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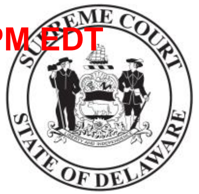

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RUTH ADAMS, SHARON RIDDICK, and ALAN ROSENTHAL,	)	No. 54, 2016
Plaintiffs Below, Appellants,	)	Court Below – Superior Court of the State of Delaware in and for New Castle County
v.	)	C.A. No. N15C-06-030 MMJ
ANDREW J. GELMAN, D.O., and ANDREW J. GELMAN, D.O., P.A.,	)	
Defendants Below, Appellees.	)	

APPELLEES ANDREW J. GELMAN, D.O. AND ANDREW J. GELMAN, D.O., P.A.'S ANSWERING BRIEF

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OTHER AUTHORITIES

Oxford Dictionaries,
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NATURE OF PROCEEDINGS

Ruth Adams, Sharon Riddick, and Alan Rosenthal ("Plaintiffs") filed their "Complaint for Declaratory and Other Relief"[1] against Andrew J. Gelman, D.O. and Andrew J. Gelman, D.O., P.A. ("Defendants") on June 2, 2015. Plaintiffs initially asserted fourteen counts in their Complaint, as follows:

Count	Alleged	Parties
I, II, III	Common Law Fraud	All Plaintiffs
IV, V	Constructive/Equitable Fraud	Riddick, Rosenthal
VI, VII	Breach of Fiduciary Duty	Riddick, Rosenthal
VIII, IX, X	Statutory Consumer Fraud	All Plaintiffs
XI, XII	Battery	Riddick, Rosenthal
XIII	Racketeering	All Plaintiffs
XIV	Conspiracy	All Plaintiffs

Defendants moved to dismiss all counts based on absolute witness immunity and on the merits of each count.[2] The parties briefed these issues in the Superior Court below. Before oral argument in Superior Court, Plaintiffs voluntarily dismissed the racketeering claim.[3]

Following oral argument and complete briefing, the Superior Court dismissed all counts of the complaint.[4] In its opinion, the court held that Defendants were immune from suit based on absolute witness immunity.[5] The

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[1]A17-69. There is no specific declaratory relief requested in the complaint. Instead, Plaintiffs requested compensatory and punitive damages, attorney's fees and costs.
[2] A3.
[3] A6.
[4] *Adams v. Gelman*, 2016 WL 373738 (Del. Super. Jan. 28, 2016).
[5] *Id. at* *3.

court also addressed the merits of each individual claim and held that dismissal was appropriate on all counts.[6]

Plaintiffs filed an appeal with this Court. In their Opening Brief, Plaintiffs address common law fraud (counts I-III), but none of the other counts.[7] Defendants, therefore, submit that Plaintiffs have abandoned those counts of the complaint and that the common law fraud allegations are the only allegations remaining to be considered on appeal, along with the applicability of absolute witness immunity.

This is Defendants' Answering Brief on appeal.

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[6] *Id.* at *3-*7.
[7] Op. Br.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court properly dismissed Plaintiffs' claims based on witness immunity. In accordance with Delaware law and due to important policy concerns involving the chilling effect on witnesses and the potential that experts will distort their testimony in favor of one side or the other for fear that they may later be sued, absolute immunity is not limited to claims involving injury to reputation. Further, absolute immunity applies pre-litigation for the same compelling policy reasons.

2. Denied. The Superior Court properly dismissed Plaintiffs' fraud claims. To make out a fraud claim, Plaintiffs must plead facts to support false representation and reasonable reliance—both of which they have failed to do. Plaintiffs also failed to plead the elements of fraud with particularity pursuant to Superior Court Rule 9(b).

STATEMENT OF FACTS

Dr. Gelman is a board certified orthopedic surgeon who has been practicing medicine in Delaware for 28 years. For many years, as part of his practice, at the request of insurance carriers and lawyers, Dr. Gelman has reviewed medical records and examined claimants seeking insurance benefits as a result of automobile and work accidents, to offer expert opinions in judicial and administrative proceedings regarding the nature and extent of injuries claimed. Plaintiffs allege that Dr. Gelman victimized them by performing these duties in a biased and unethical manner.[8]

Plaintiff Ruth Adams ("Adams") was involved in an automobile accident, for which she made a third-party claim against the alleged tortfeasor.[9] At the request of the insurance company for the alleged tortfeasor, Dr. Gelman reviewed Adams' medical records and prepared a report.[10] There is no claim that Adams had any contact or communication with Dr. Gelman.

Plaintiff Sharon Riddick ("Riddick") was also involved in an automobile accident.[11] Pursuant to the personal injury protection ("PIP") coverage in her motor vehicle insurance policy, Riddick was sent by her insurer to Dr. Gelman for

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[8] A17-18.
[9] A38-39 at ¶¶ 25-26.
[10] A39 at ¶ 26.
[11] A41 at ¶ 31.

an Independent Medical Exam ("IME").[12] Dr. Gelman performed the IME and prepared a report regarding that IME.[13]

Plaintiff Alan Rosenthal ("Rosenthal") sustained a work-related injury.[14] In accordance with Delaware's worker's compensation statute, the worker's compensation insurance carrier sent Rosenthal for two Defense Medical Examinations ("DME") with Dr. Gelman and Dr. Gelman testified before the Industrial Accident Board regarding the DMEs.[15]

[12] A42 at ¶ 35.
[13] A42 at ¶¶ 35-36.
[14] A44 at ¶ 41.
[15] A44, 46, 63 at ¶¶ 46, 50, and 117.

ARGUMENT

I. The Superior Court properly dismissed Plaintiffs' claims based on absolute witness immunity

A. QUESTION PRESENTED

Did the Superior Court correctly dismiss Plaintiffs' claims based on absolute witness immunity when Defendant is a medical expert and the subject of the claims against him are his opinions about Plaintiffs given as a medical expert witness? This issue was raised below in the briefs and at oral argument on the Motion to Dismiss.[16]

B. SCOPE OF REVIEW

The Supreme Court reviews a decision on a motion to dismiss *de novo*.[17]

C. MERITS OF ARGUMENT

The parties agree: witnesses are absolutely immune from lawsuits based upon their testimony in judicial proceedings.[18] For decades, both the United States Supreme Court and this Court have recognized this absolute immunity.[19] In *Briscoe v. Lahue*, the United States Supreme Court noted that witness immunity is "a tradition…well grounded in history and reason"[20] and that the rights of

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[16] A483-499, 559-560; B12-21, 51-60.
[17] *In re Santa Fe Pac. Corp. Shareholder Litig.*, 669 A.2d 59, 70 (Del. 1995).
[18] *Briscoe v. Lahue*, 460 U.S. 325, 326 (1983). *Barker v. Huang*, 610 A.2d 1341, 1345 (Del. 1992).
[19] *Briscoe*, 460 U.S. at 331-333; *Barker*, 610 A.2d at 1345.
[20] *Briscoe*, 460 U.S. at 334 (internal quotations and citation omitted).

individual litigants "must yield to the dictates of public policy…"[21]

That policy interest, the Court reasoned, is to prevent witness intimidation; that is, to prevent witnesses from being hesitant to testify or from distorting their testimony in favor of one side or the other for fear that they may later be sued.[22] The U.S. Supreme Court found that this policy concern was so vital to the integrity of the judicial process as a whole that it outweighed an individual litigant's right to seek redress for alleged testimonial improprieties.[23] In short, the Court determined that vigorous cross examination, not a subsequent lawsuit, is the appropriate avenue for challenging witness testimony and thereby discovering the truth.[24]

Delaware courts and courts across the country have followed the reasoning of the U.S. Supreme Court's decision in *Briscoe* regarding witness immunity.[25] A number of those courts have applied immunity to expert witnesses, particularly if the expert is an adverse witness.[26] And even more to the point, for the same

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[21] *Id.* at 333 (quoting *Calkins v. Sumner*, 13 Wis. 193, 197 (1860) (internal quotations omitted)).
[22] *Id.* at 333.
[23] *Id.* at 345-346.
[24] *Id.* at 333.
[25] *Barker*, 610 A.2d at 1345; *Nix v. Sawyer*, 466 A.2d 407, 411 (Del. Super. 1983). *Williams v. Hepting*, 844 F.2d 138, 141-142 (3d Cir. 1988); *Kahn v. Burman*, 673 F. Supp. 210, 211 (E.D. Mich. 1987); *Gilbert v. Sperbeck*, 126 P.3d 1057, 1060 (Alaska 2005); *Wilson v. Bernet*, 625 S.E. 2d 706, 711 (W. Va. 2005); *Marrogi v. Howard*, 805 So.2d 1118, 1127-28 (La. 2002); *Bruce v. Byrne-Stevens*, 776 P.2d 666, 673 (Wash. 1989); *Davis v. Tirrell*, 110 Misc.2d 889, 895-896 (N.Y. Supr. Ct. 1981); *Moity v. Busch*, 368 So.2d 1134, 1136 (La. Ct. App. 1979); *Middlesex Concrete Products v. Carteret*, 172 A.2d 22, 25 (N.J. Super. Ct. App. Div. 1961).
[26] *Briscoe*, 460 U.S. at 333; *Wilson*, 625 S.E. 2d at 711. *See Kahn*, 673 F. Supp. at 211; *Gilbert*, 126 P.3d at 1060; *Yeung v. Maric*, 232 P.3d 1281, 1282 (Ariz. Ct. App. 2010); *Marrogi*, 805 So.2d at 1127-28; *Bruce*, 776 P.2d at 673; *Moity*, 368 So.2d at 1136; *Hurley v. Towne*, 156 A.2d 377 (Me. 1959); *Dabkowski v. Davis*, 111 N.W.2d 68 (Mich. 1961); *Middlesex*, 172 A.2d at 25;

compelling policy reasons expressed in *Briscoe*, by Delaware courts and by courts nationwide,[27] courts have applied witness immunity to the IME/DME process.[28]

At issue in this appeal are two aspects of witness immunity: (1) does it apply pre-litigation and (2) does it apply to torts other than those involving injury to reputation? Defendants submit that the answer to both of those questions is yes.

1. Immunity applies pre-litigation

a. Public policy supports applying immunity pre-litigation

The policy concerns at the pretrial/pre-litigation stage are identical and just as important to the integrity of the process as they are in the courtroom itself.[29] Those policy concerns are: (1) the chilling effect on a potential expert's willingness to review cases at all and (2) the potential that the threat of subsequent litigation could color the expert's testimony.[30]

Dyer v. Dyer, 156 S.W.2d 445, 446 (Tenn. 1941).

[27]*Briscoe*, 460 U.S. at 333-334; *Barker*, 610 A.2d 1345; *Nix*, 466 A.2d at 410-411. *See also Hoover v. VanStone*, 540 F. Supp. 1118, 1122 (D. Del. 1982); *Wilson*, 625 S.E. 2d at 711; *Kahn*, 673 F. Supp. at 211; *Lipsky v. Goldstone*, 2011 WL 6112065, at *4 (N.J. Super. Ct. App. Div. Dec. 9, 2011); *Gilbert*, 126 P.3d at 1060; *Bruce*, 776 P.2d at 673; *Marrogi*, 805 So.2d at 1127-28; *Davis*, 110 Misc.2d at 895-896; *Moity*, 368 So.2d at 1136; *Middlesex*, 172 A.2d at 25.

[28]*Lipsky*, 2011 WL 6112065, at *4; *Gilbert*, 126 P.3d at 1060 (IME doctor immune from fraud and misrepresentation suit); *Wilson*, 625 S.E. 2d at 716 (IME doctor immune from suit for tortious interference); *Davis*, 110 Misc.2d at 895-896; *Hurley*, 156 A.2d 377 (physician immune on false imprisonment claim for psychological exam); *Dabkowski*, 111 N.W.2d 68 (physician immune on false imprisonment claim for psychological exam); *Dyer*, 156 S.W.2d 445, 446 (physician immune on false imprisonment claim for psychological exam); *Yeung*, 232 P.3d 1281.

[29]*Kahn*, 673 F. Supp. at 212; *Bruce*, 776 P.2d at 673; *Middlesex*, 172 A.2d at 25. *See also Williams*, 844 F.2d at 143.

[30]*Williams*, 844 F.2d at 143 (noting the risk of skewing testimony in favor of plaintiff for fear of subsequent litigation); *Hoover*, 540 F. Supp. at 1122; *Kahn*, 673 F. Supp. at 213 (noting "If doctors who provide expert reports are subjected to civil liability for the contents of their reports, fewer doctors will be willing to evaluate [cases] in advance of litigation."); *Bruce*, 776 P.2d at

In disputed personal injury and worker's compensation claims such as those at issue in this appeal, parties on one or both sides often retain experts, at least as consultants, before suits are filed. This allows parties to investigate claims and assess case viability, and potential for settlement, before committing to litigation.

If witness immunity applied solely to statements offered *after* suit was filed, it would be nearly impossible for parties to find experts to offer preliminary opinions as to case viability.[31] Physician experts would not be willing to risk being sued for their pre-suit opinions,[32] particularly avocational experts and treating physicians, who often provide pre-suit expert reports to help assess claims or aid in settlement negotiations and who generally do not have liability insurance to cover potential suits.[33] In this way, affording immunity to expert witnesses' *pre-suit* activities encourages settlement of claims before they land on the court's already-crowded docket and may prevent meritless lawsuits from being filed.[34]

667, 670, 673 (stating "[t]he purpose of [witness immunity] is to preserve the integrity of the judicial process by encouraging full and frank testimony." Also discussing chilling effects); *Middlesex*, 172 A.2d at 25 (discussing encouragement of frank testimony); *Merrick v. Burns, Wall, Smith & Mueller, P.C.*, 43 P.3d 712, 715 (Colo. App. 2001) (discussing chilling effects).

[31] *Merrick*, 43 P.3d at 715 ("An expert would be hesitant to provide consultation for a [pre-litigation] certificate of review if he or she would be subject to retaliatory lawsuits from litigants who disagree with the methods used by an expert in formulating his or her opinion.").

[32] *Kahn*, 673 F. Supp. at 213; *In re Smith*, 848 P.2d 612, 613 (Or. 1993); *Davis*, 110 Misc.2d at 895-896.

[33] *Bruce*, 776 P.2d at 670 (noting that someone such as a university professor would be discouraged from testifying).

[34] *Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC*, 22 A.3d 710, 721 (Del. Ch. 2011); *Kahn*, 673 F. Supp. at 213 (noting that if fewer doctors are willing to evaluate cases pre-suit, more meritless suits will be filed); *Krouse v. Bower*, 20 P.3d 895, 899 (Utah 2001) (holding that the purpose of the privilege is to encourage settlement).

Granting immunity to an IME/DME physician does not create a breeding ground for fraud, as Plaintiffs suggest. It does just the opposite. It promotes truth and fair adjudication of disputes because it frees physicians to offer opinions based on their medical training and experience, without fear that an adverse opinion will result in reprisal—precisely what is happening here to Dr. Gelman.[35]

What is more, even Plaintiffs' *claim* that Dr. Gelman acted fraudulently or maliciously in performing medical expert work—while hotly contested—does not abrogate immunity.[36] In fact, this Court has held that absolute immunity applies even when the witness makes knowingly or maliciously false statements.[37] So Dr. Gelman should not have to prove his opinions were made in good faith to enjoy immunity.

It is apparent from the complaint and opening brief that from Plaintiffs' perspective, whether or not a medical opinion is offered in good faith, the only acceptable IME/DME or records review opinion is one in which the physician agrees that the alleged injuries and associated treatment are reasonable, necessary, and causally related to whatever unfortunate accident befell the examinee. If the

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[35] *See, e.g.*, *Merrick*, 43 P.3d at 715 (discussing risk for suits if immunity does not apply and plaintiffs disagree with an expert's methods).

[36] *Hoover*, 540 F. Supp. at 1122; *Barker*, 610 A.2d 1341; *Nix*, 466 A.2d at 410-411.

[37] *Barker*, 610 A.2d 1341; *Nix*, 466 A.2d at 410-411. Other courts have also held that fraud or malice does not affect the absolute witness immunity. *Gilbert*, 126 P.3d at 1059; *Marrogi*, 805 So.2d at 1125; *Middlesex*, 172 A.2d at 25; *Merrick*, 43 P.3d at 714 ("…absolute immunity applies…no matter how erroneous, how injurious the consequences, or how malicious the motive"); *Hurley*, 156 A.2d at 380.

physician, in his or her own medical judgment, arrives at a different conclusion, he or she has committed fraud and should be subject to a lawsuit, in Plaintiffs view.

Allowing tort suits against physicians based on this subjective, one-sided view would undercut our entire adversarial system which, after all, is based on the idea that those with opposing interests can and should marshal conflicting evidence in support of their positions.[38] It would also undermine an insurer's ability to rely on the IME/DME physician's opinion when valuing cases for settlement because it incentivizes physicians to make their opinions more plaintiff-friendly to avoid being sued.[39] And allowing a party who disagrees with an adverse expert's opinion to respond with a lawsuit would result in an endless stream of litigation.[40]

While there may be some risk that an expert will unfairly mischaracterize the nature and cause of a claimant's injuries, leading to a delay in or denial of insurance benefits, witness immunity does not leave the Plaintiffs here, or others similarly situated, without a remedy.[41] The relief available in these circumstances is a lawsuit against the insurance company for breach of contract or bad faith, as opposed to one against the IME/DME physician.[42]

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[38] *Krouse*, 20 P.3d at 899; *Davis*, 110 Misc.2d at 896.
[39] *Martinez v. Lewis*, 969 P.2d 213, 219 (Colo. 1998).
[40] *Davis*, 110 Misc.2d at 896.
[41] *Martinez*, 969 P.2d at 219.
[42] *Id.*

b. Delaware law supports applying immunity pre-litigation

In Delaware, as well as in a "substantial number of jurisdictions"[43] absolute immunity applies outside of formal judicial proceedings.[44] As our Superior Court has said, witness immunity is not "narrowly confined to courtroom events," but also applies to conversations between witnesses and counsel, depositions, and affidavits that are relevant to judicial proceeding.[45] Indeed, other jurisdictions have specifically held that immunity attaches to pre-litigation expert reports.[46]

Plaintiffs acknowledge the important role pre-litigation IME/DMEs or records reviews have in judicial proceedings in their opening brief. There, they argue that the fruits of so-called fraudulent IME/DME reports or record reviews create "*evidentiary* records" and are something that defendants "rely heavily on…*in legal proceedings*."[47] And they even seem to concede, at footnote six, that

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[43] *Paige*, 22 A.3d at 716 (Del. Ch. 2011); *Kahn*, 673 F. Supp. at 212; *Krouse*, 20 P.3d at 899. *See also In re Smith*, 848 P.2d at 614; *Middlesex*, 172 A.2d at 25 (noting applicability to consultants for proposed litigation).

[44] *Hoover*, 540 F. Supp. at 1122; *Sunstar Ventures, LLC v. Tigani*, 2009 WL 1231246, at *6 (Del. Super. Apr. 30, 2009); *Denoble v. DuPont Merck Pharm. Co.*, Del. Super., No. 92C-11-161, 1996, Babiarz, J. (Apr. 11, 1997) (Exhibit A); *Nix*, 466 A.2d at 410. *Yeung v. Maric*, 232 P.3d at 1284; *Merrick*, 43 P.3d at 714.

[45] *Nix*, 466 A.2d at 410. *See also Williams*, 844 F.2d at 142-143; *ACG Networks v. Relevante, Inc.*, 2015 WL 1517419, at *2 (D. Del. Mar. 31, 2015) (holding that preservation letters sent to third-party witnesses were part of the judicial proceeding and thus protected by the absolute privilege.); *Bruce*, 776 P.2d at 672 (immunity applies to acts and communications made in connection with preparation for testimony because there is "no way to distinguish the testimony from the acts and communications on which it is based."); *Middlesex*, 172 A.2d at 25 (immunity applies to private conversations with attorneys in reference to litigation).

[46] *Kahn*, 673 F. Supp. at 212; *Krouse*, 20 P.3d at 899. *See also In re Smith*, 848 P.2d at 614; *Middlesex*, 172 A.2d at 25 (noting applicability to consultants for proposed litigation).

[47] Op. Br. p. 23 (emphasis added).

if an IME/DME is conducted *after* suit is filed, then it *is* protected by immunity and *is not* "outside the course of judicial proceedings."[48] But they cite no legal authority for why a different result should obtain simply because the IME/DME was conducted before the companion lawsuit is filed.

This is but one illustration of the Plaintiffs' attempt to have their cake and eat it too. They claim on one hand, where it is convenient to do so, that this case is just about them, saying that none of the examinations or reviews of the named Plaintiffs were commissioned during pending litigation and so immunity does not apply. However, in numerous other places, again where it is convenient to do so, they claim that this case is about much more than them;[49] that it is a "massive fraud, years in the making, by which Dr. Gelman feeds sham medical reports into the machinery of insurance claims handling" and so "at its core, then, this lawsuit is about Dr. Gelman's reports."[50] Taking the broader view for a moment, 45 of the 75 reports attached to Plaintiffs' brief indicate that counsel was involved at the time the report was requested. Projecting this ratio to the "massive" scale alleged, a large percentage of Dr. Gelman's reports were likely for litigation, a context in which even Plaintiffs admit an IME/DME doctor would be entitled to immunity.

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[48] *Id.* at fn. 6. *See also Id.* at 28 ("…IMEs and DMEs may arise in the course of pending judicial proceedings…).
[49] Op. Br., p. 6, 16, 19, 23, 31.
[50] *Id.* at 6.

Turning back to the named Plaintiffs, they quote part of *Barker v. Huang* for their argument that witness immunity does not apply to "statements made outside of judicial proceedings".[51] However, they leave out the remainder of that sentence: "such as those [statements] made during a newspaper interview concerning judicial proceedings…"[52] The full quote illustrates this Court's view of "outside of judicial proceedings" to be something quite tangential to legal proceeding.

The example of a news report stands in stark contrast to a medical opinion formed from an IME/DME or records review, which is intimately associated with the litigation process and is often the very basis for a lawsuit. An insurer does not contract for an IME/DME in response to every claim; such a request is only made when there is some reason to doubt whether a condition is causally related to the injury or a particular treatment is reasonable and necessary. So in such cases there is already a dispute at the time a medical opinion is requested, from which the insurance company can expect there will be litigation, as there was here.[53]

Plaintiffs also mention in passing *Paige Capital Management v. Lerner*

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[51] Op. Br. p. 24.
[52] *Barker*, 610 A.2d at 1345.
[53] There is reference in the Opening Brief to Plaintiff Adams's attorney who was called by State Farm in order to resolve her personal injury claim. Op. Br. p. 11. Furthermore, Plaintiffs seem to blame Dr. Gelman for what they say was a paltry $5,000 settlement offer. *Id.* at 27. However, only the insurance company had the power to decide how much money to offer Ms. Adams. Dr. Gelman's only role was to provide medical opinions about the claimant's alleged injuries, not to provide a settlement value and mandate that the insurance company follow that recommendation. This further demonstrates that State Farm hired Dr. Gelman to conduct Ms. Adams's medical records review because there was a disputed claim.

Master Fund, contending that the *Paige* court was skeptical of applying the privilege outside of formal judicial settings.[54] However, the *Paige* court stated, "…our Superior Court appears to have accepted as given the notion that the privilege applies to pre-litigation communications..."[55] In other words, the *Paige* court simply assumed, based on Superior Court precedent, that the privilege did in fact apply pre-litigation, and acknowledged the rationale for applying the privilege in that way, that is, to encourage frank settlement discussions and resolve disputes in advance of litigation.[56] And while *Paige* discussed the policy concerns on both sides of the course of judicial proceedings coin, it never actually decided the issue.

Finally, in support of their argument that immunity does not apply outside the course of judicial proceedings, Plaintiffs cite *Commonwealth Construction Co. v. Endecon*.[57] However, that case provides no analysis whatsoever of the witness immunity doctrine, no analysis of the court's reasons for refusing to apply the doctrine, and very limited factual background, such that there is no way to discern its applicability to this case.[58] Further, *Endecon* is contrary to the *Paige* decision, which came after it, and which assumes that the privilege applies pre-litigation,

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[54] Op. Br. p. 22.
[55] *Paige*, 22 A.3d at 717 (citing *Denoble*, No. 92C-11-161, 1996, Babiarz, J.).
[56] *Id.* at 721-23 ("[T]he public policy rationale of the privilege can be seen as an attempt to funnel disputes towards peaceable resolution through compromise or litigation as opposed to the use of violence or self help"; "…in jurisdictions that have so extended the privilege, the main rationale for the extension is that it allows parties to peaceably resolve disputes in advance of litigation…").
[57] *Commonwealth Construction Co. v. Endecon*, 2009 WL 609426 (Del. Super. Mar. 9, 2009).
[58] *Id.*

and that the Superior Court has accepted that proposition.[59]

In short, Plaintiffs have cited no reliable authority for their argument that immunity requires a formal judicial proceeding and no analysis as to why public policy would favor limiting immunity to formal judicial proceedings. Consistent with the authority cited above, Dr. Gelman enjoys absolute immunity for his records review and IME/DMEs of Plaintiffs, even though those events occurred pre-litigation.[60] Moreover, Dr. Gelman's *testimony* before the Industrial Accident Board forms the basis of this lawsuit for Plaintiff Rosenthal.[61] Industrial Accident Board hearings are judicial proceedings.[62] As Dr. Gelman's testimony was made in the course of a judicial proceeding, it is protected by absolute immunity.

c. The work product doctrine and witness immunity doctrine are two distinct legal theories with no bearing on one another

Plaintiffs only confuse the pre-litigation issue by reference to the work product doctrine and documents prepared in anticipation of litigation versus in the ordinary course of insurance claims handling. These concepts have no relation to

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[59] *Paige*, 22 A.3d at 717 (citing *Denoble*, Del. Super., No. 92C-11-161).
[60] *Id.* (noting that the Superior Court "appears to have accepted as a given the notion that the privilege applies to pre-litigation communications..."). *See also Williams*, 844 F.2d at 142-143 (holding that immunity applies to pre-trial proceedings, and that this extension of the immunity "appears to be universal."); *Hoover*, 540 F. Supp. at 1121-1122; *Nix*, 466 A.2d 407, 410; *Kahn*, 673 F. Supp. at 212 (reports by potential and retained experts); *Krouse*, 20 P.3d at 899 (events which occur prior to filing suit); *Bruce*, 776 P.2d at 672 (acts which create the basis for testimony); *Middlesex*, 172 A.2d at 25 (reports and communications).
[61] *See, e.g. Bruce*, 776 P.2d at 672 (immunity applies to acts creating the basis for testimony).
[62] The Industrial Accident Board is an Administrative Court which holds hearings and adjudicates disputed worker's compensation claims. 19 *Del. Admin. C.* §1331.

witness immunity and so are not helpful in understanding its parameters. Work product and witness immunity are two completely different legal doctrines rooted in two completely different authorities. Work product dictates what materials are *discoverable* under the Rules of Civil Procedure.[63] Witness immunity is a common law rule that protects witnesses from being sued as a result of their opinions.[64]

The criteria for applying the two doctrines are also different. For work product to apply, the court asks: (1) why the document was prepared; (2) whether the document contains legal analysis; (3) who prepared the document (attorney vs. client); (4) whether the materials were routinely prepared; and (5) when the document was prepared (whether it was "prepared in anticipation of litigation").[65] Witness immunity applies when: (1) statements occur in the course of judicial proceedings and (2) those statements are relevant to the underlying matter.[66]

The doctrines also serve two very different policy ends. Work product protects lawyer thoughts and allows preparation for trial without the fear that adversaries will have access to litigation plans.[67] Witness immunity prevents witness intimidation.[68] The Court should reject this apples-to-oranges comparison.

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[63] Super. Ct. Civ. R. 26(b)(3). Plaintiffs acknowledge in their opening brief that this doctrine relates to *documents*, and even cite F.R.C.P. 26(b)(3), a discovery rule, for this proposition. Op. Br. p. 26. Defendants do not claim that Dr. Gelman's reports are protected by work product.

[64] *Briscoe*, 460 U.S. at 326.

[65] *Rowlands v. Lai*, 1999 WL 462379, at *1 (Del. Super. Apr. 6, 2009).

[66] *Barker*, 610 A.2d at 1345.

[67] *Mullins v. Vakili*, 506 A.2d 192, 198 (Del. Super. 1986).

[68] *Briscoe*, 460 U.S. at 333.

2. Immunity is not limited to defamation or to injury to reputation

In *Barker*, this Court made clear that absolute immunity is not limited to defamation suits.[69] The Court reasoned, "absolute privilege would be meaningless if a simple recasting of 'defamation' to 'intentional infliction of emotional distress' or 'invasion of privacy' could void its effect."[70] In the case *sub judice*, the court below agreed that immunity is not limited to defamation, and went on to say "absolute immunity is limited to claims that involve *injury to reputation.*"[71] The trial court did not elaborate on the basis for this comment or provide analysis applying it to the facts here, but dismissed the matter based on immunity.

Dismissal was proper because this case involves injury to reputation recast as a fraud claim. As this Court has stated, quoting approvingly of Prosser, defamation is "…that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, *derogatory or unpleasant feelings or opinions against him*."[72] Here, Plaintiffs claim that Dr. Gelman made intentionally false and derogatory

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[69] *Barker*, 610 A.2d 1341, 1349 (addressing immunity for defamation, tortious invasion of privacy, wrongful use of civil proceedings, abuse of process, conspiracy, IIED, and outrageous conduct.). *See also ACG*, 2015 WL 1517419, at *3; *Hurst v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 426018, at *8 (D. Del. Feb. 9, 2012); *Hoover*, 540 F. Supp. at 1121 (immunity barred non-defamation claims); *McLaughlin v. Copeland*, 455 F. Supp. 749, 752 (D. Del. 1978).
[70] *Barker*, 610 A.2d 1341, 1349.
[71] *Adams*, 2016 WL 373738, at *3.
[72] *Spence v. Funk*, 396 A.2d 967, 969 (Del. 1978) (emphasis added) (quoting Prosser Law of Torts (1971) § 111 p. 739).

statements about the extent of their claimed injuries or about the connection between their physical condition and their car accident or work accident. And Plaintiffs argue strenuously that this case is also about Dr. Gelman's other reports, which they observe include derogatory comments about, *inter alia*, the claimants' credibility, punctuality, large body habitus, and even offensive body odor.[73] The claims here stem from those statements, which fall squarely within Prosser's description of injury to reputation. That is so regardless of the tort theory under which Plaintiffs sue, just as the *Barker* Court contemplated when it held that immunity applied to non-defamation torts.

But even if this Court decides that these claims do not involve injury to reputation, Dr. Gelman is still entitled to absolute immunity because immunity is *not* limited to claims involving injury to reputation.[74] The Superior Court cited *Hoover v. VanStone* for the proposition that absolute immunity is limited to claims of injury to reputation.[75] However, *Hoover* did not limit immunity in this way.[76] In *Hoover*, all of the claims stemmed from the same defamatory conduct, so the court did not address immunity as it applied to claims *not* involving injury to reputation—no such claims were before it. [77] And it did not hold that "injury to

[73] Op. Br. p. 3-9.
[74] *ACG*, 2015 WL 1517419, at *3; *Hurst*, 2012 WL 426018, at *8.
[75] *Hoover*, 540 F. Supp. 1124.
[76] *Id.*
[77] *Id.* ("These counts…are all predicated on the very same acts providing a basis for the defamation claim"). The court held that immunity applied because "[a]pplication of the absolute

reputation" was a prerequisite for applying immunity.[78] It simply analyzed the claims that were before it, which happened to be defamation-related torts.[79] It did not rule to the exclusion of other non-injury-to-reputation claims.[80]

Plaintiffs argue that absolute witness immunity is limited to suits for injury to reputation based upon the Chancery Court's decision in *Paige*.[81] But the holding in *Paige*, where the court declined to apply immunity to a non-defamation action, should be limited to its extreme and very specific facts.[82]

Paige involved a breach of fiduciary duty claim in which defendants attempted to introduce a pre-suit document into evidence that threatened the opposing party if it refused to settle.[83] The court there rightly held that the policies underlying the absolute immunity doctrine, including encouraging settlement of disputes, were not served by applying immunity *to the circumstances* "where a party is seeking to hold a party accountable for statements about the future wrongful actions it intends to take if the listener does not accede to its demands."[84]

Plaintiffs correctly point out the *Paige* court's decision to choose "tradition"

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privilege solely to the defamation count…would be an empty gesture indeed, if, because of artful pleading, the plaintiff could still be forced to defend itself against the same conduct regarded as defamatory." *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Barker*, 610 A.2d 1341; *Paige*, 22 A.3d at 726.

[82] *Paige*, 22 A.3d 710 (holding that the policy goals served by the absolute litigation privilege had no relevance to the facts before the court).

[83] *Id.* at 712-715.

[84] *Id.* at 726.

versus "a broad extension of the privilege."[85] And indeed, the *Paige* court was faced with a difficult choice.[86] It was forced to "choose between a more traditional application of [the privilege] or a broad extension of that privilege *in a way that would provide free license to parties to threaten to take future wrongful action if a party does not accede to their settlement demands and to immunize that threat from becoming the subject of a tort suit.*"[87]

Plaintiffs' mischaracterization of this choice leaves out the very important explanation of what effect a "broad extension" of immunity would have had in the particular circumstances of *Paige*.[88] It was this effect that led the *Paige* court to decide against applying immunity to a particular claim.[89] Further evidence of this is found in the sentence immediately preceding Plaintiffs' next quote from *Paige*. Again, while Plaintiffs correctly quote *Paige*'s conclusion: that "the policy rationale for the privilege is best served by limiting the privilege's scope to only defamation and related torts arising from derogatory statements alleged to be harmful to the suing party's reputation or psychic well-being,"[90] they omit the context contained in the previous sentence, explaining that the policy balance would be upset by "immunizing threats to take future wrongful action if a party

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[85] *Id.* at 720.
[86] *Id.*
[87] *Id.* (emphasis added).
[88] *Id.*
[89] *Id.*
[90] *Id.*

does not settle."[91] Plaintiffs rely on *Paige* but make no claim that the same policy concerns rightly addressed by the court in *Paige* are implicated here.

Following the limited, fact-specific holding in *Paige*, the District of Delaware has twice applied the *Barker/Hoover* analysis and has interpreted *Barker* and *Hoover* to mean that absolute witness immunity is not limited to defamation claims, *even where there is no injury to reputation*.[92]

In *ACG Networks v. Relevante*, defendants claimed tortious interference with business relations.[93] There, plaintiffs sent out truthful (non-defamatory) letters to defendants' clients about a newly-filed lawsuit, asking the clients to preserve information relevant to the lawsuit.[94] The court held that immunity applied.[95] And it did so despite the fact that there was no injury to reputation claim.[96]

In *Hurst v. State Farm*, plaintiff claimed invasion of privacy and emotional distress when defendant released truthful identifying information about him, such

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[91] *Id.*
[92] *ACG*, 2015 WL 1517419, at *3; *Hurst*, 2012 WL 426018, at *8. Defendants have not located any Delaware state court case addressing immunity in a situation where there was no injury to reputation, other than *Paige*. The Superior Court has applied immunity to other causes of action sounding in defamation, but to Defendants' knowledge, has not addressed strictly non-defamation claims. *Bove v. Goldenberg*, 2007 WL 446014 (Del. Super. Feb 7, 2007); *Sinex v. Bishop*, 2005 WL 3007805 (Del. Super. Oct. 27, 2005); *Nix*, 466 A.2d 407. The District of Delaware cases, therefore, are the most authoritative on this issue where relevant public policy interests are served but there is no injury to reputation claim. *ACG* and *Hurst*, *supra*.
[93] *ACG*, 2015 WL 1517419.
[94] *Id.* at *1.
[95] *Id.* at *3.
[96] *Id.* ("[t]he Court is not persuaded that Delaware law protects defamatory false statements but does not protect non-defamatory truthful statements…").

as his name, address, and driver's license number.[97] There, even though the released information could not "be considered as violating [plaintiff's] privacy rights or inflicting emotional distress," the court held that immunity applied.[98] In other words, immunity applied *even though there was no injury to reputation.*

Plaintiffs have no response to and have not cited *ACG* or *Hurst*. These post-*Paige* holdings are consistent with what other courts have said, nationwide.[99] Immunity is premised on allowing the free flow of information in litigation and enabling parties to engage in frank settlement discussions.[100] The threat of subsequent litigation for an expert witness and the chilling effects which result are the same, regardless of the theory under which Plaintiff sues.[101] The extreme circumstances present in *Paige* have no application here and *Paige* should not be interpreted to mean that injury to reputation is required for immunity to apply such that it stands in the way of dismissal of the Plaintiffs' claims in the event this Court concludes that these are not injury to reputation claims.[102]

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[97] *Hurst*, 2012 WL 426018, at *3.
[98] *Id.* at *8.
[99] *Bruce*, 776 P.2d at 671 (stating there are a "large number of cases in a wide range of jurisdictions in which witness immunity has been granted to bar causes of action other than defamation.") (citations omitted); *Merrick*, 43 P.3d 712 (negligence); *Williams*, 844 F.2d 138 (constitutional claim); *Kahn*, 673 F. Supp. at 213 (negligence, fraud, IIED); *Gilbert*, 126 P.3d at 1060 (fraud); *Middlesex*, 172 A.2d at 25 (tortious interference); *Hurley*, 156 A.2d at 440 (false imprisonment); *Dabkowski*, 111 N.W.2d at 70 (false imprisonment, assault, battery); *Dyer*, 156 S.W.2d at 446 (false imprisonment); *Rashid v. Kite*, 934 F. Supp. 144, 147 (E.D. Pa. 1996) (fraud, conspiracy, breach of contract).
[100] *McLaughlin*, 455 F. Supp. at 752; *Paige*, 22 A.3d at 725; *Krouse*, 20 P.3d at 899.
[101] *Bruce*, 776 P.2d at 670.
[102] *Paige*, 22 A.3d at 725.

II. The Superior Court properly dismissed Plaintiffs' fraud claims as they were not plead with particularity, there was no duty to speak, nor was there justifiable reliance

A. QUESTION PRESENTED

Did the Superior Court properly dismiss Plaintiffs' common law fraud claims when the allegations were not pled with particularity, Dr. Gelman did not make a false representation, and there is no evidence of justifiable reliance? This issue was raised in Defendants' briefs in support of their Motion to Dismiss as well as during oral arguments on the Motion to Dismiss.[103]

B. SCOPE OF REVIEW

This Court reviews a decision granting a motion to dismiss "*de novo* looking only to the face of the complaint".[104]

C. MERITS OF ARGUMENT

To prove common law fraud, Plaintiffs must allege and prove:

> (1) a false representation made by defendant, usually of fact; (2) defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; (3) defendant's intent to induce plaintiff to act or refrain from acting; (4) plaintiff's action or inaction taken in justifiable reliance thereon; and (5) resultant damages.[105]

Plaintiffs did not properly plead the false representation and justifiable reliance elements. Instead, they alleged, without attribution, that Dr. Gelman's

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[103] A535-552; B22-29, 60-62.

[104] *Santa Fe*, 669 A.2d at 70.

[105] *Sipple v. Kaye* 1995 WL 654139 at *2 (Del. Super. Oct. 30, 1995) (*citing Stephenson v. Capano Dev., Inc.,* 462 A.2d 1069, 1074 (Del. 1983)).

discourteous behavior is fraud. But rude behavior alone does not amount to fraud and so Plaintiffs' fraud claims were properly dismissed.[106]

[106] Dr. Gelman's alleged bias and supposed ill-mannered demeanor are not grounds for a fraud action, but instead is fodder for cross-examination of Dr. Gelman within the matters in which his opinion is offered. Such tests of bias and attacks on credibility are a quintessential part of the adversarial system. That system involves both parties putting forth their strongest evidence, typically in the form of expert testimony. The appropriate response to disagreements about adverse expert testimony is engaging in cross-examination, not filing lawsuits against experts. Expert testimony is tested for truth in this way in courtrooms and lawyer conference rooms every day. This is a question of credibility, not a question of fraud.

Plaintiffs' claim that Dr. Gelman has committed ethical violations is also unavailing, as ethical violations are not at issue here. If Plaintiffs are asserting that Dr. Gelman did something unethical, their recourse is to the Board of Medical Licensure and Discipline, not to the Superior Court. 24 *Del. C.* § 1731(a). There is no claim that Dr. Gelman did not review the records or examine the claimants and write the reports at issue. There is also no claim that he charged or over charged for services that he did not perform.

Defendants' opening brief is an *ad hominem* attack on Dr. Gelman that is reminiscent of whispering campaigns that spread damaging rumors or innuendo without attribution. Plaintiffs level scurrilous claims about Dr. Gelman with no attribution except for their own complaint. One would expect Plaintiffs to present their best arguments in their opening brief. What they present, however, are lengthy quotes from two cases that simply state Dr. Gelman was discourteous. They quote at length from the Phillips matter, which, if accepted at face value, establishes only that Dr. Gelman was rude to an examinee. They cite to *Watson v. Christiana Care* for one-sided testimony from a claimant that Dr. Gelman initiated a conversation with the claimant without permission from her counsel. Although Plaintiffs attempt to paint Dr. Gelman as singularly heinous in his alleged bias, that is but a means to an end. As to the primary goal being pursued in this case…and the next, the following colloquy between the Court and Plaintiffs' counsel is instructive:

> The Court: So, if you are successful in this lawsuit, it will mean Dr. Gelman is out of business for this, or probably. But is he the only one on the side of the plaintiff's bar? Are there other people, are there other expert witnesses for whom this type of cause of action will be brought?
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> The Court: I'm not asking for names, I'm just saying is it possible that this will spawn litigation with regard to other expert witnesses?
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> Mr. Spadaro: I think I can answer that question with a lot of confidence, and I think it may spawn one other, and I don't know of anyone else. Plaintiffs' lawyers will always have their gripes about what an IME doctor does . . . Now, there are some folks, some carpet baggers, I don't want to sound too parochial, but there are some doctors who come up from Maryland, but you don't see them often enough, to create the kind of record to support what we're trying to do here… A526-527.

a. Dr. Gelman did not make a false representation or conceal any material fact.[107]

A claim for fraud must involve a representation made *by the defendant*.[108] Plaintiffs do not allege that Dr. Gelman made any overt representation to them. Instead, Plaintiffs assert only that Dr. Gelman made an *implied* representation by holding himself out and "represent[ing] (at least by implication)" that he was a fair and unbiased medical examiner.[109] In other words, Plaintiffs claim that Dr. Gelman's silence equals a false representation. While silence *may* satisfy the false representation element of fraud, that is not the case here.

Plaintiffs quote *Stephenson v. Capano* in support of their silence argument: "fraud does not consist merely of overt misrepresentations. It may also occur through deliberate concealment of material facts, or by silence in the face of a duty to speak."[110] This quote, taken as it is out of context, is confusing because of the Court's use of the word "or". Plaintiffs interpret "or" here as a word used to link alternatives (*e.g.* coffee or tea). However, the *Stephenson* Court used the word "or", instead, to introduce an explanation of the preceding phrase. In other words,

[107] Plaintiffs' deliberate concealment claim also avoids the issue of intent.
[108] *Crowhorn v. Nationwide Mut. Ins. Co.*, 2001 WL 695542, at *5 (Del. Super. Apr. 26, 2001) (quoting *Stephenson*, 462 A.2d 1069). Plaintiffs have not brought this complaint against the insurance companies and defense counsel that they assert are part of this fraud. As the trial court noted during oral arguments, there is a question of who is being defrauded. A505. If the person being defrauded is in fact the Plaintiffs, why were the insurance companies, or the attorneys, or whoever made the representation to the Plaintiffs that the IME was going to be fair and independent not a party to this case?
[109] A48, A50-51 at ¶¶ 56, 64, 72. These allegations are at odds with Plaintiffs' charge that Dr. Gelman is known to be biased toward the insurer.
[110] *Stephenson*, 462 A.2d at 1074.

the Court used "or" to mean "as in" or "that is".[111]

The intended meaning of "or" is evident from the clarifying sentence that follows that quote: "[t]hus, one is equally culpable of fraud who by omission fails to reveal that which it is his *duty to disclose* in order to prevent statements *actually made* from being misleading."[112] This sentence, omitted by Plaintiffs, shows that a duty to disclose arises when a partial, potentially misleading, disclosure is made.

Ignoring this clarification, Plaintiffs argue that there are three ways to satisfy the false representation element of fraud: (1) overt misrepresentation, (2) deliberate concealment of material facts, or (3) silence in the face of a duty to speak. But this is not the law in Delaware. To the contrary, a duty to speak is a *prerequisite* to a deliberate concealment claim.[113] That is, items (2) and (3) above *combined* are one of two ways to satisfy the false representation element of fraud (the other, of course, is to make an overt misrepresentation, which is not alleged here). As this Court has previously held: "there is no duty to disclose a material fact or opinion, *unless* the defendant had a duty to speak."[114]

A duty to speak arises in two ways: (1) a special relationship between the parties or (2) "partial disclosure of facts that require the disclosure of additional

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[111] Definition of "or", Oxford Dictionaries, http://www.oxforddictionaries.com/us/definition/american_english/or (last accessed April 19, 2016) ("1. Used to link alternatives; 2. Introducing a synonym or explanation of a preceding word or phrase.").
[112] *Stephenson*, 462 A.2d at 1074 (emphasis added).
[113] *Matthews Office Designs, Inc. v. Taub Invs.*, 647 A.2d 382 (Del. 1994).
[114] *Id.*

facts to prevent a misleading impression."[115] Plaintiffs tacitly acknowledge that Dr. Gelman did not have a duty to speak by contending that it was unnecessary for them to plead such a duty.[116] And Plaintiffs do not argue in their opening brief that Dr. Gelman had either a special relationship with them which would give rise to a duty to speak or that he partially disclosed some facts which would require disclosure of additional facts to prevent them from being misled. For these reasons alone, Plaintiffs' fraud claims fail.

Nonetheless, Plaintiffs argue that without speaking, Dr. Gelman concealed material facts and thereby mislead them to believe that their claims would be fairly evaluated without improper interference from him.[117] But Plaintiffs provide no legal basis for this novel theory and do not address the case law contrary to it that silence cannot be fraud unless there is a duty to speak.[118]

The need for a partial disclosure before silence can constitute fraud was explained in *Murphy v. Berlin Constr. Co.*[119] In *Murphy*, the plaintiffs hired a

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[115] *Murphy v. Berlin Constr. Co.*, 1999 WL 41633, at *3 (Del. Super. Jan. 22, 1999) ("A duty to speak can be created by a pre-existing relationship between the parties or a partial disclosure of facts that require the disclosure of additional facts to prevent a misleading impression.").
[116] Op. Br. p. 31 ("…it was not necessary for the plaintiffs to plead the existence, on Dr. Gelman's part, of a duty to speak.").
[117] Op. Br. p. 31.
[118] *Matthews*, 647 A.2d 382 (finding no duty to disclose that the property was on a floodplain as the defendant had not concealed the fact that the warehouse was subject to flooding); *Murphy*, 1999 WL 41633, at *1 (no duty to speak absent partial disclosure)
[119] *Murphy*, 1999 WL 41633, at *1.

building contractor based on a referral from their realtor.[120] They alleged fraud when they later discovered that part of the contractor's price included a commission to the realtor.[121] The *Murphy* court held that there is a duty to disclose only when an individual volunteers some information that could mislead if other material information is not revealed.[122] For example, if the contractor had made statements regarding the allocation of the contract price, then he would have had a duty to inform the plaintiffs that a portion of the contract price was for the realtor's commission.[123] Because there had been no such partial disclosure, the court determined that the contractor had *not* committed fraud by failing to disclose the information about the commission.[124]

Here, Dr. Gelman's silence cannot constitute deliberate concealment because there is no allegation that he partially disclosed some facts which would require disclosure of more facts to prevent Plaintiffs from being misled. The Complaint does not specify *any* statements made by Dr. Gelman to the Plaintiffs,

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[120] *Id.*
[121] *Id.*
[122] *Id* at *3. The Court found that had the contractor "made statements that, in absence of disclosing the commission, would be misleading" then the failure to disclose the commission may have been actionable. *Id.* at *4.
[123] *Murphy*, 1999 WL 41633, at *4.
[124] *Id.* at *3. While the *Murphy* Court acknowledged that a fiduciary relationship between the parties would clearly lead to a duty to speak, in the present case, the trial court found that there was no fiduciary relationship between an IME/DME physician and the claimant. *Id.*; *Adams*, 2016 WL 373738 at *5. Plaintiffs did not dispute that portion of the trial court's decision in their opening brief, and as such, Plaintiffs have waived the argument that there is a fiduciary relationship between an IME/DME provider and a claimant.

partial or otherwise, much less a statement that would give rise to a duty to speak.

Turning to the allegations of each Plaintiff, there was no interaction whatsoever between Dr. Gelman and Plaintiff Adams, much less one which would constitute partial disclosure. Dr. Gelman never saw or spoke to Adams. He merely reviewed her medical records. In fact, there is no claim that Adams even knew Dr. Gelman was reviewing her medical records.

Likewise, Plaintiffs do not allege that Dr. Gelman made a partial disclosure to Riddick or Rosenthal. They argue, instead, that Dr. Gelman led them to believe he was unbiased simply by conducting the IME/DME. At the same time, they assert in the complaint that the Delaware legal community is well aware of Dr. Gelman's alleged pro-insurer bias.[125] But to undergird their fraud claims in the complaint, Plaintiffs do not allege a single fact that even hints at a statement *made by Dr. Gelman*, partial or otherwise, that his opinions would be unbiased.

In short, Delaware law provides that to prove fraud, there must be a false representation by the defendant.[126] If Plaintiffs seek to prove a false representation by asserting that there was a deliberate concealment of material facts, Plaintiffs must first present evidence that Dr. Gelman made a predicate incomplete

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[125] A24-32 at ¶¶ 13-14. In fact, the complaint goes on for eighteen pages about Dr. Gelman's history of bias and his supposed grand scheme to defraud innocent injured accident victims. A19-37.

[126] *Matthews*, 647 A.2d 382.

representation, thereby creating a duty to speak.[127] The complaint fails to make any allegation that would impose such duty and so the fraud claims must fail.

b. Plaintiffs' claims do not demonstrate justifiable reliance.

Reliance on a representation must be *reasonable* in order to form the basis for a fraud claim.[128] Even had Dr. Gelman made some kind of misrepresentation, which he did not, Plaintiffs have not alleged any facts that show that they reasonably relied on such representations in consenting to records review or an examination, as required by Delaware law.[129]

While no court in Delaware has addressed justifiable reliance in the IME/DME context, at least one other jurisdiction has.[130] In *Pugh v. Westreich*,[131] plaintiff sought first-party insurance benefits after an automobile accident for which a statute required her to submit to an IME.[132] Dismissing her fraud claim, the Minnesota Court of Appeals found that the plaintiff attended the IME due to statutory obligation and not due to any concealment of facts or false representations that the exam was "independent".[133] In other words, the court held that there was no justifiable reliance because false representations, even if made, would have had no effect on whether plaintiff attended the IME when the claimant

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[127] *Id.*
[128] *Id.*
[129] *Sipple*, 1995 WL 654139, at *1.
[130] *Pugh v. Westreich*, 2005 WL 14922 (Minn. Ct. App. Jan. 4, 2005).
[131] *Id.*
[132] *Id.* at *1.
[133] *Id.* at *2.

had an independent reason to do so (*i.e.* the statutory requirement).[134]

Like the plaintiff in *Pugh*, Riddick and Rosenthal did not submit to the IME/DME because of representations made by Dr. Gelman or his status as "independent"—whether represented or not—but rather, because they were obligated to do so under an insurance contract (PIP) and by law (worker's compensation statute),[135] respectively. Failure to submit to the exam may have been considered a failure to cooperate and may have resulted in denial of coverage.[136] This was the motivation for attending the examination, not Plaintiffs' alleged belief that Dr. Gelman was "independent". Thus, Riddick and Rosenthal cannot claim that they reasonably relied on any representation, true or not, when they decided to fulfill their contractual/statutory obligation to submit to a medical examination.

Plaintiff Adams doesn't assert that she did *anything* in reliance on Dr. Gelman's alleged concealment of facts. She does not claim that she consented to release medical records for Dr. Gelman's review, or that she even knew that her

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[134] *Id.* ("The descriptive term "independent," or [defendant's] omission of the fact that [the IME physician] was biased, thus should have no effect on whether or not [plaintiff] chose to attend the examination; rather, she was compelled by statute to attend.")

[135] As to Rosenthal specifically, in the context of worker's compensation, 19 *Del. C.* § 2320(7) requires that medical evaluations not be referred to as "independent" or "IME" in recognition that "independent" is a misnomer. The decision by the general assembly is separate from any analysis regarding Dr. Gelman.

[136] There are a limited number of doctors available to perform DMEs in the timeframe required due to the short notice of hearings. Further limiting this pool is required familiarity with the current AMA guides regarding permanency/impairment for worker's compensation claims.

records would be reviewed by Dr. Gelman.[137]

To the extent there is reliance claimed by Adams, that reliance is unreasonable.[138] Adams's consent was not required for release of information to Dr. Gelman. As a matter of course, personal injury claimants release medical records to both first- and third-party insurers so that those insurers may evaluate claims, which can involve subsequent release to experts for medical opinions.[139] Therefore, if Adams provided any consent at all, that consent was to the insurance company so that it could assess her liability claim, not to Dr. Gelman and not in reliance on anything Dr. Gelman said or did.

Plaintiffs have failed to plead any facts that would demonstrate reasonable reliance, and so their claims for common law fraud were properly dismissed.

c. The allegations of fraud were not pled with specificity as required by Delaware Superior Court Civil Rule 9(b)

Plaintiffs must plead the elements of fraud with particularity.[140] For fraud, "the particularity required by Rule 9(b) includes 'the time, place and contents of the false representations . . .'"[141] In *Browne v. Robb*, the plaintiff alleged that he hired an attorney based on the attorney's statements that he would provide skillful

[137] A48 at ¶ 55. Instead, she states, "*to the extent* [she] consented…" This statement is insufficient to show that Adams consented at all, much less consented in reliance on anything Dr. Gelman said or did.
[138] A48 at ¶ 55.
[139] A19, 24 at ¶¶ 6, 11.
[140] Del. Super. Ct. Civ. R. 9(b).
[141] *Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990) (quoting *Nutt v. A.C.& S., Inc.*, 466 A.2d 18, 23 (Del. Super. 1983), *aff'd sub nom.*).

and diligent representation.[142] The court found that the complaint lacked any facts to support the claim and that the statements were "a mere expression of opinion, which is not actionable."[143]

Likewise, in the present case, Plaintiffs have failed to meet the necessary pleadings requirements for fraud. Plaintiffs make a blanket assertion that Dr. Gelman represented or implied that he was fair and unbiased, however, they fail to provide the required specifics, that is, the time, place, and contents of the representation.[144] The Plaintiffs' allegations are vague and ambiguous regarding what was actually said, if anything, between Dr. Gelman and each of the Plaintiffs.

This intentional ambiguity raises questions about whether any misrepresentation was even made by Dr. Gelman, or if it was made by an insurance company, an unknown party, or even the Plaintiffs' own attorneys, such that it is unclear whether Dr. Gelman is even the appropriate defendant in this case. Without this particularity, Rule 9(b) is not satisfied, and Dr. Gelman is unable to defend himself against these allegations. Accordingly, the claim for common law fraud was appropriately dismissed.

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[142] *Id.*

[143] *Id.* at 955-956. *See also Vavro v. Albers*, 2006 WL 2547350, at *17 (W.D. Pa.) (dismissed fraudulent claims against an IME provider as the allegations were without specifics regarding the date, place, time of the misrepresentation, or the content of the misrepresentation and the person making the misrepresentation).

[144] Del. Super. Ct. Civ. R. 9(b).

III. CONCLUSION

Plaintiffs assert that they simply want honest medical opinions from IME/DME providers, but then arbitrarily contend that any opinion contrary to their claims is a fraud. What Plaintiffs are really seeking to do here is warn every IME/DME physician out there that there can be personal consequences to offering medical opinions that stand in the way of claimants getting that to which they believe they are entitled. It is precisely this type of intimidation that witness immunity was created to prevent. And that immunity is worthless if an expert is prohibited from expressing his or her opinion to an insurer or defense counsel at the initial stages of a claim for fear that he or she may be accused of fraud.

Immunity aside, Plaintiffs' "fraud" claim is only a baseless *ad hominem* assault. Accusing a medical examiner of skepticism, bad manners, avarice, bias or even ethical lapses is not the same thing as alleging fraud. These are matters best dealt with in the crucible of cross examination or taken to the administrative bodies that supervise physicians. To make out a fraud claim, Plaintiffs must show a false representation and reasonable reliance—both of which they have failed to do, much less with the particularity required by Rule 9(b).

Accordingly, Plaintiffs claims were properly dismissed by the Superior Court and this Court should affirm.

Respectfully submitted,

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