

2017

Rocio Smith Plaintiff-Appellant vs. Kayelyn Robinson, Lcsw Defendant-Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROCIO SMITH,

Plaintiff-Appellant,

vs.

KAYELYN ROBINSON, LCSW,

Defendant-Appellee.

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Case No. 20160106

REPLACEMENT BRIEF OF DEFENDANT-APPELLEE

* * *

PLAINTIFF'S APPEAL FROM A JUDGMENT OF DISMISSAL,
ENTERED BY THE FOURTH JUDICIAL DISTRICT COURT, SPANISH
FORK, UTAH, THE HONORABLE JAMES BRADY, PRESIDING

* * *

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Case No. 20160106

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IN THE SUPREME COURT OF THE STATE OF UTAH

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vs.

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Case No. 20160106

REPLACEMENT BRIEF OF DEFENDANT-APPELLEE

* * *

STATEMENT OF APPELLATE JURISDICTION

This is an appeal from a district court order dismissing a health care malpractice claim brought by plaintiff Rocio Smith (“Mother”) against defendant Kayelyn Robinson, LCSW (“Therapist”). Dismissal was ordered by the Fourth Judicial District Court, Spanish Fork Division, the Honorable James Brady, presiding. This Court originally transferred this case to the Utah Court of Appeals under Utah Code Ann. §§ 78A-3-102(4), 78A-4-103(2)(j) (Westlaw 2016). However, after briefing to the court of appeals was completed, this Court recalled the case, and then authorized supplemental or replacement briefing. This Replacement Brief responds to the one filed by Mother.

ISSUE PRESENTED ON APPEAL,
STANDARD OF APPELLATE REVIEW,
and
ISSUE PRESERVATION

Therapist identifies one issue on appeal, departing from Mother's two identified issues, as permitted by Utah R. App. P. 24(b)(1). The issue is:

I: Did the district court correctly dismiss Mother's malpractice claim against Therapist, based upon its holding that Therapist, as an adverse witness to Mother in underlying litigation, owed no duty to Mother? Appellate review of an order granting a motion to dismiss, or a motion for summary judgment, is non-deferential. *E.g.*, *Candelaria v. CB Richard Ellis, et al.*, 2014 UT App 1, ¶ 5, 319 P.3d 708, 709-710. Also: "The issue of whether a duty exists is entirely a question of law to be determined by the court." *Joseph v. McCann*, 2006 UT App 459, ¶ 10, 147 P.3d 547 (quoting authority), *cert. denied*, 168 P.3d 339 (Utah 2007). This "duty" issue was presented in the defense motion to dismiss, in the district court. (Corrected Mot. to Dismiss, R. 141-144.)

DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, AND RULES

While some statutes are implicated in Therapist's argument, none is determinative.

STATEMENT OF THE CASE

This case statement departs from Mother's. For a clearer presentation, the defense begins with a recitation of underlying child custody litigation that gave rise to the district court lawsuit that is the direct subject of this appeal. And although the district court treated Therapist's dispositive motion as a motion to dismiss (R. 284, in Appellee's

Replacement Addendum § 4), the defense presented it, alternatively, as a motion for summary judgment, and supported it with material outside the pleadings—in particular, rulings in the underlying child custody litigation—in which Therapist had been a witness. We proceed similarly in this Court as does Mother.

**Nature of the Case, Course of Proceedings, and
Disposition in the District Court**

The Underlying Child Custody Litigation.

This case arises from a bitter child custody dispute that pitted Mother (plaintiff Rocio Smith) against her ex-husband (“Father”) and his new wife (“Stepmother”). Stepmother engaged Therapist, a social worker, to provide therapy to the two subject children. Subsequently, Father and Stepmother called Therapist as a witness in a child custody trial, seeking termination of Mother’s parental rights based upon their allegation that Mother had abused the children. The trial was held in a juvenile court (the “custody court”), and Therapist’s testimony supported the abuse allegation.

Her testimony did not persuade the custody court, which decided the child custody dispute in favor of Mother. In its decision, the custody court harshly criticized Therapist. The court also found Father and Stepmother in contempt for misconduct during the child custody litigation, and ordered them to pay Mother’s attorney fees and court costs. (Findings of Fact, Conclusions of Law, and Order, hereinafter “custody decision,” R. 153-217, in Appellee’s Rcpl. Addendum § 1.) The custody decision was affirmed on appeal as to custody of the children, but vacated for a hearing on the contempt issue.

Mother's District Court Lawsuit.

Subsequently, Mother sued Therapist in a district court. Mother asserted two claims: one for malpractice, and the other for negligent infliction of emotional distress. (Complaint ¶ 32-51, R. 1-8, in Appellee's Replacement Addendum § 2.)

After filing her answer, Therapist filed a motion to dismiss, or alternatively, a motion for summary judgment. Addressing malpractice, Therapist argued that she owed no duty of care, toward Mother, that could support the malpractice claim. (R. 141-144.) Addressing negligent infliction of emotional distress, Therapist argued that the "distress" alleged by Mother was insufficient to support that claim. (R. 144-150.)

After briefing and oral argument, the district court granted the motion to dismiss both of Mother's claims, explaining its reasoning in a written ruling. (R. 284-294, in Appellee's Repl. Addendum § 4.) It then entered a final dismissal order. (R. 302.) Mother appeals the dismissal of her malpractice claim. She does not appeal the dismissal of her "NIED" claim. (Replacement Br. of Appellant p. 5-6, Statement of Issues.)

Facts Relevant to the Issue Presented on Appeal

The defense focuses on *facts* that are presumed true or are undisputed, for purposes of deciding a dispositive motion. The district court observed that conclusory assertions are not treated as facts. (R. 284-285, in Appellee's Repl. Addendum § 4.) We draw the facts from Mother's Complaint, as well as from the custody decision, from which Mother's Complaint borrowed heavily. The district court's fact recitation, by and large, was consistent with these sources.

1. Father and Mother were divorced in July 2008. In November 2008, the decree was amended to provide “joint legal custody” of their two young children (born August 2004 & November 2006), with visitation rights to Mother. (Complaint ¶ 9-10, R. 2, in Appellee’s Repl. Addendum § 2; custody decision ¶ 7-8, R. 155, in Repl. Addendum § 1.)
2. After the divorce, Father married Stepmother. From September 2008 onward, the Utah Division of Child and Family Services (DCFS) investigated multiple accusations, by Father and Stepmother, that Mother was neglecting or abusing the children. (Complaint ¶ 11, R. 3, in Repl. Addendum § 2; custody decision ¶ 11-15, 17, R. 156-158, in Appellee’s Repl. Addendum § 1.)
3. Three of those accusations led to “supported findings” by DCFS against Mother, for maltreatment of the children. (Custody decision ¶¶ 11, 12, 17, R. 156-158, in Appellee’s Repl. Addendum § 1.) Those accusations, and the DCFS investigations of same, resulted in the interruption of Mother’s child visitation rights for varying time periods, once for nearly two years. (Id. ¶¶ 15, 18.)
4. In February 2011, Father and Stepmother petitioned the custody court to terminate Mother’s parental rights over the children. Mother counter-petitioned, asking to terminate Father’s parental rights. (Complaint ¶ 12, R. 3, in Appellee’s Repl. Addendum § 2; custody decision p. 1-2, R. 153-154, in Repl. Addendum § 1.)

5. At that time, Therapist was providing mental health therapy to the children, having been previously hired by Stepmother for that purpose. (Complaint ¶¶ 13-14, 21, R. 3-4, in Appellee's Repl. Addendum § 2.)
6. Therapist became involved in the child custody dispute, and eventually was a witness at the custody trial, called by Father and Stepmother. (Custody decision, R. 169-172, in Appellee's Repl. Addendum § 1.)
7. Mother alleges that Therapist committed misconduct while she was serving as the children's therapist, in connection with the child custody litigation. Those allegations included the following:
 - a. Therapist opined, to the custody court, that Mother had sexually abused the children. (Complaint ¶ 48, R. 7, in Appellee's Repl. Addendum § 2; custody decision ¶ 62, R. 170, in Repl. Addendum § 1.)
 - b. However, in reaching that opinion, Therapist "uncritically accepted" Stepmother's statements about the alleged abuse, without recognizing that they may have been influenced by Father's and Stepmother's position in the child custody litigation. (Complaint ¶ 16, R. 3, in Appellee's Repl. Addendum § 2; custody decision ¶ 62, R. 170, in Repl. Addendum § 1.)
 - c. Based upon her belief that the children had been abused, Therapist "actively advocated against" Mother in the child custody litigation, and worked with Father and Stepmother to "protect" the children from Mother. (Complaint ¶ 17,

R. 3, in Appellee's Repl. Addendum § 2; custody decision ¶ 59, R. 169-170, in Repl. Addendum § 1.)

- d. Therapist "actively opposed" a custody court order, supported by a court-appointed custody evaluator, for independent observation of the interactions between the children and Mother. (Complaint ¶ 19-20, R. 3, in Appellee's Repl. Addendum § 2; custody decision ¶ 60, R. 170, in Repl. Addendum § 1.)
8. In November 2011, the custody court ordered Therapist to terminate her therapy services to the children, and to have no further contact with them. (Complaint ¶ 21, R. 4, in Appellee's Repl. Addendum § 2; custody decision ¶ 61, R. 170, in Repl. Addendum § 1; custody court Nov. 10, 2011 order, R. 131.)
9. Mother alleges that after being discharged as the children's therapist, Therapist committed the following acts:
- a. Therapist continued to have contact with the children. (Complaint ¶ 22, R. 4, in Appellee's Repl. Addendum § 2.) This looks like an overstatement. According to the custody court, Therapist attempted to observe a supervised visit between Mother and the children, at the behest of Stepmother. (Custody decision ¶ 64, R. 171, in Appellee's Repl. Addendum § 1.)
 - b. Therapist continued to "uncritically accept" the statements of Stepmother "to the detriment of the minor children and [Mother]." (Complaint ¶ 23, R. 4, in Appellee's Repl. Addendum § 2.)

- c. Therapist recruited another therapy patient, unrelated to the custody case, to surreptitiously record the court-appointed custody evaluator. To persuade the other patient to do this, Therapist allegedly made a “what if they were your children?” sympathy pitch to her. (Complaint ¶ 25, in Appellee’s Repl. Addendum § 2.)
 - d. Therapist improperly used somebody else’s key to enter the therapy office (Utah Family Institute, or “UFI”) where she had formerly worked, to access the children’s protected therapy records. (Complaint ¶ 26, R. 4, in Appellee’s Repl. Addendum § 2; custody decision ¶ 66, R. 172, in Repl. Addendum § 2.)
 - e. Without releases to do so, Therapist dispersed information about the children, from those records, to the custody dispute parties, attorneys, and the custody court. (Complaint ¶ 27, R. 4, in Appellee’s Repl. Addendum 2; custody decision ¶ 66, R. 172, in Repl. Addendum § 2.)
10. Eventually, the custody dispute—between Father and Stepmother on one side, and Mother on the other—proceeded to trial. The custody trial spanned nearly six months, in 23 sessions, from late March 2012 to early September 2012. (Custody decision, R. 153-154, in Appellee’s Repl. Addendum § 1.)
11. Participation in the custody trial was not limited to Therapist’s testimony. The custody court referenced multiple investigations by the Utah Division of Child and Family Services. (Custody decision, R. 156-157 ¶ 14-17, 165 ¶ 43, in Appellee’s Repl. Addendum § 1.) The Utah Attorney General’s office was involved. (Id., R.

153.) Psychosexual and polygraph examinations were done. (Id., R. 158 ¶ 19-20.)

The court-appointed examiner attempted a parental fitness and parent time evaluation, but was obstructed by Father and Stepmother; he did eventually testify.

(Id., R. 159-160 ¶ 24-27, 175-179 ¶ 76-84.) An entity described as “ACAFS” submitted child visitation reports. (Id., R. 162 ¶ 162.) At least two other therapists for the children testified. (Id., R. 163 ¶ 36-37, R. 167-169 ¶ 49-56.) A children’s shelter nurse testified. (Id., R. 172-173 ¶ 68-69.)

12. Called as a witness by Father and Stepmother, Therapist’s testimony supported Father’s and Stepmother’s allegation that Mother had sexually abused the children, which the custody court called the “primary and most serious allegation in this matter . . .” (Custody decision ¶ 47, R. 166, in Appellee’s Repl. Addendum § 1.)

13. In April 2013, over a year after convening trial, the custody court issued its 65-page child custody decision. The custody court rejected the child sex abuse allegation against Mother, finding that Father’s and Stepmother’s evidence, presented in support of that allegation, was not credible. (Custody decision ¶ 47-112, R. 166-189, in Appellee’s Repl. Addendum § 1.)¹

14. Before addressing Therapist’s testimony, the custody court addressed the testimony of a predecessor therapist for the children. The predecessor therapist evidently opined that the children had been abused by Mother. The custody court

¹The custody decision contains duplicate paragraphs numbered 112 and 113, but with different content. (R. 189-190.)

found that testimony to be non-credible. (Custody decision ¶ 49-56, R. 167-169, in Appellee's Repl. Addendum § 1.)

15. Turning to Therapist's testimony, the custody court detailed its reasons for finding that her opinion, in support of the sex abuse allegation, was not credible. Those reasons included Therapist's "uncritical acceptance" of information tending to show that the children had been abused, and various actions taken by Therapist based upon her abuse opinion—such as opposing the court-ordered parent-child evaluation. The court also condemned Therapist's recruitment of the other therapy patient to record the court-appointed evaluator, and her retrieval of records from her former office. The court opined that "[Therapist]'s actions in this matter were at best biased, and at worst tortious or criminal." (Custody decision ¶ 57-67, R. 169-172, in Appellee's Repl. Addendum § 1.)

16. The custody court also rebuked Father and Stepmother, finding that they had "behaved like individuals with both a vendetta and a hidden agenda." (Custody decision ¶ 92, R. 181-182, in Appellee's Repl. Addendum § 1.) The court found that Father and Stepmother had manipulated the children, and misrepresented the statements of professionals, to support their accusations of abuse. (Id. ¶ 70-75, R. 173-175.) After numerous other criticisms (id. ¶ 93-102, R. 182-186), the custody court found that Father's and Stepmother's "perceptions are deeply biased, misinformed and/or based on malice," and that their credibility was "severely damaged." (Id. ¶ 103, R. 185-186.)

17. The custody court did not only find that Father and Stepmother had failed to prove that Mother had abused the children. It went even further, stating: “[T]he Court finds by clear and convincing evidence that the Mother *did not* sexually abuse [the children] and hereby exonerates her.” (Custody decision ¶ 113, R. 189, in Appellee’s Repl. Addendum § 1, emphasis in original.)
18. Accordingly, the custody court entered no less than eighteen orders, including:
- a. Denial, with prejudice, of Father’s and Stepmother’s petition to terminate Mother’s parental rights. (Custody decision ¶ 195, R. 213, in Appellee’s Repl. Addendum § 1.)
 - b. Partial grant of Mother’s counter-petition to terminate Father’s and Stepmother’s parental rights. (Id. ¶ 196, R. 213.)
 - c. Setting a primary goal to reunify the children with Mother. (Id. ¶ 199-200, R. 213-214.)
 - d. Significant curtailment of Father’s and Stepmother’s contact with the children. (Id. ¶ 204, R. 215.)
 - e. Ordering Father and Stepmother to pay “all legal fees, costs and expenses incurred by [Mother] in prosecuting her claims and defending against [Father’s and Stepmother’s] claims.” (Id. ¶ 205, R. 215.)
 - f. Found Father and Stepmother in contempt of court, seven counts; suspended jail time for same, on condition that they pay Mother’s attorney fees and costs within ninety days. (Id. ¶ 208, R. 216.)

19. Father and Stepmother appealed the custody decision. The Utah Court of Appeals affirmed as to custody of the children, holding that Father's and Stepmother's appellate brief on that issue was inadequate. The court vacated the contempt finding, remanding that issue for a hearing. *In re E.S. & N.S.*, 2013 UT App 222, 310 P.3d 744 (per curiam).
20. In opposing Therapist's motion to dismiss Mother's subsequent district court lawsuit, Mother reported that she had been unable to collect attorney fees and costs from Father and Stepmother. She did not say whether the custody court had held a contempt hearing. (Opp. to Mot. to Dismiss, Aug. 31, 2015, R. 247.)

SUMMARY OF ARGUMENT

A: Under the "duty" analysis of *Jeffs v. West*, this Court should affirm the district court's dismissal of Mother's malpractice claim. First, this Court should apply a *Jeffs* duty "categorization" that is consistent with the categorization originally presented by Mother, which the district court accepted. That categorization limited the analysis to Therapist's negligently-formulated opinion testimony, in the underlying custody litigation, that the children had been abused by Mother. The Court should reject, as "invited error," Mother's effort to present a much broader categorization to this Court. Because Mother seems to concede that the district court's decision was correct under the original "negligent forensic opinion" categorization, this Court may choose to summarily affirm that decision. If not, then applying the five *Jeffs* "duty factors," weighed as befits the

circumstances, this Court should conclude, like the district court, that Therapist owed no duty to Mother.

B: If this Court applies Mother's original "negligent forensic opinion" categorization, it should disregard her grievances about Therapist's misconduct that falls outside that categorization. If this Court does address those "collateral mistakes," none of them justifies imposing a duty upon Therapist toward Mother. First, contrary to Mother's argument, the law permitted Therapist to serve as both a treating therapist and as a witness at the custody trial. Next, Therapist's interference with Mother-Children visits, and her improper acquisition of the children's care records, do not fall within any reasonable definition of malpractice. Eavesdropping on the court-appointed evaluator, via another therapy patient, also does not fall within malpractice, and any rights violated thereby are not Mother's to assert. Finally, Mother's argument that Therapist behaved "unethically," "tortiously," or "criminally," is unsupported by meaningful analysis; to the extent that she expresses legitimate concerns, such concerns need not and should not be deemed malpractice, and do not justify imposition of a malpractice duty toward Mother.

C: Although Mother asserts misapplication of the judicial proceeding privilege as a separate and reversal-requiring error on appeal, neither the defense position nor the district court's ruling turned on the privilege. Instead, the policies underlying the privilege were presented within the framework of the *Jefferis* duty analysis. In her argument regarding the privilege, Mother also improperly attempts to accuse Therapist of acting dishonestly or otherwise in bad faith—an accusation absent from her Complaint and effectively

disavowed by Mother in opposition to the motion to dismiss. She cannot present such accusation, for the first time ever, to this Court.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT DEFENDANT THERAPIST, AS AN ADVERSE TRIAL WITNESS, OWED NO DUTY TO PLAINTIFF MOTHER.

A: CORRECT “NO DUTY” HOLDING UNDER JEFFS v. WEST.

The district court decided Therapist’s motion to dismiss under this Court’s five-factor analysis of when a duty exists, detailed in B.R. ex rel Jeffs v. West, 2012 UT 11, 275 P.3d 228. (District court Ruling, R. 286-292, in Appellee’s Repl. Addendum § 4.) Mother’s claim was for health care malpractice, and failure of the “duty” element defeats a malpractice claim. Id. ¶ 5 & n.2. As follows, under a rational application of *Jeffs*, adapted to this case, the district court’s judgment should be affirmed.

Categorization under Jeffs v. West, and Invited Error.

In *Jeffs*, this Court identified five “duty factors” that must be “analyzed at a broad, categorical level for a class of defendants . . .” Scott v. Universal Sales, Inc, 2015 UT 64, ¶ 29, 356 P.3d 1172 (quoting *Jeffs*). *Jeffs* arose from a tragedy wherein a husband, while allegedly under the influence of improperly prescribed medications, murdered his wife. This Court held that the couple’s surviving children were entitled to sue the prescriber for the wife’s death, because the prescriber owed a duty not only to the husband, but to the children as well. The “category” of defendants in *Jeffs*, for the purpose of assessing duty,

was “healthcare providers as a class, negligent prescription of medication in general, and the full range of injuries that could result in this class of cases.” *Jeffs*, 2012 UT 11, ¶ 23.

In this case, the district court defined the category as “a treating therapist who testifies in litigation relying on their negligent formulation of forensic opinions . . .” (R. 286, in Appellee’s Repl. Addendum § 4.) To that categorization, and consistent with *Jeffs*, the defense would append “and the range of injuries that could result.”

Mother now argues that the district court’s categorization constituted “one initial, overarching error [that] taints the [district] court’s entire analysis of the duty owed . . .” (Appellant’s Replacement Brief p. 16.) She now argues that the correct categorization is: “treating therapists who commit negligent acts during the performance of their services.” (Id. p. 20.) That category is dramatically broader than the one that Mother urged in the district court: “[I]n this matter, the duty analysis considers treating therapists as a class, negligent forensic determinations of sexual abuse of a minor, and the full range of injuries that could result in the class of cases.” (Mother’s opp. to mot. to dismiss, R. 245, in Appellee’s Repl. Addendum § 3.) She offered this same categorization, *verbatim*, in her brief to the Utah Court of Appeals. (Br. of Appellant p. 15, Court of Appeals No. 20160106-CA.) This “negligent forensic opinion” categorization is virtually the same as the one that was adopted by the district court, quoted earlier.

Under its longstanding “invited error” doctrine, this Court should reject Mother’s new categorization of this case. This Court has explained: “Our invited error doctrine arises from the principle that a party cannot take advantage of an error committed at trial

when that party led the trial court into committing the error.” Pratt v. Nelson, 2007 UT 41, ¶ 17, 164 P.3d 366 (quoting authority). “Invited error” is not limited to errors “at trial;” for example, in Pratt, the doctrine was considered in the context of summary judgment proceedings. Id. ¶¶ 8-10, 17-24. Indeed, invited error should be more strongly condemned in the context of written motion practice, in which the parties have more time, than would be available at trial, to consider, research, and brief their positions.

So it was in this case. In Therapist’s motion to dismiss, the defense initially argued that *Jeffs* does not apply. (R. 142-143.) In opposition, Mother insisted that *Jeffs* does apply, and presented her “negligent forensic opinion” categorization. (R. 245, in Appellee’s Repl. Addendum § 3.) In reply, the defense briefed the motion under *Jeffs*, and offered a modified version of Mother’s categorization: “This case may be better categorized to involve health care professionals who testify in litigation, negligent formulation of forensic opinions, and the injuries that could result.” (R. 269.)

It is pretty clear that Mother’s eleventh-hour attempt to vastly broaden her case categorization is an effort to emphasize alleged (and presumed true) conduct of Therapist that falls outside Mother’s original “negligent forensic opinion” categorization. In the defense briefing to the district court, as well as our brief to the court of appeals, we described that conduct as collateral (and hence irrelevant) to “duty” analysis under *Jeffs*. (Defense reply mem., R. 272-273; Br. of Appellee p. 24-25, Utah Court of Appeals No. 20160106-CA.) That conduct included Therapist’s defiance of custody court orders,

improperly retrieving records from her former office, and her effort to eavesdrop on the court-appointed evaluator. (Fact ¶¶ 7-d, 9-a, 9-c, 9-d, *supra* p. 7-8.)

The defense understands that this Court is likely to disapprove of that conduct. Our best explanation is that it was driven (like her deficient forensic opinion) by Therapist's inexperience and her lack of legal counsel to guide her. (Tr. argument on mot. to dismiss pp. 11, 27-28, at R. 330, 346-347, in Appellee's Repl. Addendum § 5.) But when Mother presented her "negligent forensic opinion" categorization to the district court, for purposes of "duty" analysis, she effectively invited the court to disregard Therapist's collateral misconduct. While the district court did not ignore that conduct, its ruling did focus, consistently with Mother's case categorization, upon Therapist's flawed opinion testimony. (R. 284-294, in Appellee's Repl. Addendum § 4.)

"Invited error" doctrine discourages litigants from affirmatively misleading trial courts, and "fortifies [this Court's] long-established policy that the trial court should have the first opportunity to address a claim of error." *Pratt*, 2007 UT 41, ¶ 17 (quoting authority), followed and quoted in *Wilson v. IHC Hospitals, Inc.*, 2012 UT 43, ¶ 72, 289 P.3d 369. Mother now assails, as "overarching error," the district court's adoption of the very case categorization that she herself advocated. Based upon invited error, that argument is barred. See *Pratt*, ¶ 16 (invited error bars even "plain error" appellate review, which can apply to issues that were merely overlooked in the trial court).

Therefore, this Court should categorize this case similarly to the district court, for purposes of "duty" analysis under *Jeffs*. The defense proposes this version of the district

court's categorization: Treating health care providers who testify in litigation relying on their negligent formulation of forensic opinions, and the range of injuries that could result. Under *Jeffs*, 2012 UT 11, ¶¶ 23, 27, this seems to be suitably clear, general, and broad, yet not so broad and vague as to be unworkable.

Remarkably, in her brief to this Court, Mother appears to concede that under her original “negligent forensic opinion” categorization, the district court’s decision was correct: “Mother does not disagree with the [district] court’s ruling under the law as it now exists, as it applies to the therapist’s testimony—both the rule of law and the policy behind the rule are fairly stated.” (Appellant’s Replacement Br. p. 30, italics in original, underscore added.) If Mother is held to that concession, and if “invited error” bars her effort to change her case categorization, then it appears within this Court’s prerogative and discretion to summarily affirm the district court judgment.

The defense would welcome such result. Nevertheless, in the balance of this section A, we apply *Jeffs* under the district court’s “negligent forensic opinion” categorization. In section B—although it should not be necessary—we revisit Therapist’s collateral misconduct, explaining why it fails to support imposition of a duty, upon Therapist, toward Mother. In section C, we address the “judicial proceeding privilege,” which Mother incorrectly raises as a separate issue on appeal.

The Five Jeffs “Duty Factors.”

The five *Jeffs* “duty factors” are: (1) whether the defendant’s alleged errors consist of affirmative acts or mere omissions; (2) the legal relationship of the parties; (3) the

foreseeability or likelihood of injury; (4) public policy as to which party can best bear (prevent) the loss occasioned by the injury; and (5) “other general policy considerations.” The first two factors are generally deemed “plus” factors to hold that a duty exists, while the last three are “minus” factors. “Not every factor is created equal,” such that “some factors are featured heavily in certain types of cases, while other factors play a less important, or different, role.” Jeffs, 2012 UT 11, ¶ 5.

On appeal, the defense “*Jeffs* duty factor” analysis varies a bit from that of the district court. This variance is permissible, because this Court can affirm the district court’s decision on any proper alternative ground. *E.g.*, Moss v. Parr Waddoups Brown Gee & Loveless, 2012 UT 42, ¶ 26, 285 P.3d 1157; State v. South, 924 P.2d 354 (Utah 1996). Also, *Jeffs* arose from a murder; this case arises from contentious underlying litigation. The variances urged by the defense relate to this distinction.

Jeffs Factor 1: Affirmative Acts versus Omissions.

The first *Jeffs* duty factor does not bear the weight that Mother places upon it. As evidenced by the case categorization, Mother’s grievance is that Therapist negligently formed and testified to her opinion that Mother had abused her children. In the district court, Mother described that error as “affirmative misconduct.” (Opp. to mot. to dismiss, R. 242-243, in Appellee’s Repl. Addendum § 3.) “Affirmative misconduct” would generally be a *Jeffs* “plus factor” for holding that Therapist owed a duty to Mother.

However, “almost every instance,” and thus not every instance, of affirmative conduct gives rise to a duty. *Jeffs*, 2012 UT 11, ¶ 9 (quoting authority, emphasis added).

Also, “[t]he line between acts and omissions is sometimes subtle.” *Scott v. Universal Sales*, 2015 UT 64, ¶ 35.² In describing Therapist’s error as “affirmative misconduct,” Mother omits one of her key criticisms: that Therapist “uncritically accepted” Stepmother’s statements that the children had been abused, without recognizing that such statements were heavily influenced by Father and Stepmother’s position in the custody dispute. (Appellant’s Replacement Br. p. 9 ¶ 6.)

That criticism was a key component of Therapist’s alleged malpractice: Because Therapist *omitted*, or *failed to perform*, critical examination of Stepmother’s statements, her expert opinion in the child custody dispute was flawed (and therefore failed). That *omission* is a “minus” factor under *Jeffs*—or at least a feature to be subtracted from the “plus” nature of the first *Jeffs* factor.

Even if Therapist’s “negligent forensic opinion” error is deemed an entirely “plus” factor for imposing a duty, it is not on the magnitude of prescribing drugs that could cause a patient to physically injure others, as alleged in *Jeffs*. Therapist did nothing that could have caused the children to physically harm Mother. She created no risk that the children would be effectively orphaned, as happened in *Jeffs*. Instead, Therapist testified at the custody trial against Mother, giving an opinion that was flawed and non-credible.

²In *Scott*, the “affirmative act” was establishing a work-release program for jail inmates. 2016 UT 64, ¶ 34. However, there was a tragic “omission” in *Scott*, consisting of failure to adequately supervise those inmates; one such inmate assaulted the plaintiff. *Id.* ¶ 9.

Furthermore, Therapist had a legislatively-mandated “affirmative duty.” While treating the children, if she had “reason to believe” that they were being abused, Therapist was obliged to report such belief to law enforcement. Failure to report could be a crime. Utah Code Ann. §§ 62A-4a-403, 62A-4a-411 (Westlaw 2017). By communicating her opinion to the custody court, Therapist acted consistently with Utah law. It would be unfair to expose Therapist to criminal liability for an omission in failing to report suspected abuse, yet subject her to civil liability for making a report that turns out to be mistaken. This also weakens the “affirmative acts” factor in this case. In sum, Therapist’s faulty opinion testimony is, at most, a very weak “plus” factor.

Jeffs Factor 2: Legal Relationship of the Parties.

In *Jeffs*, no “special legal relationship,” between the prescriber and the non-patient plaintiffs, was needed to hold that the prescriber owed a duty toward the plaintiffs. This Court explained that this factor “generally” applies only when negligent omissions or “failures to act” are alleged. 2012 UT 11, ¶ 7. Because the prescribing decisions in *Jeffs* were affirmative acts, the “legal relationship” factor did not apply. *Id.* ¶ 7-15.

In this case, the district court similarly held that because Mother did not allege omissions as the basis for her malpractice claim, “this element requires no further evaluation at this time.” (R. 289, in Appellee’s Repl. Addendum § 4.) The defense respectfully disagrees. This case presents an instance wherein the general rule does not apply, and the “legal relationship” factor is of major concern.

That legal relationship was *adversarial*, because Therapist was a witness for Mother's adversaries in the underlying custody dispute. It beggars belief to suggest that as an adverse witness, Therapist owed to Mother a duty of care that could support a malpractice claim. When the children were her patients, Therapist had a duty to treat them within care standards. *Maybe* she had a duty toward Father and Stepmother, who called her as their custody trial witness. *Cf. Marrogi v. Howard*, 805 So.2d 1118 (La. 2002) (permitting the party who retained an expert to sue him, after his defective opinion caused that party to lose the underlying case) (cited in Appellant's Replacement Br. p. 42). But she certainly had no duty to give opinions in support of Mother. If Therapist's opinion was negligently formulated, Mother's remedy was to counter it in the custody court—which she did successfully. (Tr. argument on mot. to dismiss, p. 11-12 at R. 330-331, p. 29-30 at R. 348-349, in Addendum § 5.) *See Parker v. Dodgion*, 971 P.2d 496, 499 (Utah 1998) (remedy against errant court-appointed expert was not a civil claim, but rather, cross-examination and presentation of an opposing expert).

Apparently comprehending that Therapist's erroneous opinion might be deemed an omission rather than affirmative misconduct, Mother argues that Therapist had a "special relationship" with her, because Therapist "was treating Mother's minor children with full knowledge of the allegations against her." Mother then segues into a recitation of the constitutional dimension of parental rights. (Appellant's Replacement Br. p. 23-24.) Mother overlooks that Father had an equally powerful constitutional interest in the children, and thus an equally compelling "special relationship" with Therapist. Given the

parents' competing constitutional interests, the custody court applied the "clear and convincing" proof standard at the custody trial. (R. 211 ¶ 185-186, in Appellee's Repl. Addendum § 1.) In short, the custody court accounted for constitutional concerns.

Also, Mother overlooks the children whose best interests were the proper center of Therapist's and the custody court's attention. Therapist's relationship with Mother was no more "special" than her relationships with Father and the children. It cannot impose a duty upon Therapist, toward Mother, for purposes of malpractice.

Again, the key "special" feature about the legal relationship was its adversarial nature. Under thoughtful application of *Jeffs* duty analysis, this feature has to be considered. Although disregarded by the district court, and identified in *Jeffs* as a "plus" factor, 2012 UT 11, ¶ 5, this feature has to be a "minus" factor in this case. It is hard to imagine that it could even be neutral.

Jeffs Factor 3: Foreseeability or Likelihood of Injury.

No doubt, it is foreseeable that when a witness testifies in favor of one party to a lawsuit, her testimony, if believed, will "injure" the adverse party. No doubt, when Father and Stepmother called Therapist as one of their custody trial witnesses, they *intended* to injure Mother's position on child custody. The district court aptly observed: "That is the inherent nature and intent of our adversarial court system." (R. 290, in Appellee's Repl. Addendum § 4.) As it turned out, the custody court dashed Father's and Stepmother's intentions, because it did not believe Therapist's testimony.

In her argument on foreseeability, Mother cites a psychology abstract, entitled “The Treating Expert: A Hybrid Role with Firm Boundaries,” by L. Greenberg, Ph.D. and J. Gould, Ph.D. (2001) (hereinafter “Greenberg-Gould article”). (Appellant’s Replacement Br. p. 25-26; the article is copied in Appellant’s Addendum E.) The Greenberg-Gould article cautions child therapists against the “uncritical acceptance” of statements made by individuals who are involved in “high-conflict” custody disputes. As such, the article provides worthwhile advice to care providers, such as Therapist, who find themselves caught in such “tribal warfare.”³

In litigation, it is both foreseeable and expected that the credibility of any witness will be challenged for foundation, for bias, and for any and all other reasons permitted under evidentiary rules. It is both foreseeable and expected that in a contest of competing witnesses, the fact finder will decide which are more credible, and one side or the other will come away disappointed and defeated. This is normal under “the inherent nature and intent of our adversarial court system,” to borrow the district court’s expression. The Greenberg-Gould article changes that not one iota.

Had she received and taken Greenberg and Gould’s advice to heart, perhaps Therapist’s custody trial testimony would have been more credible. With ironic candor, Mother acknowledges—not once, but twice—that Therapist’s testimony in the custody court “was in fact helpful to Mother.” It “was so biased and flawed that it was helpful to

³Or, as defense counsel put it in arguing the motion to dismiss, “a poop storm.” (Tr. argument on mot. to dismiss, p. 29-30, R. 348-349, in Appellee’s Repl. Addendum § 5.)

Mother.” (Appellant’s Replacement Br. pp. 28, 39.) So while harm was foreseeable from Therapist’s faulty testimony, the intended and dire harm at issue—loss of parental rights—did not occur. In sum, this “foreseeability” factor cannot support imposition of a duty, upon Therapist, to Mother. To the contrary, given Therapist’s “adverse witness” role, this is a powerful “minus” factor under *Jeffs*.

Jeffs Factor 4: Public Policy about Who Should Bear (can prevent) the Loss.

The fourth *Jeffs* factor “considers whether the defendant is best situated to take reasonable precautions to avoid injury.” *Jeffs*, 2012 UT 11, ¶ 30. The district court observed that because child custody decisions utilize information from multiple sources, it would be unfair to impose a duty on one witness, as attempted by Mother:

There are many people and institutions involved in custody determinations. Orders to keep a parent away from her children, include information provided by other parents, other witnesses, other therapists, departments of the State such as the Department [sic] of Child and Family Services. Ultimately, whether an order is issued is determined by the Court. Since a health care provider who testifies is not the sole, or direct cause of a court’s order, it would be impossible for her to prevent the harm on her own. The person who is best situated to avoid the injury is the person or agency who orders the separation of Plaintiff from her children, based upon the totality of the information provided. . . . It would be inappropriate to place the full burden of blame for separation of parent and child upon the shoulders of one witness, even if it is alleged that the witness negligently formulated forensic opinions.

(Ruling on Mot. to Dismiss, R. 291-292, in Appellee’s Repl. Addendum § 4.)

That observation was astute and accurate. The long custody dispute, underlying Mother’s district court lawsuit, did not turn just upon Therapist’s testimony. Instead, it featured multiple investigations by the Utah Division of Child and Family Services. The

Utah Attorney General's office was involved. Psychosexual and polygraph examinations were done. A court-appointed examiner testified at the trial. "ACAFS" submitted child visitation reports. At least two other involved therapists testified, besides defendant Therapist. A children's shelter nurse also testified. (Fact ¶ 11, *supra* p. 8-9.) It took six months to try the custody dispute, and another seven months for the custody court to issue its decision. (Fact ¶ 10-13, *supra* p. 8-9.)

As it happened, Mother's position was vindicated, in part because of the very "negligence" that she attributes to Therapist. (This was not the first time, nor will it be the last time, that a trial witness has been found non-credible.) The custody court also lambasted and sought to punish Father and Stepmother for their misconduct during the custody litigation. (Fact ¶ 16-18, *supra* p. 10-11.) Thus while the custody court criticized Therapist, it identified Father and Stepmother as the major culprits.

As the named litigants, assisted by counsel, Father and Stepmother were better situated than Therapist to avoid Mother's alleged injury—which evidently consists of the expense and angst of successfully opposing Therapist's opinion. Of course, as already observed, Father and Stepmother set out to cause a much more dire injury to Mother—the deprivation of her parental rights. Had they and their counsel done a better job of preparing Therapist for her custody trial testimony, or had they utilized a more competent expert, Mother could have lost those rights. After all, at least three prior abuse allegations against Mother had been investigated and found to be *supported*. (Fact ¶ 3, *supra* p. 5.)

Mother asserts that Therapist “was neither qualified nor authorized” to give forensic opinion testimony. (Appellant’s Replacement Br. p. 16.) If that were so, then she and her counsel should have moved to exclude Therapist from testifying, under Utah R. Evid. 702 and related case law. Of course, it turned out to be strategically astute to permit Therapist to testify, and to so thoroughly impeach her that her testimony actually helped Mother. In either event, Mother and her counsel were better situated, than Therapist, to prevent the “injury” foreseen by Therapist’s testimony.

Even the very existence of “injury” is in question. Having prevailed in the custody trial, Mother’s only tangible harm is that she had to pay her counsel to defeat the abuse allegations. The custody court ordered Father and Stepmother to pay Mother’s attorney fees and costs, in rare exception to the normal American rule that each side in litigation pays its own attorney fees. *E.g., Utahns for Better Dental Health v. Davis Co. Clerk*, 2007 UT 97, ¶ 5, 175 P.3d 1036. They were to pay those fees and costs in order to avoid jail on the custody court’s contempt finding. (Fact ¶ 18e-f, *supra* p. 11.) Mother does not say whether she had a hearing on the contempt finding, nor does she say why she could not collect the fees and costs. In any event, Therapist cannot be obliged to correct Mother’s default on that issue, nor to indemnify Father and Stepmother for that award.

As to the angst of litigation, Mother offers no authority to suggest that such emotional distress is independently compensable. Trials are stressful—another inherent feature of our adversarial justice system. Overall, then, the “bear (prevent) the loss” factor, a “minus” factor under *Jeffs*, is a “strong minus” in this case.

Jeffs Factor 5: Other General Policy Considerations.

Into this factor, the defense incorporates policies that underpin the judicial proceeding privilege. The district court similarly considered such policies, finding potent reasons against imposing a duty upon Therapist toward Mother. (R. 289-291, in Appellee's Repl. Addendum § 4.) Again, Mother's alleged harm arose from Therapist's opinion testimony. That testimony—whether or not well-founded—is protected by the judicial proceeding privilege:

A witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as part of a judicial proceeding in which he [or she] is to testify, if it has some relation to the proceeding.

RESTATEMENT (2D) OF TORTS § 588, quoted and followed in Price v. Armour, 949 P.2d

1251, 1256 (Utah 1997). “The policy behind such privilege is to encourage full and candid participation in judicial proceedings by shielding the participant from potential liability for defamation.” Price, 949 P.2d at 1256. The privilege bars all civil liability arising from participation in judicial proceedings, not limited to defamation:

“Participation in a judicial proceeding will be inhibited unless all claims arising from the same statements are protected.” Id. at 1258.

The judicial proceeding privilege has three elements: (1) The statements must be made during or in the course of a judicial proceeding; (2) they must have some reference to the subject matter of the proceeding; and (3) the statements must have been made by someone acting in the capacity of judge, juror, witness, litigant, or counsel. Price, 949

P.2d at 1256. The first two elements are broadly interpreted, while the third is “relatively straightforward.” *Pratt v. Nelson*, 2007 UT 41, ¶ 29-31. They are undeniably established in this case: (1) Therapist’s opinion was given during and in the course of the underlying child custody litigation; (2) her opinion related to the litigation; and (3) she was acting as a witness in that litigation.

As Mother observes (Appellant’s Replacement Br. p. 34-35), the privilege is limited: the statement(s) must not be “excessively published.” See *Pratt*, 2007 UT 41, ¶ 33-39. In *Pratt*, some litigants lost the judicial proceeding privilege by airing their civil complaint in a public press conference. *Id.* ¶ 48. In this case, that limitation was not transgressed: Mother does not allege that Therapist publicly aired her faulty opinion.

In *Moss v. Parr Waddoups*, 2012 UT 24, this Court examined the judicial proceeding privilege with respect to attorneys. The Court construed the privilege to immunize not merely statements, but also the *conduct* of attorneys on behalf of their clients. In *Moss*, that conduct consisted of obtaining and executing an *ex parte* order to conduct immediate discovery—akin to a search warrant for a civil case. 2012 UT 24, ¶ 5-

9. This Court approved a Texas court’s observation:

If an attorney could be held liable to an opposing party for statements made or actions taken in the course of representing his client, he would be forced constantly to balance his own potential exposure against his client’s best interest.

2012 UT 24, ¶ 33, quoting *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405

(Tex.App.2005). *Moss* thereby refutes Mother’s assertion that privilege “only applies to

the testimony of a witness in court.” (Appellant’s Replacement Br. p. 19.)

Moss and the Texas court addressed the judicial proceeding privilege with respect to attorneys. It similarly would be poor policy to force Therapist to balance potential civil liability against her duty to testify truthfully (even if mistakenly) in the child custody court, and to act in ways that she deemed helpful (even if mistakenly) to her patient children’s best interests. If attorneys are immunized for their statements and actions in connection with litigation, then persons such as Therapist, lacking equivalent legal expertise, should receive at least equivalent protection.

The judicial proceeding privilege may, by itself, bar Mother’s malpractice lawsuit against Therapist—even if she otherwise owed a duty to Mother.⁴ Regardless, the policy supporting this privilege constitutes an exceptionally potent consideration and “minus” factor, under *Jeffs*, regarding duty to Mother.

The related principle of “quasi-judicial immunity” also weighs against imposing a duty. In *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, 250 P.3d 465, the Utah Supreme Court applied quasi-judicial immunity to a government attorney and to a physician who were involved in litigation about whether a child should receive cancer treatment over his parents’ objections. The attorney had participated in decisions leading to the criminal arrest of the child’s father, and had allegedly “performed a skewed

⁴For example, in *Scott v. Universal Sales*, this Court held that the defendants owed a duty to prevent work-release inmates from harming innocent citizens. The defendants breached that duty, but were protected by governmental immunity (which differs from the judicial proceeding privilege). 2015 UT 64, ¶¶ 34-50, 62-67.

investigation” about whether the parents’ refusal of conventional treatment constituted neglect. 2011 UT 17, ¶ 54. The physician had testified that an alternative treatment provider, preferred by the parents, was not qualified. Id. ¶ 27-28. This Court affirmed summary dismissal of the parents’ claims against the attorney and physician. Id. ¶ 52-56. The attorney and physician were owed quasi-judicial immunity, the Court held, because they had “played an integral part in the judicial process.” Id. ¶ 104.

In this case, Therapist similarly played an integral (although hardly exclusive) part in the underlying child custody litigation. Assuming that she contributed to some disruption of Mother’s relationship with the children, her role does not seem as serious as causing a criminal arrest—an action that was immunized in *Jensen*. And providing trial opinions adverse to one side also was immunized in *Jensen*. Therefore, like the accused individuals in *Jensen*, Therapist may be entitled to quasi-judicial immunity. At least, the policy supporting such immunity is a potent “minus” policy factor under *Jeffs*.⁵

Mother has never accused Therapist of giving intentionally false testimony, but even perjurers are generally immune from subsequent civil lawsuits. In *Briscoe v. LaHue*, 460 U.S. 325 (1983), the United States Supreme Court upheld common law immunity for police officers who had allegedly given perjured testimony at criminal trials, resulting in

⁵*Jensen* seems to fit better within the judicial proceeding privilege than quasi-judicial immunity, because the attorney and physician were adverse to plaintiffs in the underlying litigation, and do not appear to have been court-appointed. This Court has elsewhere stated that quasi-judicial immunity protects persons who are court-appointed to exercise “discretionary judgment” that is “functionally comparable to that of a judge.” *Parker v. Dodgion*, 971 P.2d 496, 498 (Utah 1998). This Court may wish to clarify *Jensen*.

guilty verdicts. The officers' function was to testify in aid of the truth finding process. Even though they subverted that function by committing perjury, immunity applied. Quoting Judge Learned Hand, the Supreme Court explained: "In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do right to the constant dread of retaliation." 460 U.S. at 345, quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949). Of course, in this case, Therapist's negligently-formulated opinion has not gone unredressed. Her opinion was resoundingly rejected by the custody court, and Mother prevailed in the custody trial.

Consistent with the just-cited authority, the district court correctly endorsed Utah's strong policy in favor of protecting litigation witnesses:

It is crucial for witnesses to give full and candid testimony during judicial proceedings. While the [custody court] found [Therapist]'s testimony to be flawed, biased, and incorrect, it was her sworn testimony. Establishing a duty for all treating therapists to provide only testimony that is perceived to be based on non-negligently formulated forensic opinions is not reasonable.

(R. 290, in Appellee's Repl. Addendum § 4.)

Another important policy is that litigation must eventually become final. Having successfully discredited Therapist's testimony in the custody trial, Mother should not be permitted to proceed as a "sore winner" in this spinoff litigation. If prevailing parties in trials are permitted to sue their opposing witnesses in retaliation, the result will be metastatic litigation, as one lawsuit spawns another, and so on. Judicial resources should be preserved for other litigants, who need and deserve their own days in court.

In sum, there are especially powerful reasons, under this final *Jeffs* “other policies” factor, that weigh against imposing a duty upon Therapist toward Mother. Under a rational consideration of this factor, along with the other four *Jeffs* factors, this Court should affirm the district court’s holding that Therapist owed no duty to Mother, and affirm the district court’s judgment of dismissal.

B: NO DUTY CREATED BY THERAPIST’S COLLATERAL MISTAKES.

So far, the defense has focused upon Therapist’s role as a witness in the underlying child custody dispute. As explained earlier, this is because Mother originally defined this case to be about Therapist’s “negligent forensic opinion.” As also explained earlier, “invited error” should bar Mother from changing this case categorization.

If this Court agrees that invited error doctrine holds Mother to her original “negligent forensic opinion” categorization, then it should agree that Therapist’s other alleged mistakes fall outside this category, and are not relevant to “duty” analysis under *Jeffs v. West*. In the defense brief to the court of appeals, we took that position, and described those mistakes as “collateral errors.” (Br. of Appellee p. 24-25, Utah Court of Appeals No. 20160106-CA.) In case this Court views things differently, we now address those other mistakes, describing them, for brevity, as “collateral mistakes.”

A close reading of Mother’s Replacement Brief discloses the following alleged collateral mistakes: (1) Therapist “acted as a forensic therapist when she was neither qualified nor authorized to do so,” which overlaps an allegation that she “exceeded the bounds of her responsibilities as a therapist;” (2) Therapist opposed, and interfered with,

contact between Mother and the children; (3) Therapist improperly took the children's care records from her former office and released them to the custody court, the parties, and their attorneys; (4) Therapist engaged an unrelated therapy patient to surreptitiously electronically record the court-appointed custody evaluator; (5) Therapist "violated her ethical obligations;" (6) Therapist "engaged in tortious, and possibly criminal acts" (Appellant's Replacement Br. pp. 16, 22, 27.) Whether considered collectively or individually, these collateral mistakes give rise to no malpractice duty toward Mother.

Collective Consideration of Therapist's Collateral Mistakes.

Collectively, those mistakes have no more than an extremely tenuous relationship to Therapist's actual treatment of the children. Mother has never alleged that Therapist did anything that directly harmed the children. This distinguishes this case from *Jeffs v. West*, wherein the defendant prescriber harmed the patient by causing him to experience murderous rage. In this case, Therapist did no such thing.

The custody court was evidently outraged by Therapist's collateral mistakes, stating: "Due to [Therapist]'s egregious and unprofessional misconduct, as well as her obvious bias, any opinions she offered to this Court are deemed utterly unreliable." (Custody decision ¶ 67, R. 172, in Appellee's Repl. Addendum § 1.) Even if Therapist's mistakes were both wrong and criminal, they did not reflect truthfulness, and should not have been used as credibility evidence. Utah R. Evid. 608, 609. It was sufficient for the custody court to reject Therapist's opinion based upon her flawed assessment of limited information, and based upon the bias that arose from that flawed assessment. Therapist's

collateral mistakes, misused by the custody court, do not justify imposing a duty to Mother, a non-patient, for purposes of malpractice.

Mother sued Therapist under the Utah Health Care Malpractice Act (UHCMA). (Complaint ¶ 5, R. 2, in Appellee's Repl. Addendum § 2.) The UHCMA defines "health care" as follows:

"Health care" means any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement.

Utah Code Ann. § 78B-3-403(10) (Westlaw 2017). This statutory definition is not endlessly elastic. In Dowling v. Bullen, 2004 UT 50, 94 P.3d 915, this Court held that the definition did not include a therapist's seduction of her patient, and did not bar an "alienation of affections" claim by the patient's wife against the therapist.

In this case, many of Therapist's collateral mistakes, which include "exceeding the bounds of her responsibilities" and "advocating" certain positions based upon her poorly-formulated abuse opinion, exceed any reasonable boundary of "health care." Indeed, in her briefing to the court of appeals, Mother equated one such mistake—retrieving records from Therapist's former office—with different torts:

For example, if an individual broke into another's home, stole numerous items of personal property and later testified in court, he should not be immune from suit for conversion, trespass, or other offenses.

(Appellant's Reply Br. p. 5, Utah Court of Appeals No. 20160106-CA.) If Mother wanted

to sue Therapist “for conversion, trespass, or other offenses,” she should have done so in her Complaint. She did not. Nor did she move to amend her Complaint, to add any such claims or others, when faced with the defense motion to dismiss. Neither the definition of “health care” nor the assessment of duty should be distorted to create a duty based upon Therapist’s collateral mistakes.

Individual Consideration of Therapist’s Collateral Mistakes.

Considered individually, Therapist’s collateral mistakes also do not justify imposing a duty toward Mother. The defense responds in the listed order.

(1): A Treating Care Provider Can Testify as an Expert.

Without analysis or citation to authority, Mother argues that Therapist “was neither qualified nor authorized” to serve both as the children’s therapist and as an expert in the custody litigation. Actually, the law permits a treating health care provider to give forensic opinion testimony, subject to pretrial disclosure and the usual standards for foundation. Drew v. Lee, 2011 UT 15, ¶ 29, 250 P.3d 48; Pete v. Youngblood, 2006 UT App 305, ¶ 11-15, 141 P.3d 629. Without the patient’s consent, a care provider cannot testify as an expert *against* his or her patient. Sorensen v. Barbuto, 2008 UT 8, 177 P.3d 614. In this case, there is no inkling that Therapist acted against what she perceived (mistakenly or not) to be the interests of her patients, the children.

As for Therapist’s foundational qualification to testify, as explained earlier, Mother evidently made no such challenge in the custody court. Instead, her counsel let

Therapist testify at trial, and successfully attacked her credibility. Because she asserts that Therapist's testimony actually helped her (*supra* p. 24), Mother appears ill-positioned to complain of it now.

Mother's assertion that Therapist was not "authorized" to testify as an expert is also unexplained and also fails. Father and Stepmother called Therapist into the custody court as one of their witnesses. Whatever further "authority" was required, Mother does not explain. This is a classic instance of inadequate appellate briefing. Neither this Court nor the defense need provide such explanation for her. *See, e.g., MacKay v. Hardy*, 973 P.2d 941, 947-948 & n.9 (Utah 1998).

Mother repeatedly incants, in varying terms, that Therapist "exceeded the bounds of her responsibilities as a therapist."⁶ The misguided source of that mantra appears to be the Greenberg-Gould article, discussed earlier. The custody court accepted the Greenberg-Gould article "as a learned treatise." (Custody decision ¶ 52, R. 167, in Appellee's Repl. Addendum § 1.) It apparently did so as an exception to the hearsay prohibition, under Utah R. Evid. 803(18).

⁶E.g., Appellant's Replacement Br. p. 13 (Therapist improperly acted as "accuser"); p. 22 (Therapist opined that the children had been abused, "[d]espite it being beyond her role as a treating therapist"); p. 27 (Therapist "exceeded her role as a treating therapist and improperly made a forensic determination that the minor children were sexually abused by Mother"); p. 28 (Therapist acted "outside her role as a therapist"); p. 33 (Therapist acted "outside the scope of the legitimate role of the testifying therapist"); p. 39-40 (Therapist "was precluded from having any kind of dual role as both treating therapist and forensic therapist").

The Greenberg-Gould article warns about “dual role” pitfalls of serving both as therapist and expert witness in child custody disputes. The authors describe the differing “focus” of a treating psychologist, as opposed to that of a child custody evaluator, and then state: “It is therefore not appropriate for treating therapists to render opinions on psycholegal issues (parental capacity, child custody, validity of an abuse allegation, etc.) that are the province of the child custody evaluator and ultimately the Court.” (Greenberg-Gould article p. 12, in Appellant’s Addendum E.)

Greenberg and Gould are entitled to that opinion, but it does not state the law on this point. Besides permitting care providers to testify as experts in support of their patients, Utah law states: “An opinion is not objectionable just because it embraces an ultimate issue.” Utah R. Evid. 704(a); Green v. Louder, 2001 UT 62, ¶ 34 n. 12, 29 P.3d 638 (experts may testify as to ultimate opinion) (quoting and citing authority). So the law permitted Therapist to opine, to the custody court, that the children had been abused by Mother. That opinion was found to be deficient, to Mother’s benefit.

Nor can it be concluded that the Greenberg-Gould article establishes a standard of care for Therapist, as Mother seems to presume—again with zero authority or analysis. (Appellant’s Replacement Br. p. 39.) Greenberg and Gould appear to be forensic psychologists (Appellant’s Addendum E, p. 1.) It is far from clear that their opinion about “dual role” psychologists purports to set care standards; presumably, the forensic psychologist profession has its own set of actual standards. Therapist is a social worker; presumably, that profession has its own standards. Mother offers, to this Court, zero

explanation about whether these different professions have identical or overlapping care standards that would support her malpractice claim.

The custody court was persuaded, in part, by the Greenberg-Gould article, and in part by live testimony, that Therapist's opinion was improperly formulated and non-credible. That was the custody court's prerogative. But rejecting an opinion as non-credible cannot and should not be taken to mean, after the fact, that the opinion should never have been given in the first place. Nor can it support, after the fact, the imposition of a duty, by the errant witness, toward an opposing party.

Mother's "exceeded the bounds" mantra is of a piece with another oft-repeated assertion: that Therapist improperly acted as an "advocate" in the custody dispute. (Appellant's Replacement Br. pp. 7, 9 ¶ 9, 14, 22, 27, 39.) It does not appear that either the custody court, any legal authority offered by Mother, or the two scholarly articles in Mother's Addenda utilized this term or addressed what it means for a witness to act as an "advocate." If Therapist acted as an "advocate," it was as an advocate for the children.

Given that Therapist believed, albeit mistakenly, that the children had been abused by Mother, it is hardly surprising that she would "advocate" to restrict Mother's contact with them. It is probable that Therapist's misplaced "advocacy" appeared, to the custody court, to give rise to bias against Mother. Bias, of course, was one of the custody court's legitimate reasons to discredit Therapist's testimony. But bias—an affliction from which nobody is immune—does not justify the imposition of a duty, upon the losing "advocate," to the winning party. Advocacy, like bias, is an inescapable feature of litigation.

(2): Interfering with Mother-Children Contact.

The custody court found that Therapist openly opposed a court-appointed evaluator's observation of Mother's interactions with the children. (Custody decision ¶ 59-61, R. 169-170, in Appellee's Repl. Addendum § 1.) The custody court's remedy was to remove Therapist as the children's therapist, to appoint a new therapist for them, and to bar further contact between Therapist and the children. (Custody decision ¶ 61, R. 170.)

Unquestionably, it is a serious mistake to defy a court order, and Therapist compounded the just-identified collateral mistake by either re-contacting the children or by attempting to observe a supervised Mother-children visit, at Stepmother's request, after the custody court banished her. (Fact ¶ 9-a, *supra* p. 7.) For that misconduct, it would not have been surprising for the custody court to find Therapist in contempt, and to punish her, under Utah Code Ann. §§ 78B-6-302, -303, -310 (Westlaw 2017).

The custody court did not do so, and it does not appear proper now, long after the fact, to incorporate that misbehavior into a malpractice claim. At the time, the children were no longer Therapist's patients, which should remove that misbehavior from the purview of health care malpractice. Therefore, this collateral mistake should not give rise to a duty owed to Mother, for purposes of her malpractice claim.

(3): Unauthorized Retrieval and Release of Care Records.

The next collateral mistake is Therapist's retrieval of the children's care records, described by the custody court as "HIPPA [sic: HIPAA]-protected." She used someone else's key to enter her former office, obtained the records, and distributed them to the

custody dispute parties, attorneys, and court. (Fact ¶ 9d-e, *supra* p. 8.) The custody court viewed that misbehavior as “a serious violation of the children’s privacy rights and highly unethical.” (Custody decision ¶ 66, R. 172, in Appellee’s Repl. Addendum § 1.)

Mother offers no legal support for her apparent conclusion that Therapist violated HIPAA, the federal Health Insurance Portability and Accountability Act, when she obtained and distributed those records. Nor did the custody court reach such conclusion, beyond its bare assertion that the records were “protected” by HIPAA. But even if such violation occurred, HIPAA creates no private right of action. *Espinoza v. Gold Cross Services, Inc.*, 2010 UT App 151, ¶ 8, 234 P.3d 156.

Furthermore, assuming that Therapist improperly obtained the children’s care records from her former office, the custody court found she distributed them only within the confines of the custody litigation—to the court, the parties, and counsel. (Fact ¶ 9d-e, *supra* p. 8.) On appeal, Mother does not suggest otherwise. Hence, those private records were not excessively distributed, which minimizes the impact of this mistake.

Finally, whether “unethical” or otherwise improper, Therapist’s handling of those records did not violate *Mother’s* rights. The *children’s* privacy rights, according to the custody court, were violated. Mother has never purported to bring her malpractice claim on behalf of the children. She named herself as plaintiff, in her own right, without asserting that she was acting on the children’s behalf. (Complaint, in Appellee’s Repl. Addendum § 2.) Overall, there is no rational or just basis to bootstrap Therapist’s mistake, regarding the children’s records, into a malpractice claim to benefit Mother.

(4): *Eavesdropping on the Court-Appointed Evaluator.*

It was wrong for Therapist to recruit her unrelated patient to electronically record the court-appointed custody evaluator. But that eavesdropping was not a mistreatment of the children, nor was it a violation of Mother's privacy interests. It may have violated the custody evaluator's privacy, but Mother claims no standing on behalf of the evaluator, and it does not appear that she can. Similarly, Mother neither claims, nor could plausibly claim, standing to sue on behalf of the unrelated patient. Accordingly, that collateral mistake cannot give rise to a duty owed by Therapist toward Mother.

(5) *Allegation that Therapist "Violated her Ethical Obligations."*

This is another bare conclusion by Mother, repeatedly asserted with no effort to support it with legal authority or argument. (Appellant's Replacement Br. pp. 38, 40 n.5, 44.) She is evidently parroting the custody court's comment that Therapist's retrieval of the children's care records was "highly unethical." (Custody decision ¶ 66, R. 172, in Appellee's Repl. Addendum § 1.) Maybe she means to encompass the custody court's comment that Therapist's collateral mistakes were "tortious or criminal." (Appellant's Replacement Br. p. 17 n. 1, pp. 21, 41.)

The defense's best guess is that Mother is placing unjustified reliance on the custody court's comments and adjectives. After all, her Complaint significantly parrots such comments *verbatim*. As just one example: "[Therapist] displayed reckless disregard for professional boundaries and ruthless pursuit of her agenda, regardless of who may have been harmed in the process" (Complaint ¶ 29, R. 4, in Appellee's Repl. Addendum

§ 2); and “The court concludes that [Therapist] has displayed a reckless disregard for professional boundaries and ruthless pursuit of her agenda, regardless of who may be harmed in the process” (custody decision ¶ 65, R. 171-172, in Appellee’s Repl. Addendum § 1). Mother purports to agree that such “findings are not binding on the therapist or dispositive of the issues,” but then asserts that the findings “are strong evidence of the impropriety of the therapist’s actions and behavior.” (Appellant’s Replacement Br. p. 31 n. 3.)

The district court correctly rejected Mother’s effort to utilize the custody court decision against her:

[Therapist] was not a party to the juvenile court proceedings, was not represented by counsel, and the issue before that court did not include causes of action against [Therapist]. Therefore, in ruling on this motion, the Court considers all of [Mother]’s factual allegations and inferences reasonably drawn therefrom as true, and disregards all of [Mother]’s statements of conclusions and all findings and rulings by the Juvenile Court.

(Ruling on Mot. to Dismiss, R. 284-285, in Appellee’s Repl. Addendum § 4.) That rejection was correct under principles of issue preclusion. See *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 41 (elements of issue preclusion).

Mother is also wrong in her assertion—once again, supported by zero citation to authority—that the custody court’s decision, or any part thereof, is “strong evidence” in support of her claim against Therapist. To the contrary, with respect to Mother’s malpractice claim, the custody decision is hearsay that is presumptively inadmissible under Utah R. Evid. 801 and 802. Having never offered admissible evidence or

meaningful analysis in support, Mother's broad allegation that Therapist "violated her ethical obligations" does not support the imposition of a duty, upon Therapist, that could support Mother's malpractice claim.

Any determination of whether Therapist violated her own professional and ethical standards is best left to licensing authorities who have actual expertise in the interpretation of those standards. See Krouse v. Bower, 2001 UT 28 ¶ 16 n.1, 20 P.3d 895 (while defamatory attorney statements were protected by the judicial proceeding privilege against civil suit, professional discipline could be appropriate). Arguing the dismissal motion in the district court, Therapist's counsel reported, without dispute from Mother's counsel, that Therapist's alleged misconduct had been reported to the Utah Division of Occupational and Professional Licensing. (R. 347, in Addendum § 5.) Whatever the outcome of that proceeding, Mother presents no persuasive rationale to create, from her nebulous claim of unethical conduct, a duty owed to her by Therapist.

(6): "*Tortious and even Criminal Acts.*"

This broadly conclusory statement, also copied from the custody decision, cannot support imposition of a duty upon Therapist toward Mother. As already explained, the factually supported instances of collateral mistakes do not constitute wrongs against Mother, but rather, against other individuals or against the custody court. And criminal acts are prosecuted by government prosecutors—supported first by investigation into facts, and then a determination about whether the provable facts constitute any crime(s). Neither Mother's nor the custody court's disapproval of how Therapist handled herself, in

the underlying child custody dispute, justifies imposing a duty, upon Therapist, to support Mother's ill-conceived malpractice claim.

**C: THIS CASE DOES NOT TURN UPON THE
JUDICIAL PROCEEDING PRIVILEGE.**

The defense returns now to questions about the judicial proceeding privilege. Mother inaccurately implies that the district court dismissed her malpractice claim based on the privilege. She asserts misapplication of the privilege as a separate error, and devotes much of her brief to arguing that point. (Appellant's Replacement Br. pp. 6, 29-44.) But the defense did not seek dismissal based on the privilege. Instead, we argued that Therapist had no duty toward Mother that could support Mother's malpractice claim. Our arguments about the judicial proceeding privilege were presented in the "other policies" factor of our *Jeffs* duty analysis.

The defense did comment to the district court, as we do to this Court, that the judicial proceeding privilege *may* form an independent basis for dismissal. But we have always recognized that the privilege has limits that can strip protection against some claims, as happened in *Pratt v. Nelson* (*supra* p. 28). And because Mother's actual claim was for malpractice, not defamation, it was more prudent to challenge the "duty" element of malpractice. So it was that the district court dismissed the malpractice claim based upon its holding that Therapist owed no duty to Mother, and not based upon privilege:

[Mother] claims [Therapist] owes a duty based on her negligent formulation of forensic opinions while participating in a Court process, while treating children, gathering information, and presenting testimony in a contested custody case. The Court finds that treating therapists who testify, do not

owe a negligence duty of care to the opposing party even [if] it is alleged that their opinions were negligently formulated.

(R. 292, in Appellee's Repl. Addendum § 4.) In her long argument on privilege, Mother really is fishing for an "alternative ground to reverse," which does not exist.

Pursuing that argument, Mother quotes law professor Jeffrey Harrison. Professor Harrison questions whether the law should protect litigation experts "who overstep the bounds of their expertise, or, stated another way, is there an ethical basis for protecting those who do not tell the truth or purposely attempt to mislead?" (Appellant's Replacement Br. p. 43, quoting J. Harrison, "Reconceptualizing the Expert Witness: Social Costs, Current Controls and Proposed Responses," 18 YALE LAW J. ON REGULATION Vol. 18:253 (2001), at p. 312 (in Appellant's Addendum F)).

That query misses the mark in several ways. For one, Professor Harrison does not address duty and to whom a testifying expert may owe a duty—which is the issue in this appeal. For another, as explained earlier, the law provides means to exclude experts who attempt to testify outside their legitimate expertise, or to expose their deficiencies at trial. (*Supra* p. 27.) Finally, it is wrong to imply that "overstepping the bounds of one's expertise" necessarily constitutes dishonesty or purposeful deception. People often overstep the limits of their actual knowledge by mistake, not on purpose.

Mother's Complaint contains no allegation of dishonesty against Therapist. In arguing the motion to dismiss, her counsel, after equivocation, conceded that Mother's malpractice claim is grounded in neglect, not intentional misconduct:

Q (district court): So I'm analyzing this under whether or not, under a *neglect* standard, she's breached a duty?

A: (Mother's counsel): Correct.

(Tr. argument on Mot. to Dismiss, p. 24, R. 343, in Appellee's Repl. Addendum § 5, emphasis added.)

Before this Court, for the first time ever, Mother insinuates that Therapist did act dishonestly, or otherwise in bad faith: "For all these reasons, Therapist has separated herself from the attorney who exercised his duties in good faith (albeit wrongly) in the course of his services in *Moss v. Parr Waddoups*." (Appellant's Replacement Br. p. 40.) Mother is wrong. She never alleged "bad faith" in her Complaint, and effectively disavowed any such allegation in opposing the motion to dismiss. She cannot present a different case, to this Court, than she presented to the district court.

CONCLUSION

Under the "negligent forensic opinion" categorization that Mother presented and the district court accepted, and upon rational application of the *Jeffs v. West* duty factors within that categorization, this Court should affirm the district court's holding that Therapist owed no duty to Mother for purposes of her malpractice claim. This Court need not consider Therapist's mistakes that fall outside this "negligent forensic opinion" category, but if it does, it should hold that those mistakes also do not justify imposing a duty upon Therapist toward Mother. Finally, this Court should reject Mother's effort to

re-frame this case as an issue of privilege. Accordingly, this Court should AFFIRM the district court's judgment of dismissal.

RESPECTFULLY SUBMITTED this 31st day of March, 2017, by:

EPPERSON & OWENS, P.C.

/s/ J. Kevin Murphy

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CERTIFICATE OF COMPLIANCE WITH UTAH R. APP. P. 24(f)

I certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains no more than 14,000 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).
2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font, size 13.

/s/ J. Kevin Murphy

J. KEVIN MURPHY

March 31, 2017

CERTIFICATE OF DELIVERY

The undersigned hereby certifies that on the 31st day of March, 2017, two true and correct copies of the foregoing **REPLACEMENT BRIEF OF DEFENDANT-APPELLEE**, and of the separately-bound **DEFENDANT-APPELLEE'S REPLACEMENT ADDENDUM**, plus a searchable CD-PDF diskette of both documents, were delivered via U.S. Mail, first-class postage prepaid, to the following:

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