

United States Court of Appeals  
For the Eighth Circuit

---

No. 23-2392

---

Angela Moody,

*Plaintiff - Appellant,*

v.

James R. Flens, Ph.D.,

*Defendant - Appellee.*

---

Appeal from United States District Court  
for the Eastern District of Arkansas - Central

---

Submitted: June 11, 2024

Filed: August 23, 2024

---

Before COLLOTON, Chief Judge, ARNOLD and GRUENDER, Circuit Judges.

---

COLLTON, Chief Judge.

In the course of divorce proceedings between Angela and Edward Moody, Edward hired James Flens, a forensic psychologist, as an expert witness. Flens produced an expert report that Angela believes reflected negatively on her. Based on the content of that report, Angela brought an action against Flens alleging tort claims under state law. The district court\* granted Flens's motion for summary judgment on the ground that he is entitled to absolute immunity as a witness under Arkansas law. Angela argues that the court's privilege ruling was erroneous. We disagree and affirm the judgment.

The focus of the lawsuit is a consultation report that Flens produced in September 2014 about whether a child custody evaluation would be helpful to the court in deciding how to award custody of the couple's minor child. Flens concluded that there were (1) concerns about Angela's credibility, honesty, and possible characterological issues; (2) concerns about Angela's exposure of the minor child to her paramour; (3) issues regarding Edward's alcohol use; and (4) intertwined issues of high conflict co-parenting and gatekeeping. Based on these findings, Flens recommended an evaluation by a forensic psychologist and did not make a recommendation on how the court should award custody of the child. Flens was also deposed about the report in October 2014, but he did not testify in court. The court did not order the suggested evaluation, and ultimately awarded primary custody to Angela.

Years later, in 2022, Angela sued Flens in Arkansas state court. She alleged that Flens was liable to her for negligence, intentional infliction of emotional distress, and defamation based on his expert report. Flens removed the case to federal court

---

\*The Honorable James M. Moody, Jr., United States District Judge for the Eastern District of Arkansas.

and moved for summary judgment. Relying on *Johnson v. Dover*, 143 S.W.2d 1112 (Ark. 1940), the court granted summary judgment for Flens on the ground that his report and testimony were “absolutely privileged.” The court concluded that because Flens’s report and testimony were directly responsive to a question propounded by Edward’s counsel on an issue relevant to child custody, he was entitled to absolute privilege. Whether Flens was ultimately called to testify at trial or whether his report was admitted into evidence was not determinative.

In *Johnson*, the Arkansas Supreme Court explained that “[t]he general rule of the American cases is that statements made by a witness in the regular course of a judicial proceeding are absolutely privileged where they are directly or fairly responsive to questions propounded by counsel or court, or where they are relevant and pertinent to the subject of inquiry, whether they are false or malicious.” *Id.* at 1113 (internal quotation omitted). Under this “general rule,” the witness “is entitled to absolute privilege with respect to [his voluntary statement] if it is in fact pertinent to the issues being tried.” *Id.* (internal quotation omitted). This immunity extends beyond courtroom testimony to preparatory activity such as production of an expert report and testimony in a deposition. See *Bruce v. Byrne-Stevens & Assocs. Eng’rs, Inc.*, 776 P.2d 666, 669 (Wash. 1989); *Adams v. Peck*, 415 A.2d 292, 294-95 (Md. 1980).

Flens was an expert witness in the regular course of a judicial proceeding. The custody of the couple’s minor child was a major issue in the divorce proceedings. Flens’s report was pertinent to that issue. Based on his expertise in psychology, he cited what he believed were relevant facts about the two parents and explained his view that a child custody evaluation would be helpful to the court in making a custody determination. *Johnson* involved a lay witness, but we doubt that Arkansas would except experts from the privilege. “The mere fact that the expert is retained and compensated by a party does not change the fact that, as a witness, he is a participant in a judicial proceeding. It is that status on which witness immunity

rests.” *Bruce*, 776 P.2d at 669; see *McNall v. Frus*, 784 N.E.2d 238, 239-40 (Ill. 2002). “Litigation is costly enough without judges’ making it more so by throwing open the door to defamation suits against expert witnesses.” *MacGregor v. Rutberg*, 478 F.3d 790, 792 (7th Cir. 2007). Arkansas grants absolute immunity to court-appointed experts who act within the scope of their appointments, *Chambers v. Stern*, 994 S.W.2d 463, 465-66 (Ark. 1999), and the threat of liability “faced by party-retained experts is as great as, or greater than, the threat to court-appointed experts.” *Harrison v. Roitman*, 362 P.3d 1138, 1141 (Nev. 2015).

Angela asserts that *Johnson v. Dover* has been superseded by three more recent decisions of the Arkansas Supreme Court: *John v. Faitak*, 594 S.W.3d 871 (Ark. 2020); *Martin v. Smith*, 576 S.W.3d 32 (Ark. 2019); and *Chambers*, 994 S.W.2d 463. In those cases, the court explained that a court-appointed physician is entitled to quasi-judicial immunity when he serves an integral part of the judicial process and acts within the scope of the court’s order. *John*, 594 S.W.3d at 873, 875 n.2; *Martin*, 576 S.W.3d at 37; *Chambers*, 994 S.W.2d at 466. This immunity is “absolute” when the physician assists the court with an evaluation or otherwise acts within the scope of a court appointment. *Chambers*, 994 S.W.2d at 465. The court concluded, however, that a physician may not have immunity—and thus may be subject to liability for medical negligence or other torts—if he engages in diagnostic work or the provision of treatment or therapy that is outside the scope of a court’s appointment order. *John*, 594 S.W.3d at 874; *Chambers*, 994 S.W.2d at 466-67.

These more recent decisions did not cite *Johnson v. Dover*. They involved activity of physicians that went beyond conducting evaluations in connection with divorce proceedings to providing treatment or therapy that was allegedly negligent. Flens’s disputed actions, by contrast, were limited to traditional evidence-giving—production of an expert report and testimony in a deposition. In that context, *Johnson* is the most applicable precedent and the best indicator of state law on

witness immunity. Applying our best prediction of Arkansas law, we conclude that Flens is entitled to absolute immunity for the actions at issue in this lawsuit.

The judgment of the district court is affirmed.

---