

# Fourth Circuit Upholds Witness Testimony Privilege to Bar All Civil Liability

By Gregg H. Mosson

The Fourth Circuit affirmed dismissal of a lawsuit containing shocking allegations against a Johns Hopkins-based coal industry expert, holding that, regardless of the malice or fraud alleged, his testimony was protected by an absolute “Witness Litigation Privilege.” *Day v. Johns Hopkins Health Sys. Corp.*, 907 F.3d 766 (4th Cir. 2018). The Fourth Circuit affirmed the trial court’s grant of a motion to dismiss by broadly interpreting the privilege in line with recent national federal precedent and over a vigorous dissent that would have permitted lawsuits against “strawman” expert witnesses who testify as part of a profitable fraud scheme.

## The Day Decision

In a lawsuit filed in Maryland Federal Court, the plaintiffs alleged that Johns Hopkins Dr. Paul Wheeler and his “radiology unit” gave knowingly biased testimony to aid defendant companies in defeating coal miner claims for benefits due to Black Lung Disease. This “expert” testified routinely at administrative hearings before the U.S. Department of Labor, which determined a claimant’s entitlement to those benefits. In 1500 administrative hearings over two decades, Dr. Wheeler never opined that Black Lung Disease was a cause of death qualifying a coal miner for benefits. Plus, he charged above-industry rates for this testimony. As alleged, the fix was in for the right price with Dr. Wheeler.

The plaintiffs, including families of the deceased, brought the lawsuit after a published report exposed his questionable track record and methods. The DOL re-

opened many of the cases, found significant irregularities and made hundreds of corrective benefit awards. *Day*, 907 F.3d at 769-71. The complaint alleged Maryland common law claims as well as violations of the civil provisions of the federal Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>1</sup>

In holding that the witness litigation privilege is absolute—a “trade off” to protect the judicial process—*Day* bars civil claims against witnesses arising from their testimony. As the Fourth Circuit noted in defending its rationale, experts like Dr. Wheeler remain subject to employment and licensing ramifications as well as to criminal charges. *Id.* at 771-72. The Fourth Circuit’s majority opinion rejected a strong dissenting opinion that argued that criminal activity under RICO should be an exception to the privilege. According to the majority, the dissent’s approach would lead to a slippery slope of lawsuits brought against experts by unsuccessful litigants. *Id.* at 778-80.

## Maryland Law

Maryland law supports a broad application of the “litigation privilege” for witnesses, parties and attorneys involved in judicial and quasi-judicial proceedings without having embraced the absolute scope above. In 2016, the Maryland Court of Appeals held that the “absolute” nature of the witness privilege means that the “motive” of an expert witness is immune from examination. See *O’Brien & Gere Eng’rs, Inc. v. City of Salisbury*, 447 Md. 394, 410-11 (2016).

Logically applied, this holding also means that fraud claims, which require proof of intent, are very likely barred. Although many older Maryland cases involved defamation civil actions, the Court held the privilege is broader and “not confined in the law of torts to matters of defamation.” *Id.*<sup>2</sup> *O’Brien* applies the privilege to bar a contract claim. Its holding could be construed narrowly

<sup>1</sup> The racketeering and conspiracy claim was filed under The Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961–1968, alleging a conspiracy to provide a result favorable to companies for pay at above-industry rates. The complaint brought these allegations under claims for fraud, RICO, negligent misrepresentation, tortious interference and unjust enrichment as a class action against Dr. Wheeler and various Hopkins corporate entities. See Complaint, *Day v. Wheeler*, No. 16-CV-03944, ECF No. 2 (D. Md. Dec. 8, 2016). The Fourth Circuit focused on the RICO claim but applied the privilege as an absolute bar to civil liability.

<sup>2</sup> For instance while the rationale behind the privilege is broad, Maryland decisions often have applied it to bar defamation claims. See., e.g., *Norman v. Borison*, 418 Md. 630, 650 (2011).

to mean the privilege only applies to tort and contract claims. *Id.* at 410-18. Yet, the rationale of *O'Brien* permits a broader application.

Importantly, the Court also held that a non-disparagement clause in a settlement agreement did not prevent one signer, during a lawsuit against a third party, from publishing written allegations in that complaint that also involved the co-signer, as a necessary part of that third-party lawsuit. In other words, the Court did not allow that disparaged co-signer to pursue a breach of contract claim under the non-disparagement clause of their settlement, due to the witness litigation privilege. It invalidated the non-disparagement clause, absent an express waiver of the privilege in it. *Id.* at 418-24. If there had been an express waiver, it is unclear that *O'Brien* would have enforced it. See *id.*

The privilege applies to administrative proceedings, subject to a case-by-case analysis. It also applies to witness statements made outside of trial or hearing, but related, such as an expert's statements made while conducting a litigation-related medical exam. *Odyniec v. Schneider*, 322 Md. 520, 588 A.2d 786 (1991). It also bars defamation actions based on statements made in non-judicial forums.<sup>3</sup>

## Federal Precedent and Other Concerns

Both the majority and dissenting opinions in *Day* find support in federal case law. The U.S. Supreme Court recently applied the privilege broadly to actions brought under 42 U.S.C. § 1983,<sup>4</sup> while noting that the witness litigation privilege at common law only protected witnesses from slander or libel actions. While applying it, the Supreme Court's rationale also used language supportive of an absolute privilege concerning claims arising from "witness' testimony." *Rehberg v. Paulk*, 566 U.S. 356, 366-67 (2012). While the phrasing of the *Rehberg*

decision could be read as applicable only to § 1983 claims, as the Day dissenter opined, it is not clearly circumscribed. A broader reading of the holding supports the Day decision.<sup>5</sup>

But the Day dissent's position also has common-law support. In 2005, the Supreme Court of West Virginia opined that the witness litigation privilege might not apply under West Virginia law if the allegations involved "criminal activity." *Wilson v. Bernet*, 625 S.E.2d 706, 713 (W. Va. 2005). In *Wilson*, a father in a difficult custody case sought tort and other civil damages against several witnesses who hurt his case. The allegations did not include fraud. In the end, the *Wilson* court upheld dismissal of his case.

While the Day decision protects witness testimony as privileged from civil suits, it does not protect all acts that precede it. A person can be sued civilly for falsifying evidence. See *Gregory v. City of Louisville*, 444 F.3d 725, 738-39 (6th Cir. 2006) (discussing cases and holding that prosecutors who are "accused of fabricating expert evidence" cannot hide behind witness immunity because such illegal conduct results in a trial with witnesses).<sup>6</sup>

5 See *Lisker v. City of L.A.*, 780 F.3d 1237, 1241-43 (9th Cir. 2015). The 9th Circuit Court of Appeals adopted this broad reading of *Rehberg*, providing for an absolute witness litigation privilege for false testimony as well as any pre-hearing conspiracy to do so. But the 9th Circuit also held that the immunity backwards has limits and would not cover, according to prior federal court decisions, tampering with evidence during an investigation that led to a judicial process.

6 Further, in what may seem like a fine distinction, the U.S. Supreme Court extended absolute immunity during a probable cause hearing to a prosecutor's alleged elicitation of purposefully misleading testimony to obtain a warrant, but did not extend it to advice that the same prosecutor provided to police concerning the police investigation beforehand. *Burns v. Reed*, 500 U.S. 478, 489-96 (1991). In a 1987 RICO decision, a federal appellate court held that falsely sworn affidavits by land developers - who had been bribing town officials to squeeze out the competition, before they were caught - could serve as one prong in an alleged "pattern" of racketeering to support a valid RICO lawsuit. *Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1269 (3d Cir. 1987) (reversing the trial court, primarily on another basis). The Day dissent looked to this decision. Still, it is notable in how it differs from the Fourth Circuit's perspective in *Day*. Here, a land deal racketeering scheme - which in a tangential matter also involved perjured affidavit filed at Court - is not the same totality of facts as an alleged expert witness whose primary alleged scheme is testimonial fraud. Still, affidavits are testimonial. The gap here also may reflect that the law has involved in the last three decades, pursuant to *Rehberg* (2012) and *Day* (2018) as discussed in this article. Judge Smalkin, in *Green v. Mayor & City Council of Balt.*, 198 F.R.D. 645 (D. Md. 2001), dismissed a lawsuit because the claimant falsely signed and falsely notarized witness affidavits at summary judgment. These fake affidavits can be distinguished from alleged malicious or false (actual) testimony protected by Day. Of course, the *Green* decision involves a competing intervening duty to safeguard our courts. As the *Green* Court opined in justifying the dismissal as penalty, "[t]he prejudice to the integrity both of the process of adjudication in general and of this Court in particular, which relies on the trustworthiness of those who submit - not to mention notarize - affidavits, is manifest." *Id.*

3 Whether the privilege applies in a non-judicial forum involves an analysis of procedural safeguards. The privilege does not apply to an open public meeting, but it likely does to an adjudicative proceeding where there is an opportunity to offer evidence, under oath, on the record. See *Reichardt v. Flynn*, 374 Md. 361, 369-70, 823 A.2d 566, 571 (2003). The privilege has wide application and protects citizen complainants and student complainants from defamation actions even outside of a court process. See *id.* at 370-72. These are just a few examples.

4 42 U.S.C. § 1983 imposes civil liability on "[e]very person who, under color of any statute ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws."

In conclusion, the Fourth Circuit held in *Day* that a witness is absolutely shielded from civil liability for his or her expert testimony. The Maryland Court of Appeals' most recent decision in *O'Brien* supports a similar broad application of the witness litigation privilege and yet did not hold the privilege absolute against express written waiver. Maryland courts may well hold that the privilege is absolute as matter of Maryland law based on *Day* and the broad rationale of *O'Brien*.

## Biography

**Gregg H. Mosson** practices employee rights litigation, domestic law, select civil litigation, and handles Social Security disability benefit claims, based out of Mosson Law, LLC, in Towson, Maryland. He regularly practices

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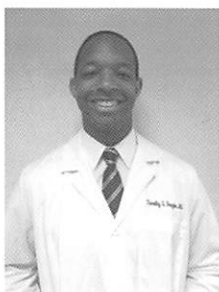
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- 8** The "20% Rule" is a Fatal Flaw for Expert Witnesses in Medical Negligence Cases  
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- 12** Correctional Officers Recognized as "Public Safety" through House Bill 205 in a 2018 Victory for Workers' Compensation  
*By James K. MacAlister*
- 14** The "No-Fault Birth Injury Fund" – Fiscally Unsound and Irresponsible Legislation  
*By Kelly A. Donohue*
- 18** Jeff Sessions is Gone, but His Impact on Immigration Remains  
*By Sheri B. Hoidra*
- 24** The Difficulties and Limitations of Carbon Monoxide Cases  
*By Mary M. Koch*
- 28** Repeal of Alimony Tax Deduction in the TCJA  
*By David V. Diggs, David S. Goldberg and Louise A. Taylor, PhD*
- 34** Ex Parte Contacts with Treating Health Care Providers  
*By Ellen B. Flynn*
- 40** Fourth Circuit Upholds Witness Testimony Privilege to Bar All Civil Liability  
*By Gregg H. Mosson*
- 44** Persuading a Digital Jury with Electronic Trial Presentations  
*By John J. Cord*
- 54** Special Reporter – Interesting Verdicts of 2018  
*By Tj Keilty*
- 60** The Use of Language for Trial Lawyers and Their Clients  
*By Eric Stravitz and Keith Mitnik*

## IN EVERY ISSUE

- 2** President's Message  
*By David J. Wildberger*
- 66** Appellate Watch  
*By Stephan Y. Brennan and Patrice Meredith Clarke*