REL: November 25, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190327

Dennis Borden, individually and as father and next friend of J.B., a minor

v.

Bobby L. Malone and B.L. Malone and Associates, Inc.

Appeal from Calhoun Circuit Court
(CV-19-900631)

MENDHEIM, Justice.

Dennis Borden, individually and as father and next friend of his son J.B., a minor, appeals the dismissal by the Calhoun Circuit Court of his

claims alleging defamation and negligence, wantonness, and willfulness against Bobby L. Malone and Malone's counseling clinic, B.L. Malone and Associates, Inc. ("the clinic"). We affirm in part, reverse in part, and remand.

I. Facts

From 1999 to 2012 Borden was married to Kathy Smith, and during their marriage they had one son, J.B. The complaint that precipitated this case alleged that, during the marriage, Borden and Smith received marriage counseling from Malone at the clinic. However, in 2010 Borden filed for divorce from Smith. The complaint in this case alleged that in the divorce proceedings Malone, as an employee of the clinic, "served in the role of custody evaluator" and that Malone recommended to the court that Smith be given sole custody of J.B. According to Borden's complaint, instead of following Malone's recommendation, the court awarded Borden and Smith joint custody of J.B. The divorce was finalized in 2012.

In 2019, Smith apparently filed a petition for a modification of custody, seeking sole custody of J.B. Borden opposed the petition. According to Borden's complaint: "In July of 2019, during the pendency

of an adversarial custody dispute involving litigation, Defendant Malone began seeing ... J.B. for counseling at the behest of his mother Kathy Smith, but without Plaintiff Borden's knowledge or consent." The complaint asserted that, even though Borden was responsible for J.B.'s health insurance, "Malone did not file those initial counseling visits on ... J.B.'s health insurance in an effort to conceal those counseling sessions from ... Borden." On August 14, 2019, Malone wrote a letter addressed to Trudie Phillips, the attorney representing Kathy Smith in the custody dispute, that included many deeply personal statements concerning J.B.'s relationship with Borden that J.B. had related to Malone in their counseling sessions. The letter began: "I am writing to you to share some of my concerns and that [J.B.] has given me permission to share with you and the court some of his feelings." The letter ended by stating:

> "This case is not about whose [sic] winning but what's in the best interest of [J.B.]. All of the writs and threats need[] to stop. This only heightens [J.B.'s] anxiety. This kind of trauma can seriously affect his adolescence and other relationships.
>
> "... Therefore, my concern[] is for [J.B.] and his safety of himself and others [sic]. I hope the court will not allow this

> case to drag out like other similar ones for five or six years. The damage is being done to the child."

(Emphasis omitted.)

Borden's complaint alleged that in the letter "Malone made numerous false, defamatory, dishonest, malicious, fraudulent, reckless and unprofessional allegations and misrepresentations about and against Plaintiff Borden." The complaint then detailed several of the statements made about Borden in the letter. The complaint asserted that the letter was "openly filed in court, [was] given to [J.B.'s] mother to openly distribute with no discretion or oversight, and [was] distributed to personnel at [J.B.'s] school." The complaint further alleged that the "false, defamatory, malicious, reckless and unprofessional claims [in the letter] ... caused Plaintiff Borden to suffer worry, fear, embarrassment, severe emotional distress and anguish and have caused damage to his reputation in and throughout the community. These damages [sic] are likely to continue in the future, some being permanent in nature." The complaint similarly alleged as to J.B. that

> "Malone's release, disclosure, and publication of the subject [letter] and the numerous false, dishonest, reckless allegations

> about ... J.B., as well as the critically private information disclosed and made public by said [letter] have and will continue to cause ... J.B. to suffer worry, fear, embarrassment, severe emotional distress and anguish, as well as damage to his reputation in and throughout the community. These damages [sic] are likely to continue in the future, some being permanent in nature."

A week after the letter was written, on August 21, 2019, Borden commenced an action individually and on behalf of J.B. against Malone and the clinic in the Calhoun Circuit Court. Borden's complaint asserted three counts based upon Malone's August 14, 2019, letter: (1) defamation, libel, and slander; (2) negligence, wantonness, and willfulness; and (3) the tort of outrage. With respect to the negligence/wantonness/willfulness claims, Borden alleged, in part, that Malone had "breached and violated numerous ethical rules and regulations by serving in multiple conflicting capacities for Plaintiff Borden, ... J.B., and even Plaintiff's ex-wife Kathy Smith."

On September 18, 2019, Malone and the clinic filed a motion to dismiss or, in the alternative, for a summary judgment. In the motion, Malone and the clinic contended that Borden had failed to state a claim for which relief could be granted, that Borden had failed to allege facts

that would support his tort-of-outrage claim, and that "[a]ll of the statements in the [August 14, 2019,] letter ... were made for a judicial proceeding which is recognize[d] by law as absolute[ly] privilege[d], Barnett v. Mobile County Personnel Bd., 536 So. 2d 46 [(Ala. 1988)]." Malone and the clinic attached to the motion a copy of the August 14, 2019, letter and an affidavit from Malone. Malone's affidavit included several factual assertions regarding his role as a marriage counselor to Borden and Smith, his role in the divorce proceeding, the nature of the payments for J.B.'s counseling sessions, the reasons Smith engaged his services for counseling J.B., and the circumstances surrounding his writing of the August 14, 2019, letter that precipitated the litigation.

On November 22, 2019, Borden filed a response in opposition to the motion from Malone and the clinic. In the response, Borden noted various factual discrepancies between the allegations in the complaint, the August 14, 2019, letter, and Malone's affidavit. The response also argued that by writing and distributing the letter Malone had violated the privilege between a licensed professional counselor and a patient codified in § 34-8A-21, Ala. Code 1975, and that, therefore, Malone and the clinic

were not entitled to a litigation privilege as to the letter. Borden further asserted that the counselor-patient privilege was the reason the court adjudicating the custody-modification dispute between Borden and Smith had stricken the August 14, 2019, letter from evidence and had not allowed Malone to testify as a witness in the custody-modification proceeding. Borden's response to the motion to dismiss requested that the August 14, 2019, letter and Malone's affidavit be stricken because, he said, they contained private and privileged information. The response further requested that any hearing on the motion to dismiss should be continued pursuant to Rule 56(f), Ala. R. Civ. P., so that discovery could be conducted; an affidavit from Borden's counsel attached to the response contended that information from discovery "could be essential and necessary to justify and support" opposition to the motion. Borden also attached to his response his own affidavit that sought to refute factual assertions Malone had made in his affidavit.

On November 25, 2019, the trial court held a hearing on the motion filed by Malone and the clinic. At the outset of the hearing, the trial court stated: "So we're looking at a motion to dismiss filed by the

defense/motion for summary judgment, but right now I'm just treating it as a motion to dismiss. We can look at [it] however." During the hearing, Borden voluntarily dismissed the tort-of-outrage count that he had asserted in his complaint, leaving the defamation/libel/slander and negligence/wantonness/willfulness counts. The parties argued about the application of the litigation privilege, as well as the assertions made in the dueling affidavits from Malone and Borden.

On December 11, 2019, the trial court granted the motion filed by Malone and the clinic. The order stated:

> "The Court finds [Malone] has immunity covering his actions in this case.
>
> "Therefore, the MOTION TO DISMISS, OR IN THE ALTERNATIVE SUMMARY JUDGMENT filed by MALONE BOBBY L. is hereby GRANTED.
>
> "This matter is Dismissed with Prejudice with costs taxed as paid."

The record on appeal does not reflect that the trial court ever ruled upon Borden's motion to strike materials submitted by Malone and the clinic. On January 10, 2020, Borden filed a motion to alter, amend, or vacate the

judgment. On January 17, 2020, the trial court denied the postjudgment motion. Borden filed an appeal the same day.

On June 15, 2020, this Court entered an order noting that the trial court's December 11, 2019, order did not appear to dispose of the claims asserted against the clinic and remanding the case for the trial court to make its interlocutory order final by certifying it pursuant to Rule 54(b), Ala. R. Civ. P., or to enter a final order. The order noted that if there was no response within 14 days, Borden's appeal would be dismissed. On July 15, 2020, this Court entered an order dismissing the appeal. The next day, Borden filed a motion to set aside the order dismissing the appeal on the ground that the trial court had entered a final order on June 23, 2020, in response to this Court's June 15, 2020, remand order, but that Borden had failed to notify this Court of the trial court's order because he had not received a copy of this Court's remand order. The motion noted that the trial court had granted a motion to supplement the record so that the trial court's final order could be included in the record on appeal. Subsequently, a supplemental record was filed with this Court that included the trial court's order of June 23, 2020, which provided: "In

accordance with this Court's previous order finding Defendant Bobby Malone had immunity covering his actions, this Court hereby dismisses with prejudice all claims against Bobby Malone and B.L. Malone & Associates, Inc." On August 4, 2020, this Court entered an order reinstating Borden's appeal.

II. Standard of Review

To apply the proper standard of review, we must first determine whether the trial court considered matters outside the pleadings in granting the motion to dismiss, i.e., whether we are reviewing a ruling on a motion to dismiss or a summary judgment. Rule 12(b), Ala. R. Civ. P., provides, in part:

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Concerning this portion of Rule 12(b), this Court has observed:

> "Whether additional materials attached to a Rule 12(b)(6) motion will be considered is within the trial court's discretion.

> If an appellate court's review automatically converts a motion to dismiss supported by additional materials to a motion for a summary judgment, the discretion provided the trial court to determine whether to exclude matters outside the pleadings would be constrained."

Ex parte Price, 244 So. 3d 949, 955 (Ala. 2017). In other words, this Court no longer assumes that a motion to dismiss must be converted to a motion for summary judgment when a trial court fails to affirmatively state that it did not consider matters outside the pleadings in ruling upon such a motion.

In this case, matters outside the pleadings were submitted to the trial court in the form of affidavits from Borden and Malone, along with the August 14, 2019, letter written by Malone. With respect to the letter, we note that

> " ' " 'if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss.' " ' "

Bell v. Smith, 281 So. 3d 1247, 1252 (Ala. 2019) (quoting Donoghue v. American Nat'l Ins. Co., 838 So. 2d 1032, 1035 (Ala. 2002), quoting in turn Wilson v. First Union Nat'l Bank of Georgia, 716 So. 2d 722, 726 (Ala. Civ.

App. 1998), quoting in turn GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1384–85 (10th Cir. 1997)). The August 14, 2019, letter is central to this action, and it was repeatedly referenced throughout Borden's complaint. Therefore, the attachment of the letter to the motion to dismiss did not alone convert the motion to dismiss to a motion for a summary judgment.

The affidavits submitted by Malone and Borden clearly are matters outside the pleadings, consideration of which would require conversion of the motion. However, the trial court's only statement on this subject -- in the hearing on the motion -- indicated that it was going to consider the motion as a motion to dismiss rather than a motion for a summary judgment. The trial court's December 19, 2019, order granted the motion based on "immunity covering [Malone's] actions in this case," a principle that, as we shall discuss at more length in Part III of this opinion, is more traditionally referred to as "the litigation privilege" or "absolute privilege."

> "Alabama courts treat the litigation privilege as an affirmative defense. See, e.g., Webster [v. Byrd], 494 So. 2d [31,] 32 [(Ala. 1986)]. Nevertheless, a court may dismiss a complaint for

> failure to state a claim based on an affirmative defense when the allegations of the complaint, on their face, show that the defense bars recovery. Douglas v. Yates, 535 F.3d 1316, 1321 (11th Cir. 2008). 'Thus, a court may dismiss claims based on the litigation privilege where the allegations in the complaint establish that the defendant's conduct occurred under circumstances that amounted to a privileged setting.' Tolar v. [Bradley Arant Boult] Cummings, [No. 2:13-cv-00132-JEO] (N.D. Ala. Aug. 11, 2014 [not selected for publication in Fed. Supp.] ..."

July v. Terminix Int'l Co., Ltd. P'ship, 387 F. Supp. 3d 1306, 1315 (S.D. Ala. 2019). The complaint specifically noted that the August 14, 2019, letter was written "during the pendency of an adversarial custody dispute involving litigation," that it was "addressed to the attorney for Kathy Smith," and that it was "being openly filed in court." The August 14, 2019, letter began with the statement: "I am writing to you to share some of my concerns and that [J.B.] has given me permission to share with you and the court some of his feelings." (Emphasis added.) Therefore, the trial court may have deemed it possible to determine that the litigation privilege applied based solely upon the complaint and the letter. Accordingly, in line with Price, we conclude that the correct standard of review is that applicable to the denial of a motion to dismiss.

> " 'The appropriate standard of review of a trial court's denial of a motion to dismiss is whether "when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle [the pleader] to relief." Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993); Raley v. Citibanc of Alabama/Andalusia, 474 So. 2d 640, 641 (Ala. 1985). This Court does not consider whether the plaintiff will ultimately prevail, but only whether the plaintiff may possibly prevail. Nance, 622 So. 2d at 299. A "dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." Nance, 622 So. 2d at 299; Garrett v. Hadden, 495 So. 2d 616, 617 (Ala. 1986); Hill v. Kraft, Inc., 496 So. 2d 768, 769 (Ala. 1986).' "

BT Sec. Corp. v. W.R. Huff Asset Mgmt. Co., 891 So. 2d 310, 313 (Ala. 2004) (quoting Lyons v. River Road Constr., Inc., 858 So. 2d 257, 260 (Ala. 2003)).

Under the foregoing standard, the only facts before this Court are those alleged in the complaint and in the August 14, 2019, letter written by Malone. Borden contends on appeal, as he did before the trial court, that the August 14, 2019, letter and Malone's affidavit, which largely seeks to defend Malone's writing of the letter, should be stricken because, he says, they contain information that is privileged under the counselor-patient privilege. Our determination as to the appropriate standard of

review eliminates any need to strike Malone's affidavit because the affidavit cannot be considered in reviewing a ruling on a motion to dismiss. As for the August 14, 2019, letter, it is central to all the claims asserted by Borden on behalf of himself and J.B. Borden cannot use the August 14, 2019, letter as the basis for this action and simultaneously assert that this Court cannot consider the letter in assessing the viability of his claims. Accordingly, Borden's motion to strike is denied.

III. Analysis

As we have already observed, the trial court granted Malone and the clinic's motion to dismiss on the ground that they were entitled to "immunity covering [their] actions in this case." The only "immunity" asserted by Malone and the clinic is the litigation privilege, also referred to in our cases as absolute privilege.

> "This Court has recognized that a party that has published allegedly defamatory matter in the course of a judicial proceeding may claim, as a defense to a defamation action based on that publication, the absolute privilege described in the Restatement (Second) of Torts § 587 (1977). See Walker v. Majors, 496 So. 2d 726, 729–30 (Ala. 1986)."

Hollander v. Nichols, 19 So. 3d 184, 195 (Ala. 2009). Concerning the decision in Walker v. Majors, 496 So. 2d 726 (Ala. 1986), this Court has explained:

> "In Walker, the owner of a parcel of land brought a defamation action against a real estate broker for allegedly defamatory remarks in a letter that the broker had written to some prospective purchasers of the land. The broker wrote these letters after the owners refused to sell the property and pay him his commission. In his letters, the broker stated: '"I am filing suit against the Walkers for the breach of their contract with me and to recover for the damages I have suffered as a result of their fraudulent conduct."' (Emphasis added in Walker.) Shortly after writing these letters, the broker filed suit against the Walkers for breach of contract and fraud.
>
> "In affirming the summary judgment for the broker, we adopted the Restatement (Second) of Torts, § 587 (1977), as the appropriate standard when determining whether defamatory matter is absolutely privileged by virtue of its connection with a judicial proceeding:
>
> > "'A party to a private litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding.'
>
> "(Emphasis added.) We continued, in the Walker case, to examine the rationale behind this privilege:

> "'"'There is another class of privileged communications where the privilege is absolute. They are defined in Hastings v. Lusk, 22 Wend. [N.Y.] 410, 34 Am. Dec. 330 [(1839)]. In this class are included slanderous statements made by parties, counsel, or witnesses in the course of judicial proceedings, and ... libelous charges in pleadings, affidavits, or other papers used in the course of the prosecution or defense of an action. In questions falling within this absolute privilege the question of malice has no place. However malicious the intent, or however false the charge may have been, the law, from considerations of public policy, and to secure the unembarrassed and efficient administration of justice, denies to the defamed party any remedy through an action for libel or slander. This privilege, however, is not a license which protects every slanderous publication or statement made in the

> course of judicial proceedings. It extends only to such matters as are relevant or material to the litigation, or, at least, it does not protect slanderous imputations plainly irrelevant and impertinent, voluntarily made, and which the party making them could not reasonably have supposed to be relevant.' "

" ' O'Barr v. Feist, 292 Ala. [440] at 446, 296 So. 2d [152] at 157 [1974], quoting Moore v. Manufacturers' National Bank, 123 N.Y. 420, 25 N.E. 1048, 1049 (1890).

" 'Comment (e) to Restatement § 587 (regarding statements made preliminary to trial) states:

> " ' "As to communications preliminary to the proposed judicial proceeding, the rule stated in this section applies only when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration. The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for a defamation when the possibility is not seriously considered." '

"496 So. 2d at 729.

"... While the 'issue of the relevancy of the communication is a matter for the determination of the court, ... the adjudicated cases have established a liberal view in the interpretation of the language used, and all doubts are resolved in favor of its relevancy or pertinence' to the judicial proceeding in question. Walker, supra, 496 So. 2d at 730, citing O'Barr v. Feist, 292 Ala. 440, 296 So. 2d 152 (1974).

"We acknowledge that the circumstances of this particular case may delineate the limits of the area in which we would be willing to recognize the existence of an absolute privilege for communications preliminary to a judicial proceeding. We recognize, as did the court in Brown v. Collins, 402 F.2d 209 (D.C. Cir. 1968), the need for caution in the granting of absolute privilege to preliminary statements:

> " 'The doctrine of absolute immunity for statements in judicial proceedings reflects a judgment that the need for completely free speech for litigants is dominant, and that this freedom is not to be endangered by subjecting parties to the burden of defending their motives in subsequent slander litigation, or to the risk that juries may misapprehend those motives. Such special immunity is not lightly conferred, however, as it protects deliberate lies told with intent to destroy reputation. Where dealing with preliminary statements other than witness briefings, settlement discussions and the like, there is need for particularly close attention to the factual circumstances, recognizing that unlike statements made in court, these communications are not cabined by a litigant's recognition that contempt of

> a court may follow if they are outrageously unnecessary and intemperate, even though more or less relevant.
>
> > "'... Business conversations are not absolutely privileged merely because they deal with matters likely to end up in court in the future.... Although the Restatement standard of "relation" to the proceedings is broad, and does not require legal relevance, even that liberal standard is not met merely by showing that the defamatory comments were triggered by some pending lawsuit or the facts involved therein.... [T]he mere mention of the possibility of suing the communicant [does not] automatically convert the entire conversation to one "related" to a proposed judicial proceeding.'
>
> "402 F.2d at 213–14. (Footnotes omitted.)"

Barnett v. Mobile Cnty. Pers. Bd., 536 So. 2d 46, 51–52 (Ala. 1988).

In the present case, Malone and the clinic argue that the August 14, 2019, letter clearly falls within the parameters of the litigation privilege because, they say, it was written during the pendency of a custody-modification proceeding for the purpose of communicating to the court the attitudes and feelings of J.B. about his father, Borden. In short, they contend that, because the letter was triggered by pending litigation and

because its content was relevant to the dispute before the court, the litigation privilege bars any action against them based on the letter.

Borden counters that Malone's letter should not qualify for the litigation privilege because, he says, Malone was not, in fact, a witness in the custody dispute; to the contrary, Borden contends, Malone voluntarily wrote the letter to Smith's attorney, and the trial court in the custody-modification proceeding struck the letter from the record and did not allow Malone to testify. Borden contends that, because Malone did not "participate" in judicial proceedings, the alleged disparagements of him and J.B. in the letter are not protected by the litigation privilege. See Borden's appellate brief, pp. 23-24. Borden further argues that Malone's statements in the letter were "unquestionably, 'irrelevant and impertinent' as to Borden." Id. at 25. Finally, Borden contends that Malone's violation of the counselor-patient privilege is not protected by the litigation privilege.

Our cases do not support Borden's first argument that the litigation privilege is inapplicable because Malone did not testify in the custody-modification proceeding. In Walker, the Court -- relying on Restatement

(Second) of Torts § 587 (1977) -- concluded that communications directly related to a contemplated judicial proceeding were absolutely privileged. See Walker, 496 So. 2d at 730. The letters at issue in Walker were written before any lawsuit had been filed, but the Court concluded that because the letters directly referenced a contemplated judicial proceeding they constituted communications directly related to a judicial proceeding and that, therefore, they were protected by the litigation privilege.

Similarly, in Barnett the Court determined that a letter that the then director of the Mobile County Personnel Board wrote to the town council of Mount Vernon, Alabama, which allegedly contained defamatory statements about the Mount Vernon town clerk, was absolutely privileged because the letter was "clearly relevant" to a "proposed [judicial] proceeding" that was actually filed a few weeks after publication of the letter. Barnett, 536 So. 2d at 52. The lawsuit subsequently filed by the Personnel Board and the director against the town clerk to recover payroll overpayments was dismissed based on a lack of standing. Thus, even though the letter was never submitted in a judicial proceeding and the personnel-board director never testified in a judicial proceeding, the Court

concluded that the "allegedly defamatory letter was absolutely privileged due to its clear relevance to a judicial proceeding that was 'contemplated in good faith and under serious consideration.' Restatement (Second) of Torts, § 587, comment (e) (1977)." 536 So. 2d at 52.

In Cutts v. American United Life Insurance Co., 505 So. 2d 1211 (Ala. 1987), two companies provided an assistant district attorney for Mobile County inaccurate information about a contract they were involved in with a company owned by William Cutts. Based on the information, the district attorney's office obtained grand-jury indictments against Cutts. After Cutts provided the district attorney's office with correct information about the transaction in question, the district attorney's office nol-prossed the indictments and discontinued its investigation. Cutts sued the two companies, asserting, among other things, a defamation claim based on a letter the two companies had provided to the district attorney's office. This Court concluded that the defamation claim was due to be dismissed because "an absolute privilege exists in favor of those involved in judicial proceedings, including judges, lawyers, jurors, and witnesses, shielding them from an action for defamation." Cutts, 505 So.

2d at 1215. Thus, in Cutts, although the judicial proceeding was only in the investigatory stage when the companies provided information to the district attorney's office, the criminal case against Cutts was never taken to trial, and the two companies were not parties to the criminal case, the Court concluded that the litigation privilege applied to the communication in question.

The decisions in Walker, Barnett, and Cutts illustrate that, for the litigation privilege to apply, an allegedly defamatory communication need not occur during a judicial proceeding and one accused of defamation need not actually participate in the judicial proceeding. It is enough that the communication is directly related and clearly relevant to a judicial proceeding that was "'contemplated in good faith and under serious consideration.'" Barnett, 536 So. 2d at 52 (quoting Restatement § 587 Comment (e)). On August 14, 2019, Malone wrote the letter to the attorney for Borden's ex-wife purportedly for the court's consideration in the custody-modification proceeding. Therefore, the facts that the letter was ultimately excluded from evidence in the custody-modification

proceeding and that Malone was not permitted to testify in that proceeding do not prevent the application of the litigation privilege.

Borden's second contention -- that Malone's statements in the August 14, 2019, letter were not relevant to the matter at issue in the custody-modification proceeding -- overlooks the fact that this Court has repeatedly stated that "the issue of the relevancy of the communication is a matter for the determination of the court, and the adjudicated cases have established a liberal view in the interpretation of the language used, and all doubts are resolved in favor of its relevancy or pertinence." Walker, 496 So. 2d at 730 (citing O'Barr v. Feist, 292 Ala. 440, 445, 296 So.2d 152, 156 (1974), and Adams v. Alabama Lime & Stone Corp., 225 Ala. 174, 176–77, 142 So. 424, 425 (1932)). It is certainly understandable why Borden would view some of the statements about him in the letter as gratuitous, but, viewed broadly, Malone's statements were relevant to the determination of whether Borden should retain joint custody of J.B.

Based on the foregoing, we conclude that the trial court correctly applied the litigation privilege to Borden's defamation claims in the

context of the custody-modification proceeding. However, this Court has noted:

> "Such absolutely privileged communications ... must not be published outside the circle of those who must have knowledge of them pursuant to the decision-making process. The recipient of a communication made outside the judicial or quasi-judicial proceeding must have a direct or close relationship to that proceeding or the absolute privilege is lost."

Webster v. Byrd, 494 So. 2d 31, 35 (Ala. 1986). In his complaint, Borden expressly alleged that Malone and the clinic "maliciously and falsely wrote, typed, printed and/or published a letter or 'report' dated August 14, 2019, to various persons, agencies and/or institutions concerning Plaintiff[] Borden and J.B., which maliciously and falsely accused Plaintiff[] of wrongful conduct as previously set forth above and herein." More specifically, Borden alleged that the letter had been "distributed to personnel at [J.B.'s] school," and he suggested that it had been "openly distributed with no discretion" to others, such that the defamatory statements had done "damage to [Borden's and J.B.'s] reputation[s] in and throughout the community." In short, the allegations in the complaint are broad enough to include the possibility that Malone and the clinic bore

some culpability for disseminating the contents of the August 14, 2019, letter beyond Kathy Smith and her attorney, i.e., those who had a direct or close relationship to the custody-modification proceeding. In Webster, the Court concluded:

> "Thus, although we have decided that as a matter of law the letter of termination was a communication made in the course of a quasi-judicial proceeding, and was therefore cloaked by an absolute privilege, a question of fact remains as to whether the privilege was lost by its being published outside the confines of the quasi-judicial proceeding."

Webster, 494 So. 2d at 35. Likewise, in this case, although we have determined that the August 14, 2019, letter was a communication made in the course of the custody-modification proceeding and was therefore cloaked by the litigation privilege, it remains possible that Borden could prove a set of facts under which the litigation privilege would be lost, depending on what role Malone and the clinic played in disseminating the letter outside the litigation context. Therefore, the trial court erred in dismissing Borden's defamation claims.

Borden's second count alleging negligence, wantonness, and willfulness requires further analysis because, at its core, that count is

based upon the allegation that Malone breached the counselor-patient privilege belonging to J.B. Communications between "licensed psychologists, licensed psychiatrists, [and] licensed psychological technicians and their clients" are protected under § 34-26-2, Ala. Code 1975, a statutory privilege our courts have addressed many times. However, we have no evidence indicating or allegations regarding whether Malone is a licensed psychologist, a licensed psychiatrist, or a licensed psychological technician. Rather, the allegations contend that Malone is a "professional counselor." Communications between a licensed professional counselor and a client are protected by § 34-8A-21, Ala. Code 1975, which provides:

> "For the purpose of this chapter, the confidential relations and communications between licensed professional counselor or certified counselor associate and client are placed upon the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed."

In Ex parte Holm, 283 So. 3d 776 (Ala. Civ. App. 2019), the Court of Civil Appeals concluded that a father's right to access medical records of

his minor child under § 30-3-154, Ala. Code 1975,[1] did not negate the privilege afforded to his child for the communications between the child and a licensed professional counselor under § 34-8A-21. In the course of evaluating that issue, the Court of Civil Appeals noted that "[t]his court's research has not revealed any caselaw discussing the privilege between a licensed professional counselor and his or her client pursuant to § 34-8A-21" but that "[t]he privilege afforded a licensed professional counselor and his or her client pursuant to § 34-8A-21 is the same as that afforded under § 34-26-2." Holm, 283 So. 3d at 779, 778. Accordingly, the Court of Civil Appeals applied the reasoning from cases applying § 34-26-2 to address the issue presented to it concerning § 34-8A-21. We will do the same.[2]

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[1]Section 30-3-154 provides:

> "Unless otherwise prohibited by court order or statute, all records and information pertaining to the child, including, but not limited to, medical, physiological, dental, scholastic, athletic, extracurricular, and law enforcement, shall be equally available to both parents, in all types of custody arrangements."

[2]Holm was decided on March 29, 2019, several months before Borden filed his complaint in this case.

> "We [have] stated that the psychotherapist-patient privilege rested on the need to
>
> > " 'inspire confidence in the patient and encourage him in making a full disclosure to the physician as to his symptoms and condition, by preventing the physician from making public information that would result in humiliation, embarrassment, or disgrace to the patient, and [is] thus designed to promote the efficacy of the physician's advice or treatment. The exclusion of the evidence rests in the public policy and is for the general interest of the community.' "

Ex parte University of South Alabama, 183 So. 3d 915, 921 (Ala. 2015) (quoting Ex parte Rudder, 507 So. 2d 411, 413 (Ala. 1987)). "The strength of the public policy on which the statutory psychotherapist-patient privilege is based has been well recognized by this Court. It follows that the privilege is not easily outweighed by competing interests." Ex parte United Serv. Stations, Inc., 628 So. 2d 501, 504 (Ala. 1993). The same is true for the nearly identical counselor-patient privilege.

"Alabama recognizes causes of action for breach of fiduciary duty and breach of implied contract resulting from a physician's unauthorized disclosure of information acquired during the physician-patient relationship, Horne v. Patton, 291 Ala. 701, 287 So. 2d 824 (1973)." Mull

v. String, 448 So. 2d 952, 953 (Ala. 1984). We assume for the purpose of evaluating the applicability of the litigation privilege asserted by Malone and the clinic in their motion to dismiss that a cause of action likewise exists for a counselor's unauthorized disclosure of confidential information.

> "[L]ike the attorney-client privilege on which it was modeled, the psychotherapist-patient privilege is personal to the patient, and only the patient may waive it. Watson v. State, 504 So. 2d 339 (Ala. 1986). See Swain v. Terry, 454 So. 2d 948 (Ala. 1984). In order to impliedly waive a testimonial privilege, the holder of the privilege must objectively manifest a clear intent not to rely upon the privilege. Jordan v. State, 607 So. 2d 333, 336 (Ala. Crim. App. 1992)."

Ex parte United Serv. Stations, Inc., 628 So. 2d at 505.[3] In the August 14, 2019, letter, Malone asserts that J.B. waived his right to keep private what he had related to Malone in counseling sessions. In the complaint, Borden alleges on behalf of J.B. that J.B. did not waive his right to confidentiality. In short, the record before us on the motion to dismiss does not demonstrate a clear intent by J.B. to waive the privilege for the purpose of the custody-modification proceeding. It is true that when a party has placed his or her mental state in issue in a judicial proceeding, the party is deemed to have waived any confidentiality privilege. See, e.g., Mull, 448 So. 2d at 954. However, the Holm court noted:

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[3]We recognize that J.B. is a minor. Our caselaw indicates that "[a] child, the child's parent, or the child's psychotherapist may assert the psychotherapist-patient privilege, but only the child may waive the privilege." Ex parte Sims, 246 So. 3d 155, 157 (Ala. Civ. App. 2017). See also Ex parte T.O., 898 So. 2d 706, 711 (Ala. 2004) ("Even though T.O.'s psychotherapist-patient privilege could be claimed for him by the psychiatrist Dr. Kahn, the patient T.O., the mother E.O., or the father J.O., ... only the patient T.O. could waive the privilege .... Since T.O.'s mother was not the patient, she lacked standing to waive T.O.'s psychotherapist-patient privilege."); Ex parte Johnson, 219 So. 3d 655, 657 (Ala. Civ. App. 2016) (citing T.O. for the proposition that the psychotherapist-patient privilege "belongs to the child and only he may waive it").

> "[I]n the context of the similar privilege afforded a psychologist and his or her client under § 34-26-2, this court has held that, in a custody-modification action, the psychotherapy records for the child that is the subject of the modification action remain privileged and are not required to be disclosed. Ex parte Johnson, 219 So. 3d 655, 657-58 (Ala. Civ. App. 2016)."

283 So. 3d at 779. The Holm court reasoned that a child is not considered to be a party to a custody-modification action and that, therefore, the child cannot be said to have willingly placed his or her mental state in issue for such a proceeding, which would impliedly waive the privilege.[4]

All of this serves as background to the consideration of whether the litigation privilege bars Borden's second count insofar as it is asserted on behalf of J.B. The litigation privilege arises from the common law. See, e.g., Hollander, 19 So. 3d at 195 (stating that " [t]his Court has recognized that a party that has published allegedly defamatory matter in the course of a judicial proceeding may claim, as a defense to a defamation action based on that publication, the absolute privilege described in the

[4]Regardless of the reason for the trial court's exclusion of Malone's letter and his exclusion as a witness in the custody-modification proceeding, we do not intend to preclude the possibility that further development of the facts could show that J.B. did, in fact, waive the counselor-patient privilege.

Restatement (Second) of Torts § 587 (1977)" (emphasis added)); Surrency v. Harbison, 489 So. 2d 1097, 1104 (Ala. 1986) (discussing the litigation privilege and observing that "[w]e have found no cases or rationale providing a privilege as to violence in the labor setting, so we specifically exempt the assault and battery claim from the purview of privileged matters" (emphasis added)). At common law, the litigation privilege applied solely to defamation claims. See, e.g., Lawson v. Hicks, 38 Ala. 279, 285 (1862) ("Words, calumnious in their nature, may be deprived of their actionable quality by the occasion of their utterance or publication. When this is the case, they are called in the law of defamation privileged communications." (emphasis added)); Franklin Collection Serv., Inc. v. Kyle, 955 So. 2d 284, 292 (Miss. 2007) (examining the history of the litigation privilege and concluding that "the litigation privilege at common law was only applicable to claims for defamation, such as libel and slander"); Simms v. Seaman, 308 Conn. 523, 531-36, 69 A.3d 880, 885–87 (2013) (recounting the common-law origins of the litigation privilege and explaining that it "developed in the context of defamation claims"). In Butler v. Town of Argo, 871 So. 2d 1, 24 (Ala. 2003), this Court admitted

that "this absolute privilege is rooted in defamation law," but, citing Restatement (Second) of Torts § 652F (1977),[5] the Court expanded the privilege so that it "also applies to the publication of any matter that amounts to an invasion of privacy." However, counselor-patient confidentiality is statutory in its origin. See § 34-8A-21, Ala. Code 1975. The common law is the law of Alabama unless it is repealed by statute. See § 1-3-1, Ala. Code 1975 ("The common law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this state, shall, together with such institutions and laws, be the rule of decisions, and shall continue in force, except as from time to time it may be altered or repealed by the Legislature."). Section 34-8A-21 does not contain an express exception to the counselor-patient privilege based on the litigation privilege. Therefore, the common-law litigation privilege must give way to the statutory right of confidentiality. In other words, the litigation privilege cannot insulate Malone and the clinic from a private action

[5]Restatement (Second) of Torts § 652F (1977) provides: "The rules on absolute privileges to publish defamatory matter stated in §§ 583 to 592A apply to the publication of any matter that is an invasion of privacy."

based on an unauthorized disclosure of patient confidentiality. Cf. Estape v. Seidman, 269 So. 3d 565, 569 (Fla. Dist. Ct. App. 2019) (employing similar reasoning to conclude that "absolute immunity for communications during judicial proceedings does not provide immunity to a psychotherapist for revealing communications regarding a patient contrary to section 490.0147," Florida's statute establishing the psychotherapist-patient privilege).

Based on the foregoing, we conclude that Borden's second count, alleging negligence/wantonness/willfulness asserted on behalf of J.B. against Malone and the clinic based on a breach of confidentiality between Malone and J.B. is not protected by the litigation privilege.[6] Accordingly, the trial court erred in dismissing those claims based on the litigation privilege. However, the complaint contains no specific allegation that Malone violated any confidentiality with respect to Borden. Therefore, to the extent that Borden's second count attempts to state claims on behalf

[6]This conclusion does not preclude the possibility that this claim as to J.B. is subject to some other infirmity; all that is before us in this appeal is the applicability of the litigation privilege to the claims asserted against Malone and the clinic.

of Borden, we fail to see a meaningful distinction between those claims and Borden's defamation claim. Therefore, the trial court was correct in dismissing the second count with respect to Borden.

IV. Conclusion

For the foregoing reasons, the trial court's dismissal of the defamation claims asserted on behalf of Borden and J.B. is reversed to the extent that it precluded Borden from maintaining his claim that Malone and the clinic bear some culpability for the dissemination of the August 14, 2019, letter beyond those who had a direct or close relationship to the custody-modification proceeding. Furthermore, the trial court's dismissal of the count alleging negligence/wantonness/willfulness is reversed to the extent that it precluded claims based on a breach of confidentiality on behalf of J.B., which are not foreclosed by the litigation privilege. The trial court's dismissal of the claims asserted in that count as to Borden is affirmed.

MOTION TO STRIKE DENIED; AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Bolin, Shaw, Wise, Bryan, Sellers, and Stewart, JJ., concur.

Mendheim, J., concurs specially.

Parker, C.J., and Mitchell, J., concur in part and concur in the result.

MENDHEIM, Justice (concurring specially).

As the author of the main opinion, I write specially to explain why I do not agree with Justice Mitchell's alternative rationale for why the second count in Dennis Borden's complaint, alleging "negligence/wantonness/willfulness" on J.B.'s behalf against Bobby L. Malone and B.L. Malone and Associates, Inc. ("the negligence and wantonness claims"), are not defeated by the litigation privilege, as well as his conclusion that the main opinion "could lead to the dismissal of meritorious claims." ___ So. 3d at ___ (Mitchell, J., concurring in part and concurring in the result).

The majority concludes that the statutory counselor–patient privilege, § 34-8A-21, Ala. Code 1975, takes precedence over the common-law litigation privilege that provides immunity from liability for claims based on relevant statements made for the purpose of a judicial proceeding. Despite Justice Mitchell's protestations to the contrary, the reasoning for that conclusion is simple and straightforward. It starts by recognizing that the negligence and wantonness claims are grounded in the counselor-patient privilege. This is patently obvious, given what

Borden alleged in his complaint: that Malone was J.B.'s counselor; that the letter Malone wrote to Kathy Smith's counsel divulged numerous statements and mental impressions J.B. had shared with Malone in counseling sessions; and specifically that "[d]efendant Malone negligently, wantonly, or willfully breached and violated numerous ethical rules and regulations by serving in multiple, conflicting capacities ... for ... J.B." and that, as a result of Malone's breaches of confidence, J.B. "suffer[ed] severe emotional distress, mental anguish, fear, humiliation, nervousness, stress, embarrassment and other injuries and damages described above and herein."[7] The majority then recognizes that the counselor-patient

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[7]I also note that, in his appellate brief to this Court, Borden specifically argued:

> "As to the portion of the [negligence and wantonness] claim on J.B.'s behalf, Ex parte Holm, 283 So. 3d 776 [(Ala. Civ. App. 2019)], makes it clear that it would be improper and in clear violation of privilege and privacy laws and statutes concerning that of a child and his licensed professional counselor for Malone to release information about J.B. unless J.B. waived his privilege. In turn, the complaint more than sufficiently pleaded that J.B. had not waived (and could not validly waive) the privilege and that Malone's actions were negligent and unprofessional."

privilege is a privilege conferred by statute, § 34-8A-21, which did not exist at common law.[8] Thus, § 34-8A-21 stands on its own, and it does not state that the privilege can be violated if a counselor's statements are made in contemplation of a judicial proceeding. It follows that the

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Borden's appellate brief, p. 27. As the majority opinion explains, Ex parte Holm, 283 So. 3d 776 (Ala. Civ. App. 2019), concluded that the counselor-patient privilege took precedence over a father's right to access medical records of his minor child under § 30-3-154, Ala. Code 1975. Thus, Borden plainly alleged and argued that the litigation privilege did not protect Malone and the clinic from liability for Malone's violations of the counselor-patient privilege held by J.B.

[8]Unlike the attorney-client privilege, which "is a creature of the common law," Advisory Committee's Notes to Rule 502, Ala. R. Evid., the psychotherapist-patient privilege, which was created in 1963 with the enactment of § 34-26-2, Ala. Code 1975, and the counselor-patient privilege, which was created in 1979 with the enactment of § 34-8A-21, were new confidentiality privileges in the law. See, e.g., Deirdre M. Smith, An Uncertain Privilege: Implied Waiver and the Evisceration of the Psychotherapist-Patient Privilege in the Federal Courts, 58 DePaul L. Rev. 79, 91 (2008) (noting that "[f]ew evidentiary privileges were recognized at common law and, therefore, state legislatures took the lead in establishing new privileges from the nineteenth century to the present" and that "many privileges -- including the psychotherapist-patient privilege -- came about by intensive lobbying efforts by professionals seeking special status for their communications"). Despite its lack of common-law pedigree, the psychotherapist-patient privilege at least "represents a nationally recognized privilege principle," whereas the counselor-patient privilege "is generally not found in the primary body of evidence law nationally." Advisory Committee's Notes to Rule 503A, Ala. R. Evid.

common-law litigation privilege does not provide protection against claims seeking liability for breaches of the counselor-patient privilege. Cf. Palmer v. Bice, 28 Ala. 430, 431 (1856) (observing that "[a]s the right is the creature of the statute, its extent must be determined by the statute").

In his special writing, Justice Mitchell employs a canon of construction that provides that there is a presumption against changes in the common law to argue that the legislature in enacting § 34-8A-21 had to expressly state that the counselor-patient privilege takes precedence over the common law in order for a claim based on that privilege not to be covered by the litigation privilege. Aside from the fact that neither Borden nor Malone and the clinic mention this canon in their arguments, it simply does not belong in the analysis of this issue. The presumption against changes in the common law becomes relevant when a statute alters or contravenes a common-law claim or rule. All the statutes Justice Mitchell cites as examples that expressly state that they supersede the common law do so precisely because the legislature was altering or

abolishing a common-law rule.[9] However, when the legislature invents something new, be it a cause of action, a right, or a privilege, that did not exist in the common law, this presumption canon necessarily does not apply because it is plain that the legislature intends not to follow the common law when it creates something wholly new.[10]

If a reliance on canons of construction is necessary in this case -- and I do not believe that it is -- then we should employ the most fundamental principle of statutory construction: that we apply the plain meaning of the text of the law at issue. See, e.g., Mobile Infirmary Med. Ctr. v. Hodgen, 884 So. 2d 801, 814 (Ala. 2003) ("The fundamental principle of statutory construction is that words in a statute must be given their plain meaning."). Section 34-8A-21 provides:

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[9]Section 35-4A-8, Ala. Code 1975, is part of Alabama's Uniform Statutory Rule Against Perpetuities; § 8-27-6, Ala. Code 1975, is part of the Alabama Trade Secrets Act; and § 34-27-87, Ala. Code 1975, is part of the Alabama Real Estate Consumer's Agency and Disclosure Act, and it speaks to alterations in the common law of agency.

[10]Legions of examples could be cited, but one should suffice. The Dram Shop Act, § 6-5-71, Ala. Code 1975, created a cause of action that did not exist at common law. The statute does not state that it supersedes the common law because, quite obviously, there was no need to do so when no such cause of action existed at common law.

> "For the purpose of this chapter, the confidential relations and communications between licensed professional counselor or certified counselor associate and client are placed upon the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed."

Nothing in the text of § 34-8A-21 itself indicates that the litigation privilege constitutes an exception to the protection that statute affords to the confidential communications described therein.

The majority opinion notes that the reasoning from cases involving the psychotherapist-patient privilege can be used to address issues involving the counselor-patient privilege because the two privileges are closely aligned. ___ So. 3d at ___.

> "This Court has stated that 'the Alabama legislature did not limit the [psychotherapist-patient] privilege with specific exceptions,' [Ex parte United Serv. Stations, Inc.,] 628 So. 2d [501,] 504 [(Ala. 1993)], but that that 'privilege, however, is subject to certain judicially created exceptions,' Id. (citing cases in which this Court has recognized exceptions to the privilege)....[2]
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> "[2]Rule 503(d), Ala. R. Evid., also contains a list of judicially created exceptions."

Ex parte Pepper, 794 So. 2d 340, 343 (Ala. 2001). Similarly, the only stated exceptions to the counselor-patient privilege are listed in Rule 503A(d), Ala. R. Evid. Those exceptions are:

> "(1) Proceedings for Hospitalization. In proceedings to hospitalize the client for mental illness, there is no privilege under this rule for communications relevant to an issue in those proceedings if the counselor or counselor associate has determined, in the course of counseling, that the client is in need of hospitalization.
>
> "(2) Examination by Order of Court. If the court orders an examination of the mental or emotional condition of a client, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise.[11]
>
> "(3) When the Client's Condition Is an Element of a Claim or a Defense. There is no privilege under this rule as to a communication relevant to an issue regarding the mental or emotional condition of the client, in any proceeding in which the client relies upon the condition as an element of the client's claim or defense, or, after the client's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

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[11]Obviously, the evaluation of the negligence and wantonness claims would be different if the trial court in the custody-modification proceeding had ordered Malone to examine J.B. and to testify on the basis of that examination.

"(4) Breach of Duty Arising Out of the Counselor-Client Relationship. There is no privilege under this rule as to an issue of breach of duty by the counselor, counselor associate, or victim counselor to the client or by the client to the counselor, counselor associate, or victim counselor.

"(5) Victim Counseling in Civil Cases. There is no privilege under this rule in civil cases as to a communication made to facilitate victim counseling when the person conducting the counseling is neither a licensed professional counselor nor a counselor associate, except that under no circumstances may a victim counselor or a victim be compelled to provide testimony in any proceeding that would identify the name, address, location, or telephone number of a 'safe house,' abuse shelter, or other facility that provided temporary emergency shelter to the victim of the offense or transaction that is the subject of the proceeding, unless the facility is a party to the proceeding."

Rule 503A(d), Ala. R. Evid.[12] The Advisory Committee Notes to Rule 503A indicate that the rule and its exceptions were derived from §§ 15-23-40 to -46[13] and §§ 34-8A-1 to -21, Ala. Code 1975, as well as from exceptions that already existed for the psychotherapist-patient privilege listed in Rule 503(d), Ala. R. Evid. There is no indication from this list of

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[12]I cite Rule 503A(d), Ala. R. Evid., as additional support for the reasoning employed in the majority opinion, but, as its absence from the majority opinion shows, the rule is not necessary to reach the conclusion that the litigation privilege does not shield a defendant from a claim based on the counselor-patient privilege.

Justice Mitchell makes much of the fact that the litigation privilege is an immunity defense, whereas, "[t]he counselor-patient privilege ... is a rule of evidence." ___ So. 3d at ___ (Mitchell, J., concurring in part and concurring in the result). I certainly grant that distinction. See, e.g., Eileen A. Scallen, Relational and Informational Privileges and the Case of the Mysterious Mediation Privilege, 38 Loy. L.A. L. Rev. 537, 595 n.4 (2004) ("Evidentiary privileges are different from substantive privileges. Substantive privileges partly or completely shield the holder from liability for certain claims. ... Evidentiary privileges, however, only shield the holder from providing certain evidence."). But I fail to see its relevance here because Borden did not cite the counselor-patient privilege to exclude testimony in this case; instead, it serves as the underlying basis for the negligence and wantonness claims.

[13]Sections 15-23-40 to -46, Ala. Code 1975, concern the privilege for communications between the victim of sexual assault or family violence and a victim counselor.

exceptions that other exceptions to the counselor-patient privilege are available to defeat liability for a breach of such confidentiality.[14]

The majority notes that the public policy behind the psychotherapist-patient privilege, upon which the counselor-patient privilege is modeled, is to

> " ' "inspire confidence in the patient and encourage him in making a full disclosure to the physician as to his symptoms and condition, by preventing the physician from making public information that would result in humiliation, embarrassment, or disgrace to the patient, and [is] thus designed to promote the efficacy of the physician's advice or treatment. The exclusion of the evidence rests in the public policy and is for the general interest of the community." ' "

___ So. 3d at ___ (quoting Ex parte University of South Alabama, 183 So. 3d 915, 921 (Ala. 2015), quoting in turn Ex parte Rudder, 507 So. 2d

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[14]This conclusion follows from the negative-implication canon, i.e., " 'expressio unius est exclusio alterius,' (the expression of one thing is the exclusion of another). Under this maxim, if a statute specifies one exception to a general rule, there are no other exceptions to the rule." Glencoe Paving Co. v. Graves, 266 Ala. 154, 157, 94 So. 2d 872, 875 (1957).

411, 413 (Ala. 1987)). That public policy also counsels against further exceptions than those already listed. Cf. Deatherage v. State of Washington, Examining Bd. of Psychology, 134 Wash. 2d 131, 136, 948 P.2d 828, 830 (1997) (noting that "[t]he privilege of absolute witness immunity creates an 'extraordinary breadth' of protection and should not be extended absent the existence of compelling public policy justifications"). Indeed,

> "this Court in Ex parte Pepper, 794 So. 2d 340, 343 (Ala. 2001), refused to create 'an exception to the [psychotherapist-patient] privilege applicable when a party seeks information relevant to the issue of the proximate cause of another party's injuries.' In Ex parte Northwest Alabama Mental Health Center, 68 So. 3d 792, 799 (Ala. 2011), this Court refused to create 'an exception to the privilege that would narrow those parameters by making the privilege inapplicable when a plaintiff establishes that privileged information is "necessary" to proving a cause of action.' "

Ex parte University of South Alabama, 183 So. 3d at 921. In reaching its conclusion in Ex parte Northwest Alabama Mental Health Center, 68 So. 3d 792 (Ala. 2011), the Court reasoned, in part:

> "Northwest and Newman argue that the Alabama Rules of Evidence state five exceptions to the psychotherapist-patient privilege, see Rule 503(d), and that the situation presented here falls into none of those five

> exceptions. In the face of those five exceptions, we decline to use our adjudicatory authority over an individual case such as this to create an additional exception in the interest of 'public policy.' ' " 'The term "public policy" is inherently not subject to precise definition.... "Public policy is a vague expression, and few cases can arise in which its application may not be disputed...." ' " ... Such creations are best left to the legislature.' Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130, 1131 (Ala. 1977) (quoting Petermann v. International Brotherhood of Teamsters, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1959)). We agree that such creations are best left to the legislature, or perhaps to the normal rule-making authority of this Court. See 25 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure: Evidence § 5542 (1989) ('If there is not an applicable exception to a statutory patient's privilege, courts have no power to create exceptions by judicial decision.').
>
> "....
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> "The legislature has established parameters for the psychotherapist-patient privilege, namely, that 'the confidential relations and communications between licensed psychologists, licensed psychiatrists, or licensed psychological technicians and their clients are placed upon the same basis as those provided by law between attorney and client.' Ala. Code 1975, § 34–26–2. ...
>
> "Having concluded that none of the recognized exceptions to the privilege apply here and that this Court should not in this proceeding create a new exception to the privilege, the only remaining question is whether Johnson waived that privilege."

68 So. 3d at 798–800 (emphasis added).

The fact that the litigation privilege is not a "new" principle does not alter the applicability of the foregoing reasoning. Indeed, the fact that the litigation privilege has existed for so long makes its absence from the listed exceptions to the attorney-client privilege in Rule 502(d), Ala. R. Evid., to the psychotherapist-patient privilege in Rule 503(d), Ala. R. Evid., and to the counselor-patient privilege in Rule 503A(d), Ala. R. Evid., as well as the dearth of discussion concerning the litigation privilege in cases concerning those confidentiality privileges, all the more conspicuous. In short, the statutory language, the public policy behind the counselor-patient privilege, and our cases addressing the very similar psychotherapist-patient privilege all indicate that the common-law litigation privilege is not an exception to the counselor-patient privilege.

Finally, aside from his objections to the majority's rationale, Justice Mitchell's own rationale for reversing the dismissal of the negligence and wantonness claims also has flaws. Justice Mitchell argues that the negligence and wantonness claims are not covered by the litigation privilege because they do not contain the same elements as an invasion-of-privacy claim. However, Borden never suggested in any of his

submissions to the trial court or in his briefs to this Court that the litigation privilege applies solely to defamation and invasion-of-privacy claims. I note that, absent clear statutory proscriptions, the trend throughout the country has been for courts to apply the litigation privilege to all civil claims based on statements made in view of a judicial proceeding. See, e.g., Ogbin v. Fein, Such, Kahn & Shepard, P.C., 414 F. App'x 456, 458 (3d Cir. 2011) (not selected for publication in the Federal Reporter) (dismissing plaintiff's claims of intentional misrepresentation and negligence because they fell "squarely within the scope of the New Jersey litigation privilege"); Creamer v. Danks, 863 F.2d 1037, 1037 (1st Cir. 1988) ("[T]he absolute privilege for statements made in the course of judicial proceedings bars not only plaintiffs' defamation claim, but all the causes of action alleged against defendant, including negligence for professional malpractice." (applying Maine law)); McCullough v. Kubiak, 158 So. 3d 739, 741 (Fla. Dist. Ct. App. 2015) ("[T]he circuit court's proper dismissal of the plaintiffs' defamation actions based on absolute privilege also bars the plaintiffs' negligence actions for the same reason."); Estate of Mayer v. Lax, Inc., 998 N.E.2d 238, 249 (Ind. Ct. App. 2013) ("Other

torts related to defamation, or relying upon defamatory statements as proof of wrongdoing, may also be barred by the absolute privilege."); Jones v. Coward, 193 N.C. App. 231, 235, 666 S.E.2d 877, 880 (2008) (dismissing plaintiff's claims of intentional infliction of emotional distress and negligence based off allegedly false statements made during judicial proceedings).

Justice Mitchell's rationale requires an examination of why the litigation privilege has been consistently expanded beyond its origin in defamation claims, including by this Court in Butler v. Town of Argo, 871 So. 2d 1 (Ala. 2003), which applied the litigation privilege to invasion-of-privacy claims. To support its expansion of the litigation privilege, the Butler Court cited Restatement (Second) of Torts § 652F (1977). See 871 So. 3d at 24. The commentary to that section states in part: "The circumstances under which there is an absolute privilege to publish matter that is an invasion of privacy are in all respects the same as those under which there is an absolute privilege to publish matter that is personally defamatory." Restatement (Second) of Torts § 588 (1977) concerns the litigation privilege for witnesses, and the commentary to that

section states in part: "The function of witnesses is of fundamental importance in the administration of justice. The final judgment of the tribunal must be based upon the facts as shown by their testimony, and it is necessary therefore that a full disclosure not be hampered by fear of private suits for defamation." In short, the policy behind the litigation privilege -- the need for participants in judicial proceedings to speak freely so as to establish the true facts -- could apply just as readily to statements made negligently or wantonly as it does to defamatory statements or statements that implicate an invasion of privacy. To conclude simply that the elements of a negligence claim are not the same as an invasion-of-privacy claim does not address the crux of the issue concerning the scope of the litigation privilege.

PARKER, Chief Justice (concurring in part and concurring in the result).

I join Justice Mitchell's special writing except as to his suggestion that this Court should revise its abrogation framework to hold that the Legislature may abrogate the common law by "clear" means. I would retain the present rule that the Legislature must expressly state that the common law is abrogated in order to alter it.

MITCHELL, Justice (concurring in part and concurring in the result).

I concur with the majority concerning all of the plaintiff's claims, except I concur only in the result with respect to the "negligence/wantonness/willfulness" claims asserted on behalf of J.B. ("the negligence and wantonness claims"). Because I do not believe that abrogation of the common-law litigation privilege occurred here, I write separately to explain why I would still reverse the judgment on the ground that the negligence and wantonness claims are not within the scope of the litigation privilege.

The Litigation Privilege Has Not Been Abrogated Here

The majority opinion holds that the litigation privilege does not apply to the negligence and wantonness claims because the privilege was abrogated by the counselor-patient privilege created by § 34-8A-21, Ala. Code 1975. ___ So. 3d at ___. Since § 34-8A-21 does not include an express exception for the litigation privilege, the majority concludes that the litigation privilege "must give way" to the statutory right of confidentiality. ___ So. 3d at ___. I disagree.

It is true that the common law can be abrogated if it is "inconsistent with the Constitution, laws and institutions of this state" or is "altered or repealed by the Legislature." § 1-3-1, Ala. Code 1975. But our Court has consistently held that the common law may be abrogated only if the Legislature does so expressly. See, e.g., West Dauphin Ltd. P'ship v. Callon Offshore Prod., Inc., 725 So. 2d 944, 952 (Ala. 1998) (" '[S]tatutes are presumed not to alter the common law in any way not expressly declared.' " (quoting Arnold v. State, 353 So. 2d 524, 526 (Ala. 1977))); Ex parte Parish, 808 So. 2d 30, 33 (Ala. 2001) (" 'If the legislature had intended to [abrogate the common law], that body would have made its intention evident and unmistakable.' " (quoting Holmes v. Sanders, 729 So. 2d 314, 316–17 (Ala. 1999))); Ex parte Key, 890 So. 2d 1056, 1061 (Ala. 2003) (holding that the common-law year-and-a-day rule survived "because the Legislature did not expressly abolish [the rule] when it reenacted the Criminal Code").

Indeed, the Legislature has expressly abrogated the common law numerous times in statutes. See, e.g., § 35-4A-8, Ala. Code 1975 ("This chapter supersedes the rule of the common law known as the rule against

perpetuities."); § 8-27-6, Ala. Code 1975 ("Those provisions of this chapter that are inconsistent with the common law of trade secrets supersede the common law ...."); § 34-27-87, Ala. Code 1975 ("The duties of licensees as specified in this article ... shall supersede any duties of a licensee ... which are based upon common law principles of agency to the extent that those common law duties are inconsistent with the duties ... as specified in this article."). The Legislature could have done so again when it enacted § 34-8A-21. But it clearly didn't.

Applying our precedent, it is obvious that no express abrogation occurred here. Section 34-8A-21 does not expressly abrogate the common law, and no one argues that it does. Therefore, it is inappropriate to reverse the trial court's judgment as to the negligence and wantonness claims on that ground.

I would be open to revising our Court's abrogation framework by adopting what I believe is a more reasonable rule promoted by Justice Antonin Scalia and Bryan Garner. Under their approach, "[a] statute will be construed to alter the common law only when that disposition is clear." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of

Legal Texts § 52, at 318 (Thomson/West 2012). This approach accounts for the commonsense conclusion that a legislature need not expressly state that the common law is abrogated when it passes a law incompatible with a common-law rule; the abrogation occurs by the very nature of the incompatibility. Thus, a legislature could "clearly" abrogate the common law in other ways, including by unmistakable implication.

But the majority's conclusion would not hold up even under this more forgiving approach because there is no fundamental incompatibility between the common-law litigation privilege and the counselor-patient privilege. In fact, the two are different concepts serving different purposes. The litigation privilege is a defense that governs who may proceed with a claim, and the counselor-patient privilege is an evidentiary rule that governs what communications are admissible.

Although repeatedly referred to as a "privilege" in our cases, the litigation privilege is in fact a defense that is a species of immunity. See Barnett v. Mobile Cnty. Pers. Bd., 536 So. 2d 46, 51-52 (Ala. 1988) (referring to the litigation privilege as a "special immunity"); O'Barr v. Feist, 292 Ala. 440, 446, 296 So. 2d 152, 157 (1974) (" ' "[The litigation

privilege] denies to the defamed party any remedy through an action for libel and slander." ' " (quoting Adams v. Alabama Lime & Stone Corp., 225 Ala. 174, 176, 142 So. 424, 425 (1932), quoting another case) (emphasis added)). Where applicable, immunities serve as defenses that bar a plaintiff from even proceeding with his claim. In that vein, the litigation privilege serves as an absolute bar in appropriate cases unless waiver has occurred. O'Barr, 292 Ala. at 446, 296 So. 2d at 157. Hence the existence of its alternative name in our jurisprudence: the absolute privilege. See, e.g., Hollander v. Nichols, 19 So. 2d 184, 195 (Ala. 2009) (referring to the litigation privilege as the "absolute privilege").

The counselor-patient privilege, by contrast, is a rule of evidence. The special concurrence argues -- for the first time by anyone in this case -- that the counselor-patient privilege's manifestation in Rule 503A(d), Ala. R. Evid., abrogates the litigation privilege because the rule lacks an exception for it. ___ So. 3d at ___ (Mendheim, J., concurring specially). Using the negative-implication canon, the special concurrence reasons that the absence of the litigation privilege from the list of exclusions in

Rule 503A(d) means that it must yield to the counselor-patient privilege. Id. at n.14. That is not so.

The counselor-patient privilege is a rule of admissibility. Like other rules of evidence, it governs what can and cannot be considered by a tribunal in reaching a final judgment. Rules of evidence serve as a filtering mechanism within matters that have already found their way into the courthouse; immunities lock the door. Evidentiary rules and immunities are not fundamentally incompatible concepts -- the former deals with how a party may prove his claim, while the latter deals with whether a party may even proceed with his claim. Because there is no clear legislative directive to disregard the common-law litigation privilege, I would conclude it can continue to operate alongside § 34-8A-21.

Negligence and Wantonness Are Outside the Scope of the Litigation Privilege

All that said, I don't believe it is necessary here to consider the complex interplay between statutes and common law. Rather, I would send the negligence and wantonness claims back to the trial court on narrower grounds -- by holding that those claims are not within the scope

of the litigation privilege. As the majority observes, our cases historically applied the litigation privilege only to defamation claims. See Lawson v. Hicks, 38 Ala. 279, 285 (1862); Walker v. Majors, 496 So. 2d 726, 729-30 (Ala. 1986); Hollander v. Nichols, 19 So. 3d 184, 195 (Ala. 2009) ("This Court has recognized that a party that has published allegedly defamatory matter in the course of a judicial proceeding may claim, as a defense to a defamation action based on that publication, the absolute privilege described in the Restatement (Second) of Torts § 587 (1977)." (emphasis added)). This Court expanded the application of the privilege to include "the publication of any matter that amounts to an invasion of privacy." Butler v. Town of Argo, 871 So. 2d 1, 24 (Ala. 2003) (emphasis added). Thus, a party can invoke the litigation privilege if the claim against him sounds in defamation or privacy tort.

The negligence and wantonness claims here are not defamation claims. So the question becomes whether those claims amount to an invasion of privacy. Alabama law recognizes four claims under the invasion-of-privacy umbrella: (1) wrongful intrusion; (2) publication that violates ordinary decencies; (3) false light; and (4) appropriation of some

element of a plaintiff's personality. See Phillips v. Smalley Maint. Servs., 435 So. 2d 705 (Ala. 1983) (wrongful intrusion); Smith v. Doss, 251 Ala. 250, 37 So. 2d 118 (1958) (indecent publication); Cottrell v. National Collegiate Athletic Ass'n, 975 So. 2d 306 (Ala. 2007) (false light); Norris v. Moskin Stores, Inc., 272 Ala. 174, 132 So. 2d 321 (1961) (appropriation of image). Our menu of privacy claims closely mirrors those included in the definition of "Invasion of Privacy" in the Restatement, which Butler cited when broadening the scope of the litigation privilege. See Restatement (Second) of Torts § 652A (1977). Accordingly, it appears these are the types of claims that fall within the litigation privilege.

It is clear that the plaintiff did not plead a claim under the invasion-of-privacy umbrella. He filed negligence and wantonness claims. Those causes of action do not constitute an invasion of privacy -- which means they are not covered by the litigation privilege. In my view, that is a better way to reach the holding as to the negligence and wantonness claims, making it unnecessary to engage with how § 34-8A-21 interacts with the common law.

Conclusion

By engaging in abrogation analysis, the majority opinion implies that negligence and wantonness claims (if not abrogated by a statute like § 34-8A-21) may fall within the scope of the litigation privilege. We have never expanded the reach of the privilege that far, and we should not do so now. In my view, that portion of the majority opinion only serves to encourage a broader-than-intended use of the privilege by future litigants, which could lead to the dismissal of meritorious claims.

Our cases require express abrogation. That didn't happen here. And even under Justice Scalia and Garner's formulation, which I believe is a better approach to analyzing abrogation, the Legislature is required to act clearly. That didn't happen either. It is far easier -- and in my view correct -- simply to hold what we have always held: that claims other than those alleging defamation and invasion of privacy are outside the scope of the litigation privilege.