[Cite as *Myers v. Steiner*, 2011-Ohio-576.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

DAWN MYERS, et al.	C.A. No. 25166
Appellants	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
R. DARYL STEINER, D.O., et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellees	CASE No. CV 2009-03-2359

DECISION AND JOURNAL ENTRY

Dated: February 9, 2011

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Dawn Myers lost custody of her daughter M.M. after Dr. R. Daryl Steiner reported to Children Services that he suspected M.M. had been the victim of medical child abuse. Ms. Myers sued Dr. Steiner and his employer, Children's Hospital Medical Center, for negligence, fraud, and defamation. The trial court granted summary judgment to Dr. Steiner and the hospital, concluding that Dr. Steiner did not owe a duty of care to Ms. Myers and that Dr. Steiner had immunity for reporting his child abuse suspicions to Children Services and for testifying in the custody proceeding. We affirm because Dr. Steiner has immunity for reporting his suspicions of child abuse to Children Services and for his testimony during the Myerses' custody proceedings.

BACKGROUND

{¶2} Jeffrey and Dawn Myers married in 1999 and divorced in 2004. They had three children, who lived with Ms. Myers after the divorce. Their middle child suffered from mitochondrial dysfunction, which resulted in her death. When their youngest child, M.M., also began having symptoms of mitochondrial dysfunction, Ms. Myers had her evaluated for it. Doctors eventually diagnosed M.M. with mitochondrial dysfunction and prescribed her a cocktail of 23 vitamin supplements and prescription drugs. A surgeon also implanted a G-tube in M.M. to help with digestive problems.

{¶3} In October 2007, M.M. was hospitalized for nasal congestion and fever. During her stay, M.M.'s attending physician noticed that M.M. appeared to be very healthy, which was inconsistent with the medical history Ms. Myers had provided. Because M.M.'s diagnoses were inconsistent with her clinical examination, the attending physician brought the matter to the attention of Dr. Steiner, who handles cases of suspected child abuse for the hospital.

{¶4} On October 30, 2007, Dr. Steiner held a meeting with many of the doctors who had treated M.M. over the years. A Children Services representative was also in attendance. During the meeting, the doctors were unable to identify who had made a definite diagnosis of mitochondrial dysfunction for M.M. They reviewed M.M.'s history of reported symptoms and determined that none of the doctors had actually observed the symptoms reported by Ms. Myers. They concluded that it was unlikely that M.M. actually had a mitochondrial disorder or other significant medical problem and that all of the medical interventions that she had been receiving should be discontinued.

{¶5} Following the meeting, Dr. Steiner prepared a written report for Children Services. In the report, he noted that the majority of M.M.'s physicians had decided that M.M.

did not have a mitochondrial disorder and that "it was very likely that the other diagnoses came about because [Ms. Myers's] presentation to numerous treating physicians of [M.M.] as her having this serious diagnosis." He opined that Ms. Myers's behavior was "consistent with the diagnosis of Fictitious Illness by Proxy Syndrome, otherwise known as Munchausen Syndrome by Proxy." He further opined that M.M. "is the victim of Fictitious Illness by Proxy and has suffered serious and permanent harm and is at risk for suffering further harm as the result of [Ms. Myers's] continued pursuit of medical care for an illness that [M.M.] does not have."

{¶6} The Children Services representative who had attended the meeting of M.M.'s doctors contacted the guardian ad litem who had been appointed for M.M. in the Myerses' divorce proceeding and told him that Children Services was going to take custody of M.M. unless other steps were taken. The guardian ad litem, therefore, filed an emergency motion to transfer custody of M.M. from Ms. Myers to Mr. Myers. The domestic relations court granted her motion. The domestic relations court, subsequently, held a hearing regarding custody of M.M., at which Dr. Steiner testified about what had happened at the meeting of M.M.'s doctors and his recommendation for M.M.

{¶7} After losing custody of M.M., Ms. Myers filed this action against Dr. Steiner. Her complaint had three counts: one for medical malpractice, one for fraud, and one for defamation. Regarding her medical malpractice count, Ms. Myers alleged that Dr. Steiner incorrectly diagnosed her with Munchausen Syndrome by Proxy. Regarding her fraud count, she alleged that Dr. Steiner knowingly made false statements to a Dr. Bruce Cohen, a Cleveland physician. Specifically, she alleged that Dr. Steiner fraudulently told Dr. Cohen that she had fabricated M.M.'s symptoms. She also alleged that Dr. Steiner knowingly made false statements in the report he submitted to Children Services, in particular, that he had reached his conclusion

after consulting with the majority of M.M.'s physicians. She also alleged that "[m]any other portions of . . . [the] report are patently false." Ms. Myers further alleged that, at the hearing on the guardian ad litem's emergency custody motion, Dr. Steiner "testified and continued to assert false allegations which he knew or should have known were false." Regarding her defamation claim, Ms. Myers alleged that Dr. Steiner made false and defamatory statements about her to Dr. Cohen during the hearing on the guardian ad litem's emergency custody motion and during subsequent hearings.

{¶8} Dr. Steiner and the hospital moved for summary judgment, arguing that Dr. Steiner has statutory immunity for reporting his suspicions of child abuse, that he has immunity for his participation in a judicial proceeding, and that Ms. Myers's medical malpractice claim fails as a matter of law because he did not have a physician-patient relationship with her. The trial court determined that Ms. Myers's medical malpractice claim failed as a matter of law because Dr. Steiner did not owe a duty to Ms. Myers or her family. It noted that Dr. Steiner's opinion was elicited by M.M.'s treating physicians and that he never had a physician/patient relationship with Ms. Myers or her family. The trial court also determined that Dr. Steiner has statutory immunity for reporting Ms. Myers's suspected child abuse to Children Services and for his participation in the custody proceedings. It, therefore, granted Dr. Steiner and the hospital's motion for summary judgment. Ms. Myers has appealed, assigning three errors.

SUMMARY JUDGMENT

{¶9} Ms. Myers's first assignment of error is that the trial court incorrectly granted summary judgment to Dr. Steiner and the hospital based on immunity; her second assignment of error is that the trial court incorrectly failed to rule on her motion to amend her complaint; and her third assignment of error is that the trial court incorrectly granted summary judgment to Dr.

Steiner and the hospital on her fraud and defamation claims. In reviewing a trial court's ruling on a motion for summary judgment, we apply the same standard a trial court is required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990).

IMMUNITY

{¶10} Dr. Steiner has argued that the trial court correctly granted him summary judgment because he has immunity for reporting his child abuse suspicions to Children Services and for testifying about his suspicions in court. Doctors have a duty under Section 2151.42.1(A)(1) of the Ohio Revised Code to report suspected child abuse "to the public children services agency or a municipal or county peace officer in the county in which the child resides . . . ." Under Section 2151.42.1(G)(1), "anyone . . . participating in the making of reports under division (A) of this section . . . and anyone participating in good faith in a judicial proceeding resulting from the reports, shall be immune from any civil or criminal liability for injury, death, or loss to person or property that otherwise might be incurred or imposed as a result of the making of the reports or the participation in the judicial proceeding." The purpose of Section 2151.42.1(G)(1) is "to encourage those who know or suspect that a child has fallen victim to abuse or neglect to report the incident to the proper authorities and/or participate in the judicial proceedings to secure the child's safety without fear of being exposed to civil or criminal liability." *Gersper v. Ashtabula County Child. Servs. Bd.*, 59 Ohio St. 3d 127, 130 (1991).

{¶11} Ms. Myers has argued that Dr. Steiner is not entitled to immunity under Section 2151.42.1(G)(1) because he reported his child abuse suspicions to people other than those identified in the statute. According to her, when Dr. Steiner learned that Children Services was

not going to take action on his report, "he took it upon himself to meet with the child's former guardian ad litem . . . and the child's father's domestic relations attorney . . . ." She has argued that Dr. Steiner "chose to step beyond the realm of a mandatory reporter and took on the role of an active crusader, injecting himself directly into [her] custody case."

{¶12} Ms. Myers has failed to identify any evidence in the record that supports her argument. See App. R. 16(A)(7). Her only reference to the record is to a one page excerpt from the transcript of the Myerses' custody proceeding:

> Q. And we all proceeded to have a meeting with Dr. Steiner at Children's Medical Center, correct?
>
> A. We did.
>
> Q. And Dr. Steiner explained to us that it was his intention and Children's Services' intention to have custody of the child removed from the mother regardless of whether the father ended up with custody, correct?
>
> A. That's right. They said either [children's services] was going to juvenile rule 6 the child and take custody, or we needed to make some arrangements for dad to take custody.
>
> Q. Right. And you were anxious to have dad take custody as you've testified rather than the child end up in a foster home, correct?
>
> A. Right.
>
> Q. Wasn't the additional reason for the rule 6 slash change of custody the fact that the Children's Hospital wanted someone in power to immediately discontinue all these medical treatments?
>
> A. Yes.

Q. And they believed that the father would follow the advice and the mother would not?

A. That's correct.

The excerpt Ms. Myers provided does not contain any information identifying either the lawyer or witness who was speaking. It is impossible to tell when the meeting the witness referred to occurred or who else was with Dr. Steiner at the time "[t]hey" allegedly told the witness about Children Services' intentions. Even assuming that Mr. Myers's lawyer was the one asking the questions and that M.M.'s guardian ad litem was the one answering them, the excerpt merely indicates that Dr. Steiner, along with whomever else was present at the meeting, told the guardian ad litem and the lawyer that Children Services intended to take custody of M.M. It does not create a genuine issue of material fact regarding whether Dr. Steiner accused Ms. Myers of child abuse outside the scope of Section 2151.42.1(A)(1).

{¶13} Section 2151.42.1(G)(1) "provides absolute immunity for a report made pursuant to R.C. 2151.421(A)." *Merk v. Watts*, 9th Dist. No. 2340-M, 1994 WL 479187 at *2 (Sept. 7, 1994). We, therefore, conclude that the trial court correctly determined that Dr. Steiner has immunity for what he reported to Children Services. R.C. 2151.42.1(G)(1).

{¶14} Regarding Dr. Steiner's in-court testimony, Ms. Myers has argued that Dr. Steiner does not have immunity for his testimony because he did not testify in good faith. See R.C. 2151.42.1(G)(1)(a) (providing immunity to "anyone participating in good faith in a judicial proceeding resulting from the [child abuse] reports . . . ."). She has alleged that Dr. Steiner gave testimony during the proceedings that was unsupported by other evidence or was contradicted by other witnesses. According to Ms. Myers, "[t]ime and time again, Dr. Steiner recklessly made assertions of fact that were either directly contradicted by other witnesses or which he was

completely unable to support. This clearly equates to a conscious wrongdoing and/or an intent to mislead or deceive."

{¶15} Regarding Ms. Myers's defamation claim, the Ohio Supreme Court has held, independent of Section 2151.42.1, that "[a] statement made in a judicial proceeding enjoys an absolute privilege against a defamation action as long as the allegedly defamatory statement is reasonably related to the proceeding in which it appears." *Hecht v. Levin*, 66 Ohio St. 3d 458, 460 (1993) (citing *Surace v. Wuliger*, 25 Ohio St. 3d 229, syllabus (1986)). Ms. Myers has not argued that Dr. Steiner's testimony at the emergency custody hearing and subsequent custody hearings was not "reasonably related" to those proceedings. Accordingly, to the extent Ms. Myers has alleged that Dr. Steiner defamed her at those hearings, he has absolute immunity.

{¶16} Regarding her fraud claim, Ms. Myers has argued that Dr. Steiner testified in bad faith during the custody proceeding when he said that Dr. Cohen was the first to declare during the meeting of M.M.'s doctors that M.M. did not have a mitochondrial disorder, that a surgeon implanted a G-tube in M.M. based on an online opinion offered by a doctor at Johns Hopkins, that Ms. Myers fabricated or exaggerated M.M.'s symptoms, and that no doctor had ever diagnosed M.M. with a mitochondrial disorder. In support of her argument, Ms. Myers submitted the deposition of Dr. Cohen, in which he testified that he reconsidered M.M.'s diagnosis only after the other doctors at the meeting convinced him that many of the symptoms that had been reported for M.M. were not true. She also submitted a report by the surgeon who implanted M.M.'s G-tube, indicating that M.M. "has confirmed significant esophageal reflux disease" and "is in need of G-tube feedings." She has noted that the surgeon performed the operation at the same hospital where Dr. Steiner works and so his report, presumably, would have been in M.M.'s medical records. Ms. Myers further submitted a report from a different

doctor at the hospital, listing M.M.'s "Discharge Diagnosis" as "mitochondrial disorder," which also would have been part of M.M.'s records.

{¶17} We have reviewed the record and conclude that the evidence Ms. Myers submitted does not create a genuine issue of material fact regarding whether Dr. Steiner testified in bad faith. The Ohio Supreme Court has described bad faith as "a general and somewhat indefinite term. It has no constricted meaning. It cannot be defined with exactness. It is not simply bad judgment. It is not merely negligence. It imports a dishonest purpose or some moral obliquity. It implies conscious doing of wrong. It means a breach of a known duty through some motive of interest or ill will. It partakes of the nature of fraud. . . . It means with actual intent to mislead or deceive another." *State ex rel. Bardwell v. Cuyahoga County Bd. of Comm'rs*, 127 Ohio St. 3d 202, 2010-Ohio-5073, at ¶8 (quoting *Slater v. Motorists Mut. Ins. Co.*, 174 Ohio St. 148, paragraph two of the syllabus (1962), overruled on other grounds by *Zoppo v. Homestead Ins. Co.*, 71 Ohio St. 3d 552 (1994)).

{¶18} Whether Dr. Cohen was the first to speak at the meeting of M.M.'s doctors and whether he was the first to declare that M.M. did not have mitochondrial dysfunction does not have any bearing on whether Dr. Steiner testified in good faith in the custody proceedings. For purposes of the custody proceedings, only the content of what Dr. Cohen said at the meeting was material. Although Dr. Cohen denied that he was the first to speak during the meeting of M.M.'s doctors, he agreed that he may have told the other doctors that, if M.M. did not have the symptoms that had been reported then his "[mitochondrial dysfunction] diagnosis was completely off the table . . . ." In fact, he testified that, if he was told by the other doctors that what he had been told about M.M.'s history was untrue, he "may have been . . . very emphatic" about his reconsideration of M.M.'s diagnosis.

{¶19} Regarding the G-tube, Dr. Steiner did not testify in the custody proceedings that the surgeon implanted the G-tube based solely on the online opinion Ms. Myers received. His testimony was that "it was communicated to me . . . at the meeting [of M.M.'s doctors] that mother sought a second opinion online from [a] physician at John Hopkins Hospital whereby she described her – the child's symptoms. She got a response back online communication that she needed to have the g-tube done, and she then went for surgical consultation." He testified that he spoke to the surgeon who had implanted the G-tube and "[the surgeon] was of the opinion that it was the recommendation of the physicians at Children's Hospital that it be done . . . ." Dr. Steiner supported his argument that he did not make up the story about the John Hopkins report with an affidavit from one of M.M.'s other physicians, who asserted that it was also her understanding that Ms. Myers "sought out a 'second' opinion via an inquiry through the internet to a physician at John Hopkins regarding the need for a G-tube" and that Ms. Myers presented the opinion to M.M.'s doctors in Akron.

{¶20} Regarding whether Dr. Steiner testified that Ms. Myers fabricated or exaggerated M.M.'s symptoms, Ms. Myers has not directed this Court to any testimony by Dr. Steiner in which he directly alleged that she had made up her daughter's symptoms. At most, Dr. Steiner testified that, "in the course of conversation at that table among these physicians questions were asked and responses given that led us to the conclusion that the symptoms were either inaccurate or exaggerated." Another doctor who was at the meeting corroborated Dr. Steiner's account, asserting that "[i]t was discussed [at the meeting] that [Ms.] Myers . . . would often manipulate [M.M.'s] care in order to obtain a treatment she felt necessary."

{¶21} Finally, regarding whether a doctor had ever diagnosed M.M. with a mitochondrial disorder, Ms. Myers has pointed to testimony by Dr. Steiner that, "[i]n the meeting

that we had it was universally reported that even though the disease was considered, there was no diagnosis made. There was no – she did not fit into any diagnostic parameters that allowed that diagnosis of mitochondrial disease to be made." Ms. Myers has argued that Dr. Steiner's testimony was in bad faith because "practically every one of M.M.'s medical records identifies her diagnosis as mitochondrial disorder." She has also noted that Dr. Nevada Reed, another doctor at Children's Hospital, testified at a deposition in 2006 that it was her diagnosis that M.M. has a mitochondrial disorder.

{¶22} It is not disputed that Dr. Reed was not at the meeting of M.M.'s doctors, so the fact that she had diagnosed M.M. with a mitochondrial disorder does not contradict Dr. Steiner's testimony about what was reported at the meeting. In addition, the fact that M.M.'s medical records indicate that M.M.'s diagnosis is mitochondrial dysfunction, does not demonstrate that what Dr. Steiner testified about what was said at the meeting was in bad faith. Ms. Myers, therefore, has failed to establish that genuine issues of material fact exist regarding whether Dr. Steiner testified in good faith at the custody proceeding. Accordingly, the trial court correctly determined that Dr. Steiner was entitled to immunity under Section 2151.42.1(G)(1) for his participation in the Myerses' custody proceedings.

{¶23} Ms. Myers has next argued that Dr. Steiner does not have immunity for fraudulent and defamatory statements he made to Dr. Cohen during the meeting of M.M.'s doctors. According to Ms. Myers, Dr. Steiner told Dr. Cohen during the meeting that it had been "discovered" that she was falsifying M.M.'s symptoms.

{¶24} The evidence submitted by the parties indicates that the only time Dr. Steiner spoke to Dr. Cohen about M.M.'s diagnosis was during the meeting of M.M.'s doctors that Dr. Steiner arranged. Dr. Cohen attended the meeting by telephone. Dr. Steiner submitted evidence

that a representative from Children Services also attended the meeting, which Ms. Myers has not disputed. Section 2151.42.1(G)(1) of the Ohio Revised Code does not only protect Dr. Steiner for what he wrote in his written report to Children Services. The statute contemplates that the initial report of child abuse may be done in person, followed by a written report. R.C. 2151.42.1(C) ("Any report made pursuant to . . . this section shall be made forthwith either by telephone or in person and shall be followed by a written report, if requested by the receiving agency or officer."). Because a representative of Children Services was present at the meeting of M.M.'s doctors, we conclude that the trial court correctly determined that Dr. Steiner was "participating in the making of [a child abuse] report[ ]" when he allegedly told Dr. Cohen during that meeting that Ms. Myers had fabricated M.M.'s symptoms. R.C. 2151.42.1(G)(1). The trial court, therefore, correctly concluded that Dr. Steiner had immunity under Section 2151.42.1(G)(1) and correctly granted summary judgment to Dr. Steiner and the hospital on Ms. Myers's fraud and defamation claims.

{¶25} Regarding Ms. Myers's medical malpractice claim, we note that, although Dr. Steiner wrote in his report to Children Services that Ms. Myers's behavior was consistent with the diagnosis of Fictitious Illness by Proxy Syndrome, otherwise known as Munchausen Syndrome by Proxy, Ms. Myers has not submitted any evidence that Dr. Steiner repeated his diagnosis during the Myerses' custody proceedings. Ms. Myers has submitted excerpts from, presumably, one of the custody hearings and has attributed the testimony related in those excerpts to Dr. Steiner. Even assuming the testimony is Dr. Steiner's, Ms. Myers has not identified any place in those excerpts at which Dr. Steiner alleged that Ms. Myers has Fictitious Illness by Proxy Syndrome or Munchausen Syndrome by Proxy. Accordingly, since Dr. Steiner has absolute immunity under Section 2151.42.1(G)(1) of the Ohio Revised Code for what he

wrote in his report to Children Services and Ms. Myers failed to present any Rule 56(C) evidence that he repeated that diagnosis in court, we conclude that the trial court correctly granted summary judgment to Dr. Steiner and the hospital on Ms. Myers's medical malpractice claim.

{¶26} Ms. Myers's final argument is that the trial court incorrectly failed to let her amend her complaint to assert an ordinary negligence claim against Dr. Steiner in addition to her medical malpractice claim. Ms. Myers did not file a separate motion to amend, but asked in her brief in opposition to Dr. Steiner's motion for summary judgment that, "if the Court deems necessary, [to] permit [her] to amend [her] Complaint to state a cause of action for simple negligence."

{¶27} Ms. Myers has acknowledged that there is no precedent for holding a doctor liable for medical malpractice when there is no physician-patient relationship. She has argued, however, that Dr. Steiner breached a duty of care when he "rendered a diagnosis of [Ms.] Myers" regardless of what her claim is called. As noted above, the only place in which Dr. Steiner purported to render a diagnosis of Ms. Myers was in his report to Children Services, for which he has absolute immunity under Section 2151.42.1(G)(1). Accordingly, whether Ms. Myers's claim is characterized as a medical malpractice or ordinary negligence claim is irrelevant. The trial court correctly denied Ms. Myers's motion to amend.

{¶28} Dr. Steiner has immunity under Section 2151.42.1(G)(1) of the Ohio Revised Code for what he said during the meeting of M.M.'s doctors and for what he wrote in his report to Children Services. Because there is no genuine issue of material fact that he testified in good faith during the Myerses' custody proceedings, he also has immunity for his testimony. Ms. Myers's claims against Dr. Steiner and the hospital, therefore, fail as a matter of law. Ms. Myers's first, second, and third assignments of error are overruled.

CONCLUSION

{¶29} Dr. Steiner has immunity for Ms. Myers's negligence, fraud, and defamation claims. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellants.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶30} I respectfully dissent. I agree that Dr. Steiner enjoys statutory immunity for statements made in any oral and written reports to Children Services wherein he asserted his suspicions that M.M. had been abused. I further agree that he enjoys a testimonial privilege for any testimony reasonably related to the proceedings before the domestic relations court. I disagree with both the trial court and the majority that this ends the inquiry.

{¶31} Ms. Myers alleged medical malpractice on the basis of statements made by Dr. Steiner to the child's former guardian ad litem. Such statements would not fall within the context of reporting suspected abuse to Children Services and, therefore, do not fall within the purview of statutory immunity. Moreover, there is evidence attached to the motion for summary judgment and brief in opposition which indicates that Dr. Steiner voiced his concerns to the guardian ad litem only after Children Services refused to file a complaint alleging abuse. In addition, appended evidence indicates that Dr. Steiner rendered a diagnosis of Ms. Myers without having ever evaluated her and reported that speculative diagnosis to the guardian ad litem. Further, the evidence indicates that Dr. Steiner attempted to dictate a custodial disposition in the report which he shared with third parties outside the context of a referral to Children Services alleging abuse. In his motion for summary judgment, Dr. Steiner fails to address or assert an immunity defense in regard to these statements which he allegedly made outside the scope of a referral alleging abuse or during judicial proceedings. Inasmuch as his motion challenges the allegations on the basis of a lack of duty due to the lack of a patient-physician relationship between Dr. Steiner and Ms. Myers, the trial court did not address that argument, and I would not do so in the first instance.

{¶32} A doctor's duty, as a mandatory reporter, to report suspected abuse to Children Services does not implicate any authority to attempt to dictate the suspected abused child's custodial disposition. I believe that such comments are completely outside the realm of immunity as it relates to the reporting of suspected abuse. Moreover, a speculative diagnosis of a third party, i.e., not the suspected abused child, made in the absence of any evaluation of the third party, does nothing to support the allegation of suspected abuse. According to the evidence on summary judgment, Dr. Steiner communicated such information, including a diagnosis for Munchausen Syndrome by Proxy, which he later modified, to the former guardian ad litem in an effort to further his own agenda of changing custody in order to change medical treatment, rather than to further Children Services' objectives. In fact, there is evidence that Dr. Steiner provided the report that he initially submitted to Children Services in support of his allegations of suspected abuse to the guardian in furtherance of his efforts to modify custody. Although the guardian later admitted at a hearing before the domestic relations court that she did not believe that Dr. Steiner had properly diagnosed Ms. Myers, she further testified that she submitted her affidavit along with Dr. Steiner's report in support of her motion to transfer custody from Ms. Myers to Mr. Myers, the disposition Dr. Steiner sought.

{¶33} The record indicates that Dr. Steiner communicated his unfounded diagnosis of Ms. Myers to others outside the scope of his report of suspected abuse to Children Services and his testimony during judicial proceedings solely in furtherance of his own goals. As evidence, Dr. Steiner averred in his affidavit that "it would be necessary to obtain a change of custody from Mrs. Myers to Mr. Myers and to prevent Mrs. Myers from having the ability to intervene." Dr. Steiner's averments indicate that he sought to divest Ms. Myers of all her parental rights, repeatedly referring to an award of "permanent custody" of the child despite the fact that Ms.

Myers could not have been divested of all parental rights and responsibilities by the domestic relations court. In fact, she still retains residual rights and responsibilities in relation to the child. Moreover, she is not precluded from moving the domestic relations court for a modification of the allocation of parental rights and responsibilities if the circumstances warrant it.

{¶34} Dr. Karen Willis confirmed in her affidavit that Dr. Steiner sought "to involve appropriate agencies to obtain a change of custody." When Children Services declined to seek temporary custody or file a complaint alleging the child was abused, Dr. Steiner continued to pursue his custody objectives for the child by discussing his unsubstantiated diagnosis of Ms. Myers with the child's former guardian ad litem and Mr. Myers' counsel. This is substantiated by sworn testimony adduced at a hearing before the Summit County Domestic Relations Court. Although Ms. Myers appended only a portion of the transcript to her brief in opposition, and the witness and questioner are not identified therein, she identifies the speakers as the guardian and Mr. Myers' counsel in her brief. Dr. Steiner did not object to the appended evidence and the trial court asserted that it considered all the evidence submitted. Moreover, he has not contested this evidence either at trial or on appeal. Accordingly, the reviewing court must also consider the evidence for what the proponent purports it to be. See *Zivich v. Northfield*, 9th Dist. No. 24836, 2010-Ohio-1039, at ¶11, quoting *Wolford v. Sanchez*, 9th Dist. No. 05CA008674, 2005-Ohio-6992, at ¶10 (stating that "if the opposing party fails to object to improperly introduced evidentiary materials, the trial court may, in its sound discretion, consider those materials in ruling on the summary judgment motion.").

{¶35} The evidence indicates that Dr. Steiner rendered a mental health diagnosis of Ms. Myers notwithstanding his failure to evaluate her. He then communicated that unsubstantiated diagnosis to others outside the scope of any referral to Children Services or testimony relevant to

judicial proceedings. In fact, he communicated his diagnosis to others with the goal of divesting Ms. Myers of custody. If Dr. Steiner's goal was merely to effectuate certain medical treatment in the best interest of the child, there were other legally viable means by which he could have pursued that objective. See, e.g., R.C. 2111.06 (providing for the appointment of a guardian of the child where parents are unsuitable or where the child's interests will otherwise be promoted by the appointment). By advocating in his report for a change of custody, however, he went beyond his statutory duty of merely reporting suspected abuse. I do not believe that the immunity statute was intended to shield this type of overreaching behavior. Assuming that Ms. Myers suffered harm as a proximate result of Dr. Steiner's speculative, unsubstantiated, and ultimately rejected diagnosis, he may not hide behind the veil of statutory immunity only because he originally compiled such information as part of a report of suspected abuse to Children Services.

{¶36} I recognize the important and necessary role that immunity plays in fostering the reporting of child abuse to the appropriate agencies. It is not my intention to detract from the valid purpose of immunity in those situations. Not every allegation, however, is protected where it goes beyond the reporting of suspected abuse to a child services agency. In this case, Dr. Steiner properly reported his concerns regarding the child's health and safety to Children Services. However, the evidence indicates that he contemporaneously bathed Ms. Myers with the stigma of mental illness and labeled her as a child abuser, both of which were ultimately discounted. Nevertheless, based on Dr. Steiner's misstatements, which a jury might find to be reckless, Ms. Myers was deprived of the opportunity for contact with her child during the course of the domestic relations court proceedings. The continued disruption of her presence in the child's life ultimately resulted in her loss of custody. She is permitted to visit with her child for a

mere eight hours a week, much less than the standard order of visitation; and her relationship with her daughter has been changed forever. While immunity serves a critical purpose in shielding those who are duty bound to report their suspicions that certain children have been abused, there is no valid interest to be served by shielding reporters from liability for harm caused by reckless misstatements which exceed the scope of the report of suspected abuse.

{¶37} Although this is an issue of first impression in Ohio, there is some authority for rejecting a finding of blanket immunity in a medical malpractice claim when damages arise from a negligent misdiagnosis rather than a report to Children Services. In *Harding v. Martini* (2000), 312 Ill.App.3d 108, 726 N.E.2d 84, a physician reported to the local child protective agency that she suspected that a young girl had been sexually abuse based on her finding that the child's transhymenal opening was "abnormal[ly]" large. Id. at 87. After Mother lost temporary custody of the child, the physician notified Father's attorney that an error resulting from "confusion of one of the magnifying powers used on the colposcope" resulted in a misreading of the size of the child's transhymenal opening, and that the diameter was actually "in the normal range." Id. at 88. The child filed a medical malpractice action based on the physician's misdiagnosis, seeking damages for her temporary removal from Mother. The appellate court held that immunity does not shield a physician's independent negligence "simply because the result of that malpractice also became a predicate of a[n] [agency] report [of abuse] that followed." Id. at 93. The appellate court reasoned:

> "We are not unmindful of the important policy reason underlying the Act's immunity: granting such immunity for liability arising from the reporting of child abuse helps encourage such reporting. However, in the instant case it is clear that no liability should or will flow from any damages caused by the report to [the agency] (for which immunity is granted), and there is no reason to extend that immunity to cover the doctor's independent obligation to her own patient where the failure to do so causes damage independent of the [agency] report." Id. at 91.

{¶38} I would apply the same reasoning to the instant case. If Dr. Steiner's misdiagnosis of Ms. Myers resulted in damage independent of the report itself to Children Services, then he is not immune from liability. Accordingly, I would reverse the judgment of the trial court which granted summary judgment on the basis of immunity. Moreover, I would remand for the trial court to consider in the first instance the issue of duty which was raised in the motion for summary judgment.

{¶39} I further wish to express my concerns over the unconventional management of a case in which allegations of child abuse were raised. Allegations of child abuse made to Children Services implicate the agency's duty to investigate. R.C. 5153.16(A)(1). Normally, indications that a child is being abused result in the agency's filing of a complaint in the juvenile court, where the State must prove the allegations by clear and convincing evidence. Moreover, the agency maintains a duty to use reasonable efforts, in part, to "make it possible for the child to return home safely[.]" R.C. 5153.16(A)(18). In cases where a parent is alleged to have mental health issues, this typically entails requirements that the parent obtain a mental health evaluation to determine the problem and that the parent comply with all treatment recommendations.

{¶40} Here, however, Children Services' investigation ceased with the discovery that the issue of the child's custody was already the subject of a divorce action. Accordingly, Ms. Myers was deprived of the opportunities to obtain agency services to verify or disprove a diagnosis of Factitious Illness by Proxy Syndrome and to force the State to prove the allegations of abuse by clear and convincing evidence. Instead, the issue of custody was determined, in part, on the mere speculative diagnosis of a doctor who never evaluated Ms. Myers and whose testimony needed only to demonstrate the best interest of the child by a preponderance of the evidence.

{¶41} In conclusion, I am concerned by the procedural posture utilized in the determination of child custody in this case. From a substantive perspective, I disagree with the majority's conclusion that the trial court did not err by granting summary judgment to Dr. Steiner and the hospital on the basis of immunity. I would reverse and remand this matter for further proceedings.

APPEARANCES:

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