras no duty as a matter of law. As in other tort actions, it is Plaintiff's burden to prove every element of his *prima facie*

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[2] In view of their obligations under the recent amendment to MCR 7.215(C), the Mogill Defendants state that the *Recchia* case clearly demonstrates the principle that public policy reasons have not abrogated the doctrine of absolute witness immunity.

case of negligence, namely (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached that duty, (3) that the defendant's breach of its duty was a proximate cause of the plaintiff's injuries, and (4) that the plaintiff suffered damages. *Berryman v K Mart Corp*, 193 Mich App 88, 91-92; 483 NW2d 642 (1992). "The threshold issue of the duty of care in negligence actions must be decided by the trial court as a matter of law." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992). If there is no duty, summary disposition is proper. *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001).

In *Maiden,* 461 Mich at 133, the Supreme Court explained that a witness' only duty is "owed to the court," not to the parties. "Accordingly, a breach of the duty owed to the court does not give rise to a cause of action in tort" by the parties. *Id.* at 133-34. Likewise, in *Otero*, 241 Mich App at 152, the Court of Appeals cited *Maiden* and held that the "defendant's duty as a witness at the preliminary examination was owed to the court, not to plaintiff." *Otero*, 241 Mich App at 152. Because there was "no duty imposed on defendant for plaintiff's benefit," the Court affirmed the dismissal of the plaintiff's negligence claims on the pleadings. *Id.*

Here, Mr. Mogill's role as an expert witness in connection with the underlying third-party legal malpractice claim was to render his objective opinion as to whether the Gallagher Law Firm had committed ethical violations in its dealings with **Mr.** Voutsaras. *See* Retainer Agreement, attached as **Exhibit 2.** Under Michigan Supreme Court precedent, Mr. Mogill's only duty owed was to the Court, not to any of the litigants. Moreover, he was not even retained to offer an opinion with regard to **Mrs**. Voutsaras' case. Because Mr. Mogill owed no duty to Mrs. Voutsaras as a matter of law and fact, Plaintiff's negligence claim against Mr. Mogill is barred.

D. According to the pleadings, Mr. Mogill did not cause Mrs. Voutsaras to lose the third-party legal malpractice claim. This is fatal to all of Plaintiff's claims against Mr. Mogill.

Causation of damages is an essential element of any negligence or breach of contract action. *Berryman*, 193 Mich App at 91; *Miller-Davis Co v Ahrens Const, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). Proving causation entails proof of two separate elements: (1) cause in fact, and (2) proximate cause. *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977). "The cause in fact element generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). "A plaintiff must adequately establish cause in fact in order for legal cause or 'proximate cause' to become a relevant issue." *Id.*

Here, no action or inaction of Mr. Mogill can be considered a "cause in fact" of the dismissal of the third-party legal malpractice claim in light of the allegations, whether true or not, contained in the complaint. As indicated, Plaintiff alleges that as of May of 2014, Murphy & Spagnuolo knew that Mr. and Mrs. Voutsaras' defenses and third-party claim were meritless, and also knew at that time that Gallagher Investments would accept a global settlement amount of $25,000. *See* Complaint at ¶¶ 45; 51-52. Instead of recommending settlement, however, Murphy & Spagnuolo is alleged to have rebuffed the settlement negotiations and to have continued to litigate the case merely in order to inflate its attorney fees. *See* Complaint at ¶ 46; 52. Mr. Mogill was not retained to provide his expert opinion until October of 2014. *See* Complaint at ¶ 55. In other words, Murphy & Spagnuolo is alleged to have known that the third-party legal malpractice claim was unwinnable five months prior to retaining Mr. Mogill to provide his opinion relative to that same claim. Accordingly, if the complaint is accepted as true (as it must be on a MCR 2.116(C)(8) motion), it fails as a matter of law to allege that had Mr. Mogill provided a more "satisfactory" expert opinion, the third-party claim would have survived dismissal. This failure to establish causation is fatal to all of Plaintiff's claims against Mr. Mogill.

E. Plaintiff's breach of contract claim against Mr. Mogill does not comply with the Michigan Court Rules and should be dismissed pursuant to MCR 2.116(C)(8).

Count V of Plaintiff's complaint – for breach of contract – must also be dismissed for its failure to comply with the Michigan Court Rules. MCR 2.113(F) provides, "If a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading as an exhibit...." Alternatively, a plaintiff may comply by stating in the complaint why he could not attach a copy. *Id.* These requirements are mandatory. *Stocker v Clark Refining Corp*, 41 Mich App 161, 165; 199 NW2d 862 (1972). A plaintiff's failure to comply with MCR 2.113(F) warrants dismissal of his breach of contract claim. *English Gardens Condominium, LLC v Howell Tp*, 273 Mich App 69, 81; 729 NW2d 242 (2006), rev'd in part on other grounds, 480 Mich 962; 741 NW2d 511 (2007).

In this case, Plaintiff does not identify a written contract between Mrs. Voutsaras and Mr. Mogill, or specific provisions thereof which were allegedly breached, let alone attach to his complaint a copy of any such written contract.[3] Count V must be dismissed, accordingly.

IV. CONCLUSION.

Plaintiff is asking this Court to rewrite the law of the State of Michigan. Under *Maiden* and its progeny, expert witnesses are absolutely immune from the consequences of their testimony or related evaluations. More specifically, allegations of negligence against a witness must be dismissed **at the pleadings stage** where the witness' evaluation or testimony is relevant, material and pertinent to the issue

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[3] In the event that Plaintiff moves to amend his complaint to attach a copy of Mr. Mogill's engagement letter relative to the underlying third-party claim, the amendment would be futile and the motion should be denied. The engagement letter makes clear that Mr. Mogill was engaged by Murphy & Spagnuolo attorney Gary Bender, not by Mrs. Voutsaras. *See* **Exhibit 2**. In fact, there is no contract between Mrs. Voutsaras and Mr. Mogill. Nor is Mrs. Voutsaras a third-party beneficiary to the engagement letter between Mr. Bender and Mr. Mogill. The Michigan Supreme Court has stated that a third party may only sue for breach of a contractual promise where the party is specifically designated in the contract as an intended beneficiary of the promise. *Brunsell v City of Zeeland*, 467 Mich 293, 298; 651 NW2d 388 (2002), citing MCL 600.1405. Here, the engagement letter states that Mr. Bender engaged Mr. Mogill "as an expert witness on behalf [sic] **Mr.** Voutsaras," not on behalf of Mrs. Voutsarsas. *See* Exhibit 2 (emphasis added). Accordingly, Plaintiff has no contract action against Mr. Mogill.

being tried. "In sum, witness immunity has been granted by the courts in Michigan without regard to the particular circumstances of the case. It has not been chipped away by the courts carving out exceptions." *Recchia, supra* at *3.

Moreover, Plaintiff has failed to allege that Mr. Mogill owed any duty to Mrs. Voutsaras, or that he caused her any damages. Plaintiff's breach of contract claim also fails to comply with the Michigan Court Rules.

For all of the reasons set forth above, Defendants Kenneth Mogill and Mogill, Posner & Cohen respectfully request that this Honorable Court grant their Motion for Summary Disposition and dismiss all of the claims against them, with prejudice, pursuant to MCR 2.116(C)(7) and (C)(8).

Respectfully submitted,
MADDIN HAUSER ROTH & HELLER, P.C.

Kathleen H. Klaus (P67207)
Jesse L. Roth (P78814)
Attorney for Kenneth Mogill and Mogill, Posner & Cohen
28400 Northwestern Hwy, 2nd Floor
Southfield, MI 48034
(248) 359-7520

Dated: April 12, 2016

LIST OF EXHIBITS

Exhibit 1	*Recchia v Board of Regents of the University*, unpublished per curiam opinion of the Michigan Court of Appeals, decided February 25, 2000 (Docket Nos. 214885, 214901) (decided on the pleadings)
Exhibit 2	Retainer Agreement

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

JUSTIN B. HAYES, PERSONAL REPRESENTATIVE OF THE ESTATE OF DIANA LYKOS VOUTSARAS aka DIANA M. VOUTSARAS,

Plaintiff,

v.

GARY L. BENDER, RICHARD A. CASCARILLA, LINDSAY NICOLE DANGL, VINCENT P. SPAGNUOLO, MURPHY & SPAGNUOLO, P.C., KENNETH M. MOGILL, MOGILL, POSNER & COHEN, KERN G. SLUCTER, GANNON GROUP, A PROFESSIONAL CORPORATION,

Defendants.

Case No. 16-263-NM
Hon. Joyce Draganchuk

Law Offices of Steven M. Feigelson Steven Mark Feigelson (P70735) *Attorney for Plaintiff* 4121 Okemos Road, Suite 10 Okemos, MI 48864 (517) 333-3373 steve@feigelsonlaw.com Plunkett Cooney David K. Otis (P31627) *Attorneys for Gary L. Bender, Richard A. Cascarilla, Lindsay Nicole Dangl, Vincent P. Spagnuolo, Murphy &* Spagnuolo, P.C. 325 E Grand River Ave Ste 250 East Lansing, MI 48823-4356 (517) 324-5612 dotis@plunkettcooney.com	Maddin Hauser Roth & Heller, P.C. Kathleen H. Klaus (P67207) *Attorneys for Defendants Kenneth M. Mogill and Mogill, Posner & Cohen* 28400 Northwestern Hwy, 2nd Floor Southfield, Michigan 48034 (248) 359-7520 kklaus@maddinhauser.com

PROOF OF SERVICE

The undersigned hereby states that on **April 13, 2016** she served a copy of (1) Notice of Hearing; (2) Defendants Kenneth M. Mogill and Mogill, Posner & Cohen's Motion for Summary Disposition; (3) Brief

in Support; and (4) this Proof of Service upon counsel of record as listed below by (1) first class U.S. mail with postage fully prepaid thereon; and (2) email:

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Kathleen Mitzner

Kathleen Mitzner,
Maddin, Hauser, Roth & Heller, P.C.

EXHIBIT 1

STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH MARIO RECCHIA,

Plaintiff-Appellant,

v

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, UNIVERSITY OF MICHIGAN SCHOOL OF SOCIAL WORK, d/b/a UNIVERSITY OF MICHIGAN INTERDISCIPLINARY PROJECT ON CHILD ABUSE & NEGLECT, and d/b/a FAMILY ASSESSMENT CLINIC,

Defendants-Appellees.

UNPUBLISHED
February 25, 2000

No. 214885
Court of Claims
LC No. 97-016740-CM

JOSEPH MARIO RECCHIA,

Plaintiff-Appellant,

v

KATHLEEN COULBORN FALLER, JANE MILDRED, CAROL A. PLUMMER, EDWARD BERNAT, and SHARON GOLD-STEINBERG,

Defendants-Appellees.

No. 214901
Washtenaw Circuit Court
LC No. 97-004181-NO

Before: O'Connell, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from September 15 and September 21, 1998, orders granting summary disposition to defendant mental health professionals and their employer. Plaintiff filed two

lawsuits: one against the individual professionals in their personal capacity and one against their employers. The two suits were consolidated below and on appeal. We affirm.

Plaintiff filed this action against defendants who were expert witnesses in a previous child custody case that involved claims of child abuse made by the plaintiff's former wife against him. Following a motion hearing in that previous child custody case, the circuit court ordered an investigation by a medical professional into the allegations of abuse. The court in its order suggested defendants but gave the guardian ad litem assigned to the case the option of choosing another medical professional to investigate the claims. The guardian ad litem decided to use defendants.

In a letter, the guardian ad litem requested that defendants investigate the claims of abuse and prepare a report. The report was intended by the guardian ad litem to aid her in making recommendations to the court regarding visitation and other issues involved in the custody dispute. The guardian ad litem also indicated to defendants that the report "would likely be the subject of a court hearing." Defendants interviewed plaintiff, his ex-wife, and their child and recorded their findings and recommendations in a report. The report was distributed to the guardian ad litem, attorneys for the two parties, and an employee of the county child protective services department. Defendants concluded that plaintiff abused his daughter and that he should see her only during supervised visits. The court subsequently ordered a second examination, to be conducted by a different medical professional. It was ultimately determined that defendants' findings were unreliable and that the child abuse allegations were unsubstantiated.

Plaintiff then sued defendants, alleging violations of the Michigan Consumer Protection Act, fraud, breach of contract, ordinary and gross negligence, intentional infliction of emotional distress, and professional malpractice. Before these allegations could be argued, defendants moved for summary disposition asserting that they are immune from suit. Plaintiff countered with a motion for summary disposition on defendants' claims of immunity. Following a hearing the court granted summary disposition in favor of defendants under MCR 2.116(C)(7), concluding that defendants are immune from suit as witnesses acting in the course of judicial proceedings. On appeal, plaintiff argues that public policy against negligent social workers wreaking havoc on families necessitates the allowance of lawsuits such as this one and that courts have been reluctant to grant full immunity to those involved in the judicial process and that should included defendants.

This Court reviews the trial court's grant of summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). Summary disposition of all or part of a claim or defense may be granted when a claim is barred because immunity is granted by law. MCR 2.116(C)(7).

Despite plaintiff's extensive efforts arguing that immunity should not be extended to defendants, it is well established that statements made by a witness in the course of a judicial proceeding are absolutely privileged provided they are relevant, material, or pertinent to the issues being tried. Our Supreme Court recently affirmed this principle, stating:

> [W]itnesses who testify during the course of judicial proceedings enjoy quasi-judicial immunity. This immunity is available to those serving in a quasi-judicial adjudicative capacity as well as "those persons other than judges without whom the judicial process could not function." 14 West Group's Michigan Practice, Torts, § 9:393, p 9-131. Witnesses who are an integral part of the judicial process "are wholly immune from liability for the consequences of their testimony or related evaluations." *Id.*, § 9:394, pp 9-131 to 9-132, citing *Martin v Children's Aid Society,* 215 Mich App 88, 96; 544 NW2d 651 (1996). Statements made during the course of judicial proceedings are absolutely privileged, provided they are relevant, material, or pertinent to the issue being tried. See *Martin v Children's Aid Society, supra; Rouch v Enquirer & News of Battle Creek,* 427 Mich 157, 164; 398 NW2d 245 (1986); *Meyer v Hubbell,* 117 Mich App 699, 709; 324 NW2d 139 (1982); *Sanders v Leeson Air Conditioning Corp,* 362 Mich 692, 695; 108 NW2d 761 (1961). Falsity or malice on the part of the witness does not abrogate the privilege. *Sanders, supra.* The privilege should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation. *Id.* [*Maiden v Rozwood,* 461 Mich 109, 133-134; 597 NW2d 817 (1999).]

In *Couch v Schultz,* 193 Mich App 292; 483 NW2d 684 (1992), the decision relied on by the circuit court in the present case, this Court granted witness immunity to a corrections officer who filed a misconduct report against two prisoners resulting in a finding of misconduct at a prison disciplinary hearing. *Id.* at 293. The issue in that case was not whether witnesses are granted immunity, but whether the prison discipline hearing was a "judicial proceeding" for which witness immunity would extend. *Id.* This Court did not consider or discuss the availability of witness immunity generally because "it is well settled in Michigan that statements made during the course of legislative proceedings, statements made during the course of judicial proceedings, and communications by military and naval officers are absolutely privileged." *Id.* at 294, citing *Raymond v Croll,* 233 Mich 268, 272-273; 206 NW 556 (1925).

Plaintiff has not questioned the relevancy, materiality, or pertinence of defendants' statements nor has he challenged either defendants' status as witnesses or that the underlying child custody suit was a judicial proceeding. Plaintiff has only argued that other jurisdictions extend limited immunity to some judicial participants and that the nature of child abuse allegations is such that any negligence by witnesses can cause considerable harm. Because Michigan law clearly extends immunity to witnesses in judicial proceedings, and defendants here are unchallenged as witnesses in a judicial proceeding, summary disposition was appropriately granted in this matter.

Plaintiff argues that public policy should be extended so that absolute immunity is not afforded to witnesses such as mental health professionals in child abuse matters. Plaintiff's argument, noting the significant damage that can result when negligence produces incorrect conclusions, is appealing in many ways. However, havoc and destruction in many forms result from so many types of judicial proceedings. In *Maiden, supra*, in which two cases were consolidated on appeal, the above cited passage was part of the Court's analysis affirming this Court's grant of summary disposition in favor of

the defendant in *Reno v Chung*, 220 Mich App 102; 559 NW2d 308 (1996). There, the plaintiff had sued the county medical examiner for a medical conclusion he reached in a homicide investigation that resulted in the plaintiff being charged with the murder of his wife. *Id.* at 104. The charges against the plaintiff were dismissed only after another pathologist and an otolaryngologist contradicted the medical examiner's damning and incorrect conclusion. *Id.* As evidenced by that case, the courts have extended witness immunity to professionals accused of negligence that resulted in harm equal to if not worse than that complained of by plaintiff.

In sum, witness immunity has been granted by the courts in Michigan without regard to the particular circumstances of the case. It has not been chipped away by the courts carving out exceptions. Accordingly, the circuit court's grant of summary disposition pursuant to MCR 2.116(C)(7) was appropriate because under Michigan law defendants, as witnesses in a custody proceeding, are granted immunity for statements made in connection with such a judicial proceeding. We decline to create the requested public policy exception to this clearly established principle.

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ Kathleen Jansen

EXHIBIT 2

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KENNETH M. MOGILL
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MARJORY B. COHEN
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KENNETH R. SASSE
OF COUNSEL
MARK E. WEISS
(1944-2003)

October 22, 2014

Via email only to gbender@mbspclaw.com

Gary L. Bender, Esq.
Murphy & Spagnuolo, P.C.
Beacon Place, Suite 1A
4572 S Hagadorn Rd
E Lansing MI 48823

re: Gallagher Investments, LLC v Spiro Voutsaras *et al.*, Ingham Cir #14-462

Dear Mr. Bender:

Following up on our recent communications, this letter confirms that you have engaged my services as an expert witness on behalf Mr. Voutsaras in the above-identified litigation.

The opinions I provide in connection with this engagement will be based on my professional judgment regardless of whether they are favorable or unfavorable to any position advanced by you in the litigation. Any opinion I express will at all times be arrived at independently, and my entitlement to payment pursuant to the terms of this agreement is not in any way dependent on either any opinion I express or the outcome of the matter. In addition, any opinion I provide will be based on the information available to me at the time and will be subject to change if or as additional information is revealed.

My minimum fee for this engagement is two thousand five hundred ($2,500.00) dollars, which was received at this office today. This is an advance payment of fees which will be deposited into my IOLTA account and withdrawn as work is performed in furtherance of the engagement.

All time expended by me in furtherance of this engagement, including all travel time, will be billed at the rate of four hundred fifty ($450.00) dollars per hour, plus costs.

Billing statements are sent out on a monthly basis following months in which there is significant activity on the file. In the event the minimum fee is exhausted, the entire balance due on any billing statement is to be paid within twenty-one (21) days of mailing of same. Details of time spent on the representation are sent out with monthly billing statements only when specifically requested.

This engagement is for the above-identified matter only. In the event that you wish to engage

my services for any other matter, we will need to enter into a separate engagement agreement regarding that matter.

At the conclusion of this engagement, I will retain and store my file regarding the matter for not less than two (2) years unless directed by you to return same to you prior to the expiration of that period.

Your signature below constitutes your agreement with the terms set out above.

Sincerely yours,

Kenneth M. Mogill

Gary L. Bender, Esq.

//

EXHIBIT 3

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

_____

Kathleen Gaydos,

Plaintiff,

vs. File No. 16-263-NM

Gary L. Bender, et al,

Defendant.

_____/

MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE JOYCE DRAGANCHUK, CIRCUIT COURT JUDGE

LANSING, Michigan - Wednesday, May 18, 2016

APPEARANCES:

For the Plaintiff: Steven M. Feigelson-P70735
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Certified Electronic Reporter
(517) 483-6500 x6703

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Lansing, Michigan

Wednesday, May 18, 2016

2:04:25 p.m.

THE COURT: This is Hayes versus Bender, et al, docket number 16-263-NM. This is the time set for hearing on defendant Kenneth Mogill and Mogill, Posner and Cohen's Motion for Summary Disposition. And when you get all situated there, you can put your appearances on the record, please?

MR. ROTH: My name is Jesse Roth. I represent Ken Mogill and the firm Mogill, Posner and Cohen.

THE COURT: Thank you.

MS. KLAUS: And Kate Klaus, I'm also on behalf of the Mogill defendants.

MR. OTIS: Your Honor, David Otis on behalf of the law firm defendants.

MR. FEIGELSON: Good afternoon, your Honor, attorney Steven Feigelson appearing on behalf of Justin Hayes.

THE COURT: Okay. Mr. Roth, this is your motion, you can go ahead. Everyone else can have a seat.

MR. ROTH: Thank you. Thank you, your Honor, this is our Motion for Summary Disposition of the claims against Mr. Mogill for what is essentially witness malpractice. There is absolutely no basis for support in

Michigan law for these claims as is evidenced from the fact that plaintiff has submitted two briefs in response to our motion in which he cites Louisiana law, New Jersey law, but he doesn't cite any Michigan law that would support his argument that he can state a claim against Mr. Mogill on these allegations.

This case largely plead is a legal malpractice case arising out of an underlying collection action against the Voutsaras', in which the Voutsaras' were represented by Gary Bender's firm. As part of their defense strategy in that case, the Voutsaras' filed a third-party legal malpractice claim. In connection with, in connection with which Mr. Bender retained by client Mr. Mogill to provide his expert opinion about some alleged ethical improprieties that were relevant to that third-party legal malpractice claim. And Mr. Mogill evaluated the issues, he provided his opinion to Mr. Bender and, and about a year later he was, he was served with this complaint in which the plaintiff alleges that Mr. Mogill inadequately performed his analysis and, and gave an inadequate opinion.

Now, there are really two major problems with, with the claims against Mr. Bender. One is witness immunity, I'm sorry, against Mr. Mogill, one is witness immunity and the second one is, is, is the doctrine and

case law that a witness does not owe a duty to either the litigant, rather a witness' only duties are to the Court. With regard to the issue of witness immunity, essentially, it's upset of Michigan's broad judicial proceeding privilege and immunity, which Michigan courts have been very clear is, is to be construed literally. It's an absolute privilege meaning that malice and recklessness don't abrogate the privilege.

It, the Courts have said there are no exceptions to this immunity unless the actions giving rise to the allegations are not relevant, pertinent to the judicial proceedings and, and this case, I don't see how the plaintiff can argue that the judicial proceedings of privilege, this witness immunity doesn't, doesn't protect Mr. Mogill against, against these allegations.

And the second issue I'll mention briefly is the fact that Michigan courts have been equally clear that a witness does not owe a duty to the litigants, rather a witness' only duty is, is owed to the Court. In other words, a litigant doesn't have a cause of action against a witness for the witness breach of duty, the witness may have owed to the Court, that's not the litigant's department. And it's important to point out that these two defenses are they're treated separately in the case law and are treated as two independent defenses. So in

other words, I expect that the plaintiff is gonna argue that it's different where a party is suing his own expert witness that he retained and that an expert witness does owe a duty to the party that retained him. And not that I'm willing to concede the issue, I think the case law is clear but, it doesn't matter if he argues that because that still doesn't take the allegations out of the broad judicial proceedings witness' immunity that, that the Michigan courts and Supreme Court and, and Maiden versus Rozwood in particular, that they've made those points very clear.

I think, I think that's all I wanted to say. Thank you.

THE COURT: All right, thank you. Mr. Feigelson?

MR. FEIGELSON: Thank you, your Honor. I'll be brief. A couple of things to point here, first and foremost, we believe that the witness (inaudible) doesn't apply to Mr. Roth's client, first and foremost. He was our retained expert on behalf of my client here or the estate of my client to do a job for us, he didn't do that job satisfactorily. We believe that Maiden doesn't apply here. Maiden, of the cases that is cited, Maiden apply to either a regular witness or in the cases of Maiden, apply to a Prosecutor's witness in a criminal defense case. These cases are completely separate.

Most of our case law we cited was from another state, but one case in particular was from Massachusetts. That was decided in 2001, I do believe we provided the Court a copy, that this decision was two years after Maiden. And it did a thorough analysis of all the different states case law and nowhere did it mention the broad applicability to your own expert in Michigan or for Maiden, it cited other states where the rules have applied and each time it applied, it decided in our favor. Nowhere did it mention anything about Michigan having it settled with regards to hiring your own expert.

I believe that if you hire your own expert and the expert in this case didn't do exactly the proper analysis, he should be held accountable. It doesn't help anybody if he's gonna not be held accountable because essentially, the defendant law firms' gonna throw their client under the bus and say it was all his fault. If he walks out of this thing, I don't really see how it's fair to anybody here. He did a bad job and he should be held accountable for that, your Honor. Thank you.

THE COURT: Thank you. Any last words, Mr. Roth?

MR. ROTH: I really don't have anything further to say. Thank you.

THE COURT: Okay, thank you.

MR. OTIS: Your Honor, can I make a comment for

the record, please?

THE COURT: You may.

MR. OTIS: Your Honor, I just wanted to make clear because I don't want this to be an issue that's waived. We don't have a position on the motion today between these two parties. But, I did note in the main motion that was brought by Mr. Mogill in a footnote 3 on page 11, there is a contention in the footnote that the contract between the defendant law firm and the expert witness Mr. Mogill was only for the benefit of Mr. Voutsaras. And we would just submit to the Court that it would be our position and will be our position when the case goes into discovery that the omission of Mrs. Voutsaras' name in that retainer agreement was an oversight and that it's clear that the intention was to have Mr. Mogill testify on behalf of both the joint obligor's in the underlying case. Thank you.

THE COURT: Thank you. I guess I'd like to make a statement, too, and that is that I did not know I was assigned this case until I picked up the summary disposition motion and began working on it and I don't know Mr. Mogill. To my knowledge, he's never practiced in front of me. I do not know, I know of him, of course. But, I don't know him personally and he's never practiced in front of me to my knowledge. The firm, I of course, know

of. I have no knowledge of them ever practicing in front of me. And that is not the case, however, with Murphy and Spagnolo as they practice in front of me all the time. And I, I know Lindsey Dangle, I know Mr. Spagnaolo, Mr. Cascerella, Mr. Bender has just been in front of me recently. I go to Bar events that they're at. I intend to disqualify myself from this case following this motion and the reason that I think it's okay for me to proceed with this motion is because as I said, I do not know Mr. Mogill and they do not practice in front of me.

And this motion pertains only to counts 2 and 5, which are the negligence and breach of contract claims that are only against Mr. Mogill and the law firm that he's with. And, and so, I think it's safe for me to proceed rather than to have this called off and reassigned. But, that's why I'm proceeding and I just want to make it clear between the distinction between this motion and the remaining other defendants in the case and why I would disqualify at a later date.

So, having said that, this does pertain just to Mr. Mogill and his law firm and it only pertains to counts 2 and 5, which are negligence and breach of contract and the, the main issue here is witness immunity. And that's something that's well established by the Maiden versus Rozwood case. The plaintiff has pointed out that there are

no Michigan cases that deal with a party suing his own expert because the Maiden case and the other cases that have been cited and discussed deal with suing someone on the opposite, a witness on the opposite side.

So here, we have a different situation. It isn't present in any Michigan cases. However, the Michigan cases do state that witness immunity is absolute and they're quite clear on that and that it is liberally construed. So, the plaintiff says that other states, the law in other states should be followed because those other states don't apply immunity to a case where a party sues his own retained expert. And although, as I said, there is no Michigan law on that point, there, there's some appeal to that argument why shouldn't experts be held to a standard of care owed to the party that retains them? But, nevertheless, I decline the offer to follow that law in other states for basically two reasons, well, three, I guess you could say.

One is that there are these statements in Michigan law that this is an absolute immunity and that it is liberally construed. That would be the first reason. The second would be if there is an exception made to that broad liberally construed immunity, I think it should be made by a Court higher than this one. Typically, I, I try not to make new law, I try to just follow what I have. And

then the third reason is that I can see that the policy reason behind witness immunity, which I'm quoting from one of the cases is, "the need of the judicial system for testimony from witnesses free of concern that they themselves will be targeted by the loser for further litigation."

That policy reason, it really does apply equally even when the loser was on the same side as the expert. I suppose we still don't want people turning around and saying "Well, I lost and now I'm going to blame my expert that I retained for it." So, the policy reason is valid even when you apply it to this situation that isn't addressed in Michigan law. So, for those reasons, I would decline to follow the out of state law that the plaintiff proposes and the Michigan law is that this is absolute immunity and it's liberally construed and Mr. Mogill and Mr. Mogill's firm cannot be held liable under either negligence or breach of contract claim in this context for a failure of or a breach of the standard of care allegedly in rendering an expert opinion.

So, for those reasons, I'm granting these defendants Motion for Summary Disposition.

MS. KLAUS: Thank you, your Honor.

MR. FEIGELSON: Thank you, your Honor.

MR. ROTH: Thank your Honor.

THE COURT: Do you have an order, Mr. Roth or do you want to submit one under the 7-day rule?

MR. ROTH: I'll submit one under the 7-day rule. Thank you.

THE COURT: Okay, thank you.

MS. KLAUS: Thank you, Judge.

MR. ROTH: Thank your Honor.

(Hearing concludes at 2:17 p.m.)

STATE OF MICHIGAN)

)

COUNTY OF INGHAM)

I certify that that this transcript, consisting of 13 pages, is a complete, true, and correct transcript of the proceedings and testimony taken in this case on Wednesday, May 18, 2016

October 31, 2017

Susan C. Melton-CER 7548
30th Circuit Court
313 West Kalamazoo Avenue
Lansing, Michigan 48901
517-483-6500 ext.6703

EXHIBIT 4

STATE OF MICHIGAN
INGHAM COUNTY CIRCUIT COURT

JUSTIN B. HAYES, PERSONAL REPRESENTATIVE OF THE ESTATE OF DIANA LYKOS VOUTSARAS aka DIANA M. VOUTSARAS,

Plaintiff,

v.

GARY L. BENDER, RICHARD A. CASCARILLA, LINDSAY NICOLE DANGL, VINCENT P. SPAGNUOLO, MURPHY & SPAGNUOLO, P.C., KENNETH M. MOGILL, MOGILL, POSNER & COHEN, KERN G. SLUCTER, GANNON GROUP, A PROFESSIONAL CORPORATION,

Defendants.

Case No. 16-263-NM
Hon. Joyce Draganchuk

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ORDER GRANTING DEFENDANTS KENNETH M. MOGILL AND MOGILL, POSNER & COHEN'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court, held in the
City of Lansing, County of Ingham,
State of Michigan, on May ~~18~~ 24, 2016

PRESENT: THE HONORABLE JOYCE DRAGANCHUK
CIRCUIT COURT JUDGE

This matter having come before the Court on May 18, 2016 on Defendants Kenneth M. Mogill and Mogill, Posner & Cohen's Motion for Summary Disposition, the Court having read the submitted briefs and memoranda of law, and having heard oral argument from counsel for the respective parties, and for the reasons stated in the record,

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Defendants Kenneth M. Mogill and Mogill, Posner & Cohen's Motion for Summary Disposition is **GRANTED**.
2. Summary disposition is granted on Counts II and V of Plaintiff's Complaint, which are dismissed, with prejudice.
3. This is not a final order disposing of all claims against all parties.

JOYCE DRAGANCHUK
CIRCUIT COURT JUDGE
MAY 24, 2016

P-39417

STIPULATED AS TO FORM ONLY:

Steven M. Feigelson /km (with permission 5/19/16)
Steven M. Feigelson (P70735)
Attorney for Plaintiff

Kathleen H. Klaus (P67207)
Attorney for Defendants Kenneth M. Mogill and Mogill, Posner & Cohen

1850536 / 16067-0003

EXHIBIT 5

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

JUSTIN B. HAYES,
PERSONAL REPRESENTATIVE OF THE
ESTATE OF DIANA LYKOS VOUTSARAS a/k/a
DIANA M. VOUTSARAS,

Plaintiff,

Case No. 16-263-NM

Hon. Joyce Draganchuk

vs.

GARY L. BENDER, RICHARD A. CASCARILLA,
LINDSAY NICOLE DANGL, VINCENT P.
SPAGNUOLO, P.C., KENNETH M. MOGILL,
MOGILL, POSNER & COHEN, KERN G. SLUCTER,
GANNON GROUP, A PROFESSIONAL CORPORATION,

Defendants.

_____/

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_____/

STIPULATED ORDER GRANTING DEFENDANTS KERN G. SLUCTER'S AND THE GANNON GROUP P.C.'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court held in the Court House, held at 313 W. Kalamazoo St., County of Ingham, State of Michigan, this 9 day of June, 2016.

PRESENT: Honorable Joyce Draganchuk
Circuit Court Judge

This matter comes before the Court on Defendants Kern G. Slucter's and The Gannon Group P.C.'s motion for summary disposition, pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(8). Plaintiff and the moving Defendants agree that the motion is based upon identical allegations of negligence and breach of contract as those asserted against Defendants Kenneth M. Mogill and Mogill, Posner & Cohen ("Mogill Defendants") and upon the same legal theories and defenses as presented to this Court in a motion for summary disposition filed by the Mogill Defendants and heard and decided by this Court on May 18, 2016. As this Court has granted the Mogill Defendants' motion, and as it is unnecessary for the parties to present and re-argue their legal theories in support and opposition to the motion, and as the parties have now stipulated to the entry of this order for those reasons:

IT IS HEREBY ORDERED that the motion for summary disposition filed by Defendants Kern G. Slucter and The Gannon Group, P.C. is GRANTED and said Defendants are DISMISSED with prejudice for the same reasons stated on the record at the hearing conducted by this Court on May 18, 2016. As this order is not a voluntary dismissal by Plaintiff, Plaintiff's right to appeal this order is not waived.

JOYCE DRAGANCHUK

Hon. Joyce Draganchuk
Circuit Court Judge

P-39417

So stipulated:

Steven M Feigelson

Steven M. Feigelson (P70735) WITH PERMISSION
Attorney for Plaintiffs

John S. Brennan (P55431)
Attorney for Defendants Kern G. Slucter and The Gannon Group, P.C.

EXHIBIT 6

STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF DIANA LYKOS VOUTSARAS, by KATHLEEN M. GAYDOS, Personal Representative,

Plaintiff-Appellant,

and

SPIRO VOUTSARAS,

Plaintiff,

v

GARY L. BENDER, RICHARD A. CASCARILLA, LINDSAY NICOLE DANGL, VINCENT P. SPAGNUOLO, and MURPHY & SPAGNUOLO P.C.,

Defendants,

and

KENNETH M. MOGILL, MOGILL POSNER & COHEN, KERN G. SLUCTER and GANNON GROUP, P.C.,

Defendant-Appellees.

FOR PUBLICATION
January 3, 2019
9:05 a.m.

No. 340714
Ingham Circuit Court
LC No. 16-000263-NM

Before: SWARTZLE, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J.

Plaintiff, the Estate of Diana Lykos Voutsaras ("Estate") appeals as of right the trial court's order granting summary disposition in favor of defendants Kenneth M. Mogill, Mogill

Posner & Cohen, Kern G. Slucter, and Gannon Group P.C., ("Mogill defendants").[1] This appeal arises in relevant part out of the Estate's action against the Mogill defendants for professional malpractice in their services as expert witnesses. The trial court held that a party's own expert witnesses, regardless of any duty to their client, are shielded by witness immunity. We hold that licensed professionals owe the same duty to the party for whom they testify as they would to any client, and witness immunity is not a defense against professional malpractice. Therefore, we reverse and remand.

I. STATEMENT OF FACTS

The underlying litigation involved the foreclosure of a commercial mortgage and note made by Diana and Spiro Voutsaras and held by Gallagher Investments ("Gallagher"). The Voutsarases hired the law firm defendants[2] to represent them in the foreclosure proceedings. The Voutsarases, on the advice of the law firm defendants, filed a counterclaim against Gallagher and a third party claim against some of the principal actors involved with Gallagher for malpractice. The law firm defendants then hired the Mogill defendants to provide litigation support and ultimately serve as expert witnesses at trial. Kenneth Mogill was considered to be a preeminent authority on legal ethics in the state of Michigan, and Slucter and Gannon Group were experts in the field of real estate brokerage and best practices in the field. Ultimately the law firm defendants informed the Voutsarases that their litigation strategy was bound to fail and the trial court granted summary disposition against the Voutsarases.

Diana Voutsaras passed away in January of 2015, and the Estate then brought the present action against the law firm defendants and the Mogill defendants. The Estate claimed that the law firm defendants failed to advise it of a favorable settlement offer and that the law firm defendants deliberately concealed the fact that the Estate's claims were frivolous in order to drive up their costs prior to trial. The Estate claimed that the Mogill defendants breached their duty to the estate by failing to properly investigate the facts required to formulate their opinions, failing to understand the applicable standards, and failing to provide a competent professional opinion. Noting that the ability to sue one's own expert witnesses was an issue of first impression in Michigan, the trial court engaged in a broad reading of prior witness immunity standards and granted summary judgment to the Mogill defendants on that theory. This appeal followed.

II. PRESERVATION AND STANDARD OF REVIEW

A. PRESERVATION OF THE ISSUE

[1] On October 2, 2017, Ingham Circuit Court Judge Matthew J. Stewart entered a stipulated order of dismissal following a settlement agreement between plaintiff Kathleen Gaydos, as the personal representative of the estate of Diana Voutsaras, and defendants Gary Bender, Richard Cascarilla, Lindsay Dangle, Vincent Spagnuolo and Murphy & Spagnuolo P.C. (collectively "the law firm defendants"), who were Diana and Spiro Voutsaras' attorneys in the underlying litigation.

[2] See footnote 1.

An issue is preserved for appellate review if raised in the trial court and pursued on appeal. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Plaintiff argued that whether a party may sue his or her own expert witness was an issue of first impression in Michigan and that the trial court should follow caselaw from sister state courts on that matter. The trial court agreed that this issue was an open question in Michigan but determined that defendant Mogill was entitled to witness immunity because that doctrine is broadly construed and because the policy considerations underlying the doctrine would be advanced by its application in this case. The issue is preserved.

B. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant summary disposition. *Bowden v Gannaway*, 310 Mich App 499, 503; 871 NW2d 893 (2015). A court may grant summary disposition under MCR 2.116(C)(7) "because of . . . immunity granted by law . . . " "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). This Court also reviews de novo the applicability of legal doctrines, *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 555; 540 NW2d 743 (1995), aff'd 459 Mich 500 (1999), and claims of immunity, *Denhof v Challa*, 311 Mich App 499, 510; 876 NW2d 266 (2015).

III. ARGUMENT

A. DUTY OF AN EXPERT WITNESS WHO IS A LICENSED PROFESSIONAL

Plaintiff claims that defendants owed to it a legal duty and that they breached that duty. Duty is "the legal obligation to conform to a specific standard of conduct in order to protect others from unreasonable risks of injury." *Lelito v Monroe*, 273 Mich App 416, 419; 729 NW2d 564 (2006). As will be discussed further, our decision in this matter is limited to a claim of professional malpractice, which "arises from the breach of a duty owed by one rendering professional services to a person who has contracted for those services … predicated on the failure of the defendant to exercise the requisite professional skill." *Broz v Plante & Moran, PLLC*, ___ Mich App ___, ___; ___ NW2d ___ (2018) (Docket No. 340381, slip op at p 4). "Generally, to state a claim for malpractice, a plaintiff must allege (1) the existence of a professional relationship, (2) negligence in the performance of the duties within that relationship, (3) proximate cause, and (4) the fact and extent of the client's injury." *Id*. at ___ (slip op at p 5).

The trial court granted summary disposition to defendants based solely on witness immunity. Defendants now argue on appeal that, regardless of witness immunity, plaintiff has failed to show that defendants owed a legal duty to plaintiff. "An issue not addressed by the trial court may nevertheless be addressed by the appellate court if it concerns a legal issue and the facts necessary for its resolution have been presented." *Sutton v City of Oak Park*, 251 Mich App 345, 349; 650 NW2d 404 (2002). We are not satisfied that this record presents us with the facts necessary to resolve this issue. Nevertheless, we presume for the sake of argument that defendants are subject to claims for professional malpractice by plaintiff and breached their professional duties to plaintiff. However, we do not decide those questions, and we leave for the trial court to determine in the first instance whether, in fact, defendants owed or breached a legal

duty to plaintiff. We address only whether defendants are immune from liability related to that duty, if any.

B. WITNESS IMMUNITY AS A DEFENSE TO MALPRACTICE

1. MICHIGAN CASE LAW

Defendants and the trial court rely on our Supreme Court's opinion in *Maiden*, 461 Mich at 109, for the proposition that all witnesses enjoy total immunity for any relevant testimony provided during judicial proceedings. Our Supreme Court observed that "the duty imposed on a witness is generally owed to the court, not the adverse party," so a breach of that duty "does not give rise to a cause of action in tort by the adverse party." *Id*. at 133-134. Our Supreme Court continued:

> [W]itnesses who testify during the course of judicial proceedings enjoy quasi-judicial immunity. This immunity is available to those serving in a quasi-judicial adjudicative capacity as well as "those persons other than judges without whom the judicial process could not function." 14 West Group's Michigan Practice, Torts, § 9:393, p. 9–131. Witnesses who are an integral part of the judicial process "are wholly immune from liability for the consequences of their testimony or related evaluations." *Id*., § 9:394, pp. 9-131 to 9-132, citing *Martin v Children's Aid Society*, 215 Mich App 88, 96; 544 NW2d 651 (1996). Statements made during the course of judicial proceedings are absolutely privileged, provided they are relevant, material, or pertinent to the issue being tried. See *Martin v Children's Aid Society*, *supra*; *Rouch v Enquirer & News*, 427 Mich 157, 164; 398 NW2d 245 (1986); *Meyer v Hubbell*, 117 Mich App 699, 709; 324 NW2d 139 (1982); *Sanders v Leeson Air Conditioning Corp*, 362 Mich 692, 695; 108 NW2d 761 (1961). Falsity or malice on the part of the witness does not abrogate the privilege. *Sanders*, *supra*. The privilege should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation. *Id*. [*Maiden*, 461 Mich at 134.]

We find *Maiden* only partially applicable, for several reasons.

First, the policy considerations in *Maiden* were clearly focused on the freedom witnesses must have to give *damaging* testimony without any fear of possible reprisal. We agree with defendants and the trial court to the extent that such policy considerations extend beyond witnesses who are formally or functionally adverse. In other words, any witness called by any party enjoys immunity based on the substance of that witness's testimony or evidence. Therefore, to the extent plaintiff may assert that the Mogill defendants gave testimony that was *unfavorable* to plaintiff, such assertions unambiguously run afoul of the witness immunity doctrine in Michigan. However, whether witness immunity protects the Mogill defendants from giving *professionally incompetent* testimony, which might or might not be favorable, was clearly not a matter considered by the *Maiden* court. As our Supreme Court recently explained, to derive a rule law from the facts of a case "when the question was not raised and no legal ruling on it was rendered, is to build a syllogism upon a conjecture." *People v Seewald*, 499 Mich 111, 121 n 26; 879 NW2d 237 (2016).

Additionally, the witness immunity doctrine at issue in *Maiden* addresses only actual testimony. That immunity necessarily extends to any other materials or evidence prepared by the witness for the intended benefit of the court. See *Denhof v Challa*, 311 Mich App 499, 511-520; 876 NW2d 266 (2015). Nevertheless, plaintiff's complaint appears to allege that the Mogill defendants provided expert opinions for the benefit of plaintiff or plaintiff's attorneys, *in addition to* intended expert testimony for the court. Furthermore, plaintiff alleges that the Mogill defendants not only provided incompetent opinions, but failed to undertake reasonable skill and care in forming those opinions. As discussed, we have already established that the Mogill defendants owed plaintiff a duty of professional care; plaintiff essentially alleges a perfectly ordinary claim of legal malpractice, asserting that the Mogill defendants breached that duty of professional care.

To the extent plaintiff's claims rest on the Mogill defendants having provided damaging testimony or evidence intended for consideration by the trial court, the Mogill defendants are clearly protected by the doctrine of witness immunity. However, we find nothing in *Maiden*, or any other Michigan case law, suggesting that any other claim of professional malpractice by a client is precluded merely because the professional was expected to provide expert testimony. We decline to parse which particular claims in this matter are immunized. We hold only that the Mogill defendants are not absolutely immunized from professional malpractice claims where they already owed a duty of professional care, merely because part of their retention included the provision of expert testimony.

2. OTHER JURISDICTIONS

Although not binding, authority from other jurisdictions may be considered for its persuasive value. *Abela v Gen Motors Corp,* 469 Mich 603, 607; 677 NW2d 325 (2004). We have considered the extra jurisdictional case law provided to us by the parties, and we find, on balance, that the most persuasive precedent supports our conclusion above.

In *Briscoe v LaHue*, 460 US 325; 103 S Ct 1108; 75 L Ed 2d 96 (1983), the United States Supreme Court, which is obviously binding on this Court, held that the common law standard of witness immunity was not abridged by federal law, and therefore a police officer could not be held liable for perjured testimony given during the plaintiff's trial. The Court proceeded to lay out the policy reasons behind witness immunity, holding: "A witness's apprehension of subsequent damages liability might induce two forms of self-censorship. First, witnesses might be reluctant to come forward to testify. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability." *Id.* at 333 (citations omitted). The Court explained that "the truth-finding process is served if the witness's testimony is submitted to 'the crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies.'" *Id.* at 333-334, quoting *Imbler v Pachtman*, 424 US 409, 440; 96 S Ct 984; 47 L Ed 2d 128 (1976) (WHITE, J., concurring in judgment). This case merely reaffirms that a witness must be immune to the consequences of providing damaging testimony, which in turn must extend to a party's own witnesses.

In *Mattco Forge, Inc* v *Arthur Young & Co*, 5 Cal App 4th 392; 6 Cal Rptr 2d 781 (1992), the California Court of Appeals held that California's "litigation privilege" statute[3] did not bar a party from bringing suit against its own expert. In that case, the plaintiff (Mattco) engaged the defendant (Arthur Young) "to perform litigation support accounting work" in the underlying action. *Id*. at 395. After the dismissal of that suit, Mattco brought suit against Young alleging (in part) professional malpractice, negligence, and breach of contract. *Id*. at 396. The California Court of Appeals determined that the policy considerations behind the litigation privilege, freedom of access to courts and the encouragement of truthful testimony, would best be served by allowing malpractice proceedings against expert witnesses:

> Arthur Young was not a "neutral expert," but one hired by Mattco. If an expert witness's negligence and breach of contract cause dismissal of the party who hired that expert witness, that does not expand freedom of access to the courts. Applying the privilege in this circumstance does not encourage witnesses to testify truthfully; indeed, by shielding a negligent expert witness from liability, it has the opposite effect. Applying the privilege where the underlying suit never reached the trial stage would also mean that the party hiring the expert witness would have to bear the penalty for the expert witness's negligence. That result would scarcely encourage the future presentation of truthful testimony by that witness to the trier of fact. [*Id*. at 404.]

The California Court of Appeals found the distinction between one's own witnesses and adversarial witnesses to be of unique importance, because the policies underlying witness immunity "can logically apply . . . only to trial testimony of adverse witnesses," and thus were immaterial to "a pretrial dispute between a party and its own expert witness that arose during discovery." *Id.* at 406.

In *Murphy v AA Mathews, Div Of CRS Group Engineers, Inc*, 841 SW2d 671 (Mo, 1992), the defendant engineering firm was retained by a subcontractor to prepare claims for additional compensation. The firm testified at arbitration and the subcontractor was awarded substantially less than what it was seeking. *Id*. The subcontractor then filed suit against the engineering firm, alleging that it "was negligent in its performance of professional services involving the preparation and documentation of [the subcontractor's] claims for additional compensation . . . " *Id*. The Missouri Supreme Court observed that witness immunity decisions generally entailed statements made "directly in the judicial proceeding itself or in an affidavit or pleading, and all of the statements were made by adverse witnesses or parties." *Id*. It concluded that witness immunity was not properly applied "to bar a suit against a privately retained professional who negligently provides litigation support services." *Id*. The Court reasoned that the policies

[3] That statute provided in part: " 'A privileged publication or broadcast is one made: . . . In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 . . . ' " *Mattco Forge, Inc*, 5 Cal App 4th at 402, quoting Cal Civ Code § 47(b).

underlying witness immunity would not be served by protecting "professionals selling their expert services rather than as an unbiased court servant." *Id*. at 681. Furthermore, subjecting professionals to liability for negligence would encourage skill, care, and prudence; and would discourage "extreme and ridiculous positions in favor of their clients in order to avoid a suit by them." *Id*. The Court also emphasized the role expert witnesses play in case preparation, providing advice and advocacy, and even playing as much of "a role in the organization and shaping and evaluation of their client's case as do the lawyers." *Id*. at 682. It therefore permitted the action against the engineering firm.

In *LLMD of Mich, Inc v Jackson-Cross Co*, 559 PA 297; 740 A2d 186 (1999), the plaintiffs hired an accounting firm in the underlying action to calculate their lost profits. At trial, a critical mathematical error in the firm's calculations was revealed during cross-examination of the firm's chairman. *Id*. at 299. The chairman had not personally prepared the lost profits calculation and could not explain the error. *Id*. The trial court granted a motion to strike the chairman's testimony. The next day, the plaintiffs accepted a settlement offer for $750,000; the firm later recalculated the lost profits at $2.7 million. *Id*. The plaintiffs then sued the firm for breach of contract and professional malpractice. *Id*. at 300. The Pennsylvania Supreme Court held that witness immunity did not bar the action, but emphasized that it did so because the gravamen of the action was negligence in formulating the expert opinion, rather than dissatisfaction with the substance of the opinion. *Id*. at 304-307. In particular, "[a]n expert witness must be able to articulate the basis for his or her opinion without fear that a verdict unfavorable to the client will result in litigation." *Id*. at 306. However, "immunizing an expert witness from his or her negligence in formulating that opinion" would not serve the purposes behind witness immunity." *Id*. Rather, "[t]he judicial process will be enhanced only by requiring that an expert witness render services to the degree of care, skill and proficiency commonly exercised by the ordinarily skillful, careful and prudent members of their profession." *Id*. at 307. Thus, the court held that the accounting firm was not entitled to witness immunity. *Id*.

The Connecticut Superior Court (i.e. a trial court) followed *LLMD of Mich, Inc* in *Pollock v Panjabi*, 47 Conn Supp 179; 781 A2d 518 (2000). In *Pollock*, the plaintiffs retained a spinal biomechanics expert to perform experiments relating to the underlying personal injury action. *Id*. at 180. After pretrial voir dire of the expert, the trial court ruled that the expert's opinion was not credible and was not admissible at trial. *Id*. at 182. The trial court granted numerous continuances so that the expert could perform additional experiments, but the expert repeatedly failed to follow the conditions set forth by the trial court. *Id*. at 182-183. Ultimately, the plaintiffs brought suit against the expert and a kinesiologist hired by the expert alleging (in part) breach of contract and negligence. *Id*. at 183. The Connecticut Superior Court held that the defendants were not entitled to invoke witness immunity, determining that the

> policy reasons undergirding the absolute privilege accorded witnesses are not implicated here. This is not a case in which the right of a witness to speak freely, in or out of court, is involved. While conduct, objects and experiments may have communicative aspects; the plaintiffs do not complain about what [the spinal biomechanics expert] said or about anything [the kinesiologist], who never testified, said or communicated. Rather, the plaintiffs complain of the defendants' failure to perform work, as agreed upon, according to scientific principles as to which there are no competing schools of thought. [*Id*. at 188.]

The Court concluded that the gravamen of the plaintiffs' claim was to "hold the defendants accountable for not doing what they agreed to do," which did not undermine the witness immunity policy of ensuring that witnesses could speak freely. *Pollock*, 47 Conn Supp at 193-194.

We find the above cases to be the most persuasive. However, additional state courts have allowed a party to sue its own expert, determining that the policy considerations underlying the doctrine of witness immunity would not be furthered by application in those cases. See *Boyes-Bogie v Horvitz*, 14 Mass L Rptr 208 (Mass Super, 2001) (holding that witness immunity does not bar action against a friendly expert who was negligent in valuing a martial asset); *Marrogi v Howard*, 805 So 2d 1118 (La, 2002) (holding, in a case where the friendly expert made numerous errors in estimating the plaintiff's billings and summary judgment was granted based on the expert's deposition testimony, that "claims in connection with a retained expert's alleged failure to provide competent litigation support services are not barred by the doctrine of witness immunity"); *Hoskins v Metzger*, 102 So 3d 752 (Fla App, 2012) (holding that it was erroneous for the trial court to dismiss an action against a friendly expert on the basis of witness immunity when the plaintiffs were alleging that they lost at trial because of the expert's appearance at trial and "his inadequate testimony").

3. WITNESS IMMUNITY AS A DEFENSE AGAINST MALPRACTICE

It bears repeating that the *Maiden* Court prefaced its discussion of witness immunity by ruling that the medical examiner was an adverse witness to the plaintiff. *Maiden*, 461 Mich at 133. Witness immunity protects all witnesses, including experts retained by a party, from suit for testimony or evidence premised on the damaging nature thereof. However, we note that a common theme in the cases discussed above was whether to *extend* witness immunity to ordinary professional malpractice claims. We find no Michigan law suggesting that witness immunity already precludes a claim by a client against a retained professional for the negligent performance of professional services. We are persuaded by the reasoning in the above cases that witness immunity should not be further extended. Where a duty of professional care exists such that a malpractice action may be maintained, witness immunity is not a defense to a malpractice action except, as noted, insofar as the action is premised on the substance of the professional's evidence or testimony intended to be provided to the court.

IV. CONCLUSION

We conclude that the trial court erred by construing the doctrine of witness immunity too broadly. A professional's client is not precluded from maintaining a professional malpractice action by witness immunity, except to the extent the action is premised on the substance of evidence or testimony prepared for the benefit of the court. We decline to address any other issues, such as the specific duties owed in this matter or the extent to which plaintiff's specific allegations actually implicate witness immunity. We reverse the trial court's grant of summary

disposition pursuant to MCR 2.116(C)(7), and we remand for further proceedings. We do not retain jurisdiction. An important public question of first impression being involved, we direct that the parties shall bear their own costs. MCR 7.219(A).

/s/ Amy Ronayne Krause
/s/ Brock A. Swartzle
/s/ David H. Sawyer

EXHIBIT 7

California Expert Witness Guide

CEB is a self-supporting non-profit program of the University of California. The program, which provides lawyers with information about the law and the practice of law in California, is administered by an Advisory Board that includes representatives of the University of California and members of the California legal community.

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§8.28 B. Explaining the Law

Lawsuits are determined according to a set of artificial rules that often differ significantly from those of the "real world," or at least from the expert's view of reality. Products liability, antitrust, dissolution, and a variety of other kinds of cases are determined according to laws that frequently ignore fault, individual responsibility, and other matters that nonlawyers, including experts, consider important. Accordingly, the lawyer must make sure that the expert, particularly the inexperienced expert, understands the governing legal principles and elements that each party to the litigation must prove in order to prevail. In addition, counsel's failure to explain applicable legal standards to the expert may result in the expert's trying to satisfy a far higher standard of proof than is needed or, conversely, optimistically assuring counsel that the case is defensible based on the expert's misunderstanding of the law.

After counsel outlines and discusses with the expert the legal elements needed to prove the particular case, counsel should give the expert copies of pertinent Judicial Council of California Civil Jury Instructions (CACI) (civil) or the California Criminal Jury Instruction (CALCRIM) (criminal) instructions, if they cover the case. Alternatively, the expert should be supplied with copies or excerpts from the governing statutes and cases. Counsel may also want to give the expert pertinent briefs if, *e.g.,* there has been a relevant demurrer, motion for summary judgment, or the like.

III. INFORMING AND EDUCATING THE LAWYER

§8.29 A. In General

Some lawyers, particularly those who, *e.g.,* failed biology and contrived not to take solid geometry, decide at the beginning of a case that they never will be able to understand what the expert is talking about, and they make no effort to do so. When preparing their own expert for trial, they say something like, "I'll ask you your name and address and you take it from there." An expert is not a mechanical toy that can simply be wound up and turned loose. Regardless of the expert's skill, it is the lawyer's responsibility to make sure that his or her expertise is presented to the trier of fact in an admissible and persuasive way. To accomplish this task, the lawyer needs to understand the substantive details of the expert's testimony and field of expertise.

Counsel should view the expert as a teacher. Eventually, counsel may want to use the expert as a witness to teach the judge or jury about some aspect of the case. First, however, the expert should be used to teach the lawyer. The role of student may not be one to which the lawyer is accustomed and, unless the lawyer follows several important rules discussed in §§8.30–8.35, the expert's skills and talents may be wasted. In *Forensis Group, Inc. v Frantz, Townsend & Foldenauer* (2005) 130 CA4th 14, 34, the court of appeal cited this book section as a source for a lawyer's affirmative duty to properly present expert testimony to a court in the context of a summary judgment motion.