Order

Michigan Supreme Court
Lansing, Michigan

June 26, 2020

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

159107
159124

KATHLEEN M. GAYDOS, Personal Representative of the ESTATE OF DIANA LYKOS VOUTSARAS,
Plaintiff-Appellee,

and

SPIRO VOUTSARAS,
Plaintiff,

v

SC: 159107
COA: 340714
Ingham CC: 16-000263-NM

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

and

KENNETH M. MOGILL and MOGILL, POSNER & COHEN,
Defendants-Appellants,

and

KERN G. SLUCTER and GANNON GROUP, PC,
Defendants-Appellees.
_____/

KATHLEEN M. GAYDOS, Personal Representative of the ESTATE OF DIANA LYKOS VOUTSARAS,
Plaintiff-Appellee,

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On April 15, 2020, the Court heard oral argument on the applications for leave to appeal the January 3, 2019 judgment of the Court of Appeals. On order of the Court, the applications are again considered, and they are DENIED, there being no majority in favor of granting leave to appeal or taking other action.

MARKMAN, J. (*dissenting*)

The Court of Appeals below recognized a new cause of action, a suit for professional malpractice against an expert witness retained by an unsuccessful party in prior litigation. This conclusion stands in tension with an extensive body of law of this state, broadly conferring immunity upon witnesses, not excluding expert witnesses, in prior proceedings. It also runs counter to a number of practical considerations that, in my judgment, continue generally to favor broad common-law immunity for such persons. Moreover, if this alteration of the law is to be undertaken (and it should be understood that I am not entirely unmoved by the argument that accountability constitutes a virtue of expert witnesses as it does of persons in other contexts), it should be undertaken by this Court, given that the question presented is of significance both in light of growing levels of expert involvement in contemporary litigation and as a question that has divided courts of other jurisdictions. Therefore, I respectfully dissent from the Court's order denying leave to appeal and instead would grant leave to appeal for further judicial consideration.

Although whether a retained expert is specifically entitled to witness immunity constitutes a question of first impression before this Court, the general principle of witness immunity is anything but this. Michigan first recognized a witness's right to immunity in 1881. See *Hart v Baxter*, 47 Mich 198, 200-201 (1881) (holding that statements offered

by witnesses that are relevant to the proceeding are "absolutely privileged"). Consonant with this proposition, we have observed that the privilege "should be liberally construed so that participants in judicial proceedings may have relative freedom to express themselves without fear of retaliation." *Sanders v Leeson Air Conditioning Corp*, 362 Mich 692, 695 (1961), abrogated in part on other grounds by *Moore v Mich Nat'l Bank*, 368 Mich 71 (1962); see also *Maiden v Rozwood*, 461 Mich 109, 134 (1999). Courts of this state have consistently relied upon witness immunity to preclude independent legal claims. See, e.g., *Sanders*, 362 Mich at 695-696; *Meyer v Hubbell*, 117 Mich App 699, 704, 710 (1982). And witness immunity has been held applicable not only to statements made at trial by witnesses, but also to pretrial statements by potential witnesses, including expert witnesses. *Sanders*, 362 Mich at 696; see also *Couch v Schultz*, 193 Mich App 292, 295 (1992) (concluding that witness 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"). In summation, our past cases have regularly counselled that "[w]itnesses who are an integral part of the judicial process 'are wholly immune from liability for the consequences of their testimony or related evaluations.' " *Maiden*, 461 Mich at 134, quoting 14 West Group's Michigan Practice, Torts, § 9:393, at 9-131 to 9-132 (emphasis added).[1]

In the face of this caselaw, one might have expected the Court of Appeals to look more skeptically upon plaintiff's claim against a retained expert. This is particularly true where plaintiff has not cited a single Michigan decision recognizing any type of suit against any witness, expert or otherwise. And in additional respects, rejecting plaintiff's claim for professional negligence against a retained expert would have been consistent with relevant common-law policy considerations. Cf. *Couch*, 193 Mich App at 294 ("Public policy is the principle underlying the [common-law] doctrine of absolute privilege.").[2] First, allowing lawsuits against expert witnesses following unsuccessful litigation will obviously, and certainly, render it more difficult for a litigant to retain an expert, and thus as a result render it less likely that critical or complex issues will be fully and effectively engaged for the assessment of the fact-finder. In other words, the threat of legal recourse following trials in which expert testimony has either led in unpredictable or unexpected directions or the retaining party was simply disappointed and did not prevail is likely to discourage some individuals from providing expert testimony altogether while encouraging others who remain willing to testify to undertake precautions, such as the purchase of insurance, that will increase their fees. See, e.g., *Bruce v Byrne-Stevens & Assocs Engineers, Inc*, 113

[1] The instant case involves experts retained by plaintiff in formulating pre-trial strategies and does not involve experts who testified at trial. It also does not involve perjured testimony; the instant lawsuit is a civil lawsuit to redress an asserted personal injury.

[2] As the doctrine of witness immunity is a judicially created doctrine in which courts traditionally weigh and balance a range of relevant public policy considerations, the matter is one historically falling within the domain of the common law.

Wash 2d 123, 130-131. Although these utterly-foreseeable consequences will affect all litigants, they are likely to have a disproportionately adverse impact upon those who already face financial obstacles to accessing the justice system.[3]

Second, and perhaps of even greater concern, for those individuals who remain willing to testify, the specter of future litigation may well cause the witness, bearing in mind his legal vulnerability, to overly-shade his opinions in favor of the party which retains him, thus subtly impugning both the integrity of his opinions and presumably the outcome of the proceeding. See *Briscoe v LaHue*, 469 US 325 333 (1983) ("A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence."); *Bruce*, 113 Wash 2d at 130 ("The threat of civil liability based on an inadequate final result in litigation would encourage experts to assert the most extreme position favorable to the party for whom they testify."). Such an impact is completely at odds with fundamental interests identified by this Court in sustaining broad witness immunity. See *Maiden*, 461 Mich at 135, quoting *Daoud v De Leau*, 455 Mich 181, 202-203 (1997) ("Witness immunity is . . . 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.").

Third, permitting a dissatisfied litigant to bring suit against an expert will also considerably extend the typical point of finality of litigation. The action against the expert will enable relitigation of the merits of the prior proceeding, essentially giving rise to a "retrial within a trial," typically a lengthy and often convoluted form of legal proceeding, all within the guise of a suit for expert-witness malpractice. Such lawsuits thus will predictably and disproportionately burden the resources of the judiciary.

This Court now declines to address whether retained experts should remain subject to the protections of witness immunity. This declination is concerning given that the Court of Appeals itself recognized that the question presented was "[a]n important public question of first impression," *Voutsaras Estate v Bender*, 326 Mich App 667, 682-683 (2019), and it is concerning because the Court of Appeals' decision, absent further action

[3] I fear this will be especially true for indigent criminal defendants who in many cases require the appointment of an expert in order to mount an adequate defense. And the chilling effect of allowing lawsuits against expert witnesses may be even greater for indigent defendants seeking postconviction relief from judgment, who often must recruit an expert to work pro bono on their case.

by this Court, will immediately operate to encourage witness lawsuits. See generally *Marrogi v Howard*, 805 So2d 1118, 1128 (La, 2002) (whether retained experts are entitled to witness immunity "has become one of increasing importance given the rapid growth in the number of professionals and others hired to provide litigants with assistance in the preparation and presentation of their cases"). Accordingly, I respectfully dissent and would grant leave to appeal for further judicial consideration.

MCCORMACK, C.J., and ZAHRA, J., join the statement of MARKMAN, J.

CAVANAGH, J., did not participate due to a preexisting relationship with a party.