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SJC-13554

SJC-13558

GEORGE MACKIE vs. KATRIN ROUSE-WEIR.

GEORGE MACKIE vs. ROBERT JOSS.

Plymouth. September 6, 2024. - January 24, 2025.

Present: Budd, C.J., Gaziano, Kafker, Wendlandt, & Georges, JJ.

Judicial Immunity. Privileged Communication. Witness, Expert.  
Evidence, Privileged communication, Expert opinion, Sex  
offender. Sex Offender. Practice, Civil, Sex offender,  
Civil commitment, Motion to dismiss.

Civil action commenced in the Superior Court Department on February 12, 2021.

A motion to dismiss was heard by Valerie A. Yarashus, J.

After review by the Appeals Court, 103 Mass. App. Ct. 1102 (2023), the Supreme Judicial Court granted leave to obtain further appellate review.

Civil action commenced in the Superior Court Department on February 12, 2021.

A motion to dismiss was heard by Sharon E. Donatelle, J.

After review by the Appeals Court, 103 Mass. App. Ct. 1102 (2023), the Supreme Judicial Court granted leave to obtain further appellate review.

George Mackie, pro se.

Kenneth B. Walton (Patricia B. Gary also present) for the defendants.

Mary P. Murray for Department of Correction.

GEORGES, J. Where the Commonwealth contends that a prisoner who was previously convicted of a qualifying sexual offense is a "sexually dangerous person" (SDP) as defined in G. L. c. 123A, § 1,<sup>1</sup> it may file a petition seeking to civilly commit the person following his or her release from custody. See G. L. c. 123A, § 12 (a)-(b). The provisions of the SDP statute, G. L. c. 123A (c. 123A), as well as our decisional law, require the use of at least two types of expert witnesses during

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<sup>1</sup> General Laws c. 123A, § 1, states, in relevant part, that a "sexually dangerous person" is

"any person who has been (i) convicted of or adjudicated as a delinquent juvenile or youthful offender by reason of a sexual offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility; (ii) charged with a sexual offense and was determined to be incompetent to stand trial and who suffers from a mental abnormality or personality disorder which makes such person likely to engage in sexual offenses if not confined to a secure facility; or (iii) previously adjudicated as such . . . and whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by either violence against any victim, or aggression against any victim under the age of 16 years, and who, as a result, is likely to attack or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires."

this process: probable cause experts, whose opinions are required to begin the process; and qualified examiners, whose opinions dictate whether the case may proceed to trial. This case addresses whether these experts are immune from liability for the opinions they provide during the process.

The plaintiff, George Mackie, was vindicated on appeal from a jury verdict adjudicating him an SDP. He later commenced separate civil actions against Dr. Katrin Rouse-Weir, a probable cause expert hired by the office of the district attorney for the middle district (district attorney's office), which petitioned for Mackie's commitment; and Dr. Robert Joss, a qualified examiner whose services were paid for by the Department of Correction (DOC). In his complaints, Mackie alleged that Rouse-Weir and Joss submitted inaccurate reports to the court and falsely represented that Mackie met the criteria to be committed as an SDP.<sup>2</sup>

Rouse-Weir and Joss each filed a motion to dismiss pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), contending entitlement to qualified immunity for the acts complained of by Mackie. Separate Superior Court judges allowed the motions and

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<sup>2</sup> Against both defendants, Mackie also alleged "medical malpractice" and violations of both G. L. c. 12, § 11I, and his right to liberty as secured by art. 10 of the Massachusetts Declaration of Rights. He further accused Rouse-Weir of perjury and claimed that Joss failed to comply with the statutory criteria detailed in G. L. c. 123A, § 1.

entered judgments for the defendants, with both judges concluding that the defendants were entitled to absolute quasi-judicial immunity, rather than addressing the initial basis of the experts' motions -- that is, qualified immunity. Mackie appealed from these judgments to the Appeals Court. In separate unpublished decisions, the same Appeals Court panel reversed both dismissal orders, ruling that Joss and Rouse-Weir were entitled only to qualified immunity and not to absolute quasi-judicial immunity. See Mackie v. Joss, 103 Mass. App. Ct. 1102 (2023); Mackie v. Rouse-Weir, 103 Mass. App. Ct. 1102 (2023).

We granted the defendants' applications for further appellate review and paired the appeals for argument. For the reasons that follow, we conclude that absolute quasi-judicial immunity protects qualified examiners from liability, and they are further protected by the litigation privilege. We also conclude that probable cause experts are immune from liability by the litigation privilege. Accordingly, because Mackie brought his claims against Joss and Rouse-Weir based on conduct taken solely in their expert capacities, we affirm the Superior Court judgments dismissing his complaints.<sup>3</sup>

Background. To contextualize our discussion, we first provide a brief overview of SDP commitment proceedings, focusing

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<sup>3</sup> We acknowledge the amicus brief submitted by the DOC.

on the roles of probable cause experts and qualified examiners. We then summarize the relevant facts from the complaints, reserving certain details for later discussion.

1. Chapter 123A proceedings. After an SDP petition is filed, a Superior Court judge holds a hearing to determine whether there is "probable cause" to believe the subject of the petition is sexually dangerous. G. L. c. 123A, § 12 (c). In Commonwealth v. Bruno, 432 Mass. 489, 511, 513 (2000), we held that expert testimony is required at this stage, reasoning that the question "[w]hether a person suffers from a mental abnormality or personality defect, as well as the predictive behavioral question of the likelihood that a person suffering from such a condition will commit a sexual offense, are matters beyond the range of ordinary experience and require expert testimony."

If, in light of the expert's testimony, the judge determines that there is probable cause to believe the person is sexually dangerous, that person "shall be committed to the [Massachusetts Treatment Center] for a period not exceeding [sixty] days for the purpose of examination and diagnosis under the supervision of two qualified examiners." G. L. c. 123A, § 13 (a). See Chapman, petitioner, 482 Mass. 293, 300 (2019). As defined in § 1 of the SDP statute, a qualified examiner is "designated by the commissioner of correction," but "need not be

an employee of the [DOC] or of any facility or institution of the [DOC]."

Qualified examiners serve a unique gatekeeper function. Johnstone, petitioner, 453 Mass. 544, 552 (2009). Specifically, if neither examiner finds the person sexually dangerous, "'the Commonwealth cannot rely upon other sources of potential expert evidence . . . to meet its burden of proof at trial,' and the [person] must therefore be discharged before trial." Chapman, 482 Mass. at 303, quoting Johnstone, supra at 553. However, if one or both examiners find the person is sexually dangerous, the Commonwealth may petition the court for a trial within fourteen days from the time that the qualified examiners submit their reports to the court. G. L. c. 123A, § 14 (a). At trial, a person may be civilly committed only if the jury find "unanimously and beyond a reasonable doubt that the person named in the petition is a sexually dangerous person." G. L. c. 123A, § 14 (d).

2. Underlying SDP commitment proceedings. The district attorney's office hired Rouse-Weir as its probable cause expert to evaluate Mackie and determine whether he met the criteria for an SDP. After evaluating Mackie, Rouse-Weir prepared a report opining that Mackie met the criteria of an SDP. Armed with this preliminary determination, the district attorney's office filed in the Superior Court a petition pursuant to G. L. c. 123A,

§ 12, seeking to civilly commit Mackie. At his own request, Mackie was subsequently evaluated by another expert,<sup>4</sup> who determined that Mackie did not meet the criteria for sexual dangerousness. Mackie then met with Rouse-Weir to point out factual inconsistencies in her report and to contest her conclusion that he met the criteria of an SDP. Following this second interview, Rouse-Weir updated her report, reaffirming her conclusion that Mackie was an SDP.<sup>5</sup> A Superior Court judge found probable cause that Mackie was sexually dangerous and ordered him detained at the Massachusetts Treatment Center pending trial.

Following the probable cause determination, Mackie was interviewed by Joss, one of the qualified examiners hired to evaluate Mackie as statutorily required. Joss submitted his report to the court, in which he concluded that Mackie met the diagnostic criteria for pedophilic disorder and opined that he was an SDP.

At a jury trial held in the Superior Court, Joss testified. Joss reiterated his diagnosis of Mackie's pedophilic disorder, as well as his related opinion that Mackie met the criteria for

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<sup>4</sup> "[T]he person named in the petition may retain experts or professional persons to perform an examination on his behalf." G. L. c. 123A, § 14 (b). See Bruno, 432 Mass. at 495-496.

<sup>5</sup> The updated report had twenty-seven paragraphs missing from the initial report.

sexual dangerousness. Ultimately, the jury found unanimously and beyond a reasonable doubt that Mackie was an SDP, and he was civilly committed for an indefinite period.

Mackie then appealed, challenging the Commonwealth's reliance on evidence alleging prior sexual offenses for which he was never convicted. See Commonwealth v. Mackie, 100 Mass. App. Ct. 78, 79 (2021). While acknowledging that there was sufficient evidence "to support the defendant's adjudication as an SDP," the Appeals Court agreed with Mackie that the admission of that evidence was prejudicial error. The Appeals Court vacated the judgment and set aside the verdict, remanding the case to the Superior Court. Id. at 88, 91.

3. Procedural history. a. Rouse-Weir. Mackie commenced a civil action in the Superior Court against Rouse-Weir. Relevant to this appeal, Mackie alleged that Rouse-Weir "fil[ed] . . . a false report with the [Superior] Court and ma[de] false statements under oath, which denied [Mackie] his liberty." Rouse-Weir filed a motion to dismiss, arguing that she was entitled to qualified immunity as a government-hired probable cause expert performing "a discretionary task." Mackie opposed the motion, contending that Rouse-Weir, as a private party, was not entitled to qualified immunity.

At the hearing on the motion to dismiss, counsel for Rouse-Weir did not rely on the qualified immunity argument raised in

her written motion. Rather, Rouse-Weir's counsel shifted arguments, asserting orally that she was instead entitled to absolute quasi judicial immunity based on Massachusetts case law. However, Mackie continued to focus his arguments solely on disputing Rouse-Weir's claim to qualified immunity.

The motion judge dismissed the case against Rouse-Weir on the ground that she was protected by absolute quasi judicial immunity. The judge reasoned that Rouse-Weir "performed the essential function of evaluating [Mackie's] record and rendering an expert opinion as to whether or not he met the criteria of an SDP . . . . In other words, [she] functioned as an 'arm of the court.'" Mackie timely appealed from the decision.

Before the Appeals Court, Mackie argued that Rouse-Weir had waived her right to claim quasi judicial immunity by not asserting it in her written motion to dismiss. He also disputed Rouse-Weir's entitlement to both quasi judicial and qualified immunity.<sup>6</sup> In response, Rouse-Weir claimed that she had not waived her absolute quasi judicial immunity argument where it was raised orally during the motion hearing. She further maintained that quasi judicial immunity applied because she was performing "an essential judicial function." As a result, Ross-

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<sup>6</sup> At oral argument, Mackie reiterated his claim that Rouse-Weir is not a State actor, emphasizing that she was not hired by the court.

Weir argued, the Appeals Court did not need to consider qualified immunity since quasi judicial immunity already provided her with absolute protection from Mackie's claims.

At oral argument, Rouse-Weir's counsel emphasized, in maintaining that Rouse-Weir was entitled to quasi judicial immunity, that her role as a probable cause expert was "closely associated with the judicial process."<sup>7</sup> When asked about qualified immunity, counsel confirmed that it was not being pursued as a defense. Similarly, when pressed whether the litigation privilege applied to Rouse-Weir, her counsel responded that while she believed that quasi judicial immunity sufficed to resolve the case, the court could affirm on other grounds apparent in the record.<sup>8</sup>

In an unpublished decision, the Appeals Court ultimately affirmed in part and reversed in part the lower court's judgment. Unlike the motion judge, who focused on quasi judicial immunity, the Appeals Court analyzed Rouse-Weir's claim

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<sup>7</sup> At oral argument before the Appeals Court for Joss's case, appellee counsel stated that, for both cases, they "will argue" for "either or" with respect to quasi judicial immunity and qualified immunity.

<sup>8</sup> When the court asked for further clarification as to when counsel for the appellees briefed the litigation privilege issue, counsel stated that the litigation privilege was briefed in "one of the cases." The record reflects that the litigation privilege was raised in Joss's brief to the Appeals Court but was not mentioned in Rouse-Weir's brief.

under the framework of absolute prosecutorial immunity. The Appeals Court concluded that Ross-Weir was not entitled to this theory of immunity because her role as a probable cause expert was more akin to "an investigator and a witness, at most no more than a complaining witness." In support, the Appeals Court cited Kalina v. Fletcher, 522 U.S. 118, 129 (1997), in which the United States Supreme Court held that absolute prosecutorial immunity does not apply when prosecutors act outside their prosecutorial duties and instead act as witnesses.<sup>9</sup> The Appeals Court also determined that Rouse-Weir was entitled to qualified immunity for some, but not all, of Mackie's claims, referencing Filarsky v. Delia, 566 U.S. 377, 393-394 (2012).<sup>10</sup>

b. Joss. Mackie commenced a separate lawsuit against Joss, raising similar claims to those he alleged against Rouse-

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<sup>9</sup> Below, Rouse-Weir did not expressly claim absolute prosecutorial immunity in her written motion to dismiss or orally at the motion hearing. Rather, the motion judge discussed, but did not rely on, prosecutorial immunity in her decision granting the motion to dismiss.

<sup>10</sup> In Filarsky, 566 U.S. at 393-394, the Court extended qualified immunity to a private attorney temporarily retained by a city to assist in internal affairs investigations. The Court determined that as "[t]here is no dispute that government employees performing such work are entitled to seek the protection of qualified immunity," those acting on the government's behalf should be entitled to that same protection. Id.

Weir.<sup>11</sup> Specifically, Mackie alleged that Joss falsely reported and testified that he met the diagnostic criteria for pedophilic disorder and was sexually dangerous. Joss responded with a motion to dismiss, asserting qualified immunity as the ground for dismissal, which Mackie opposed.

Like Rouse-Weir, Joss did not mention quasi judicial immunity in his written motion but raised the argument and cited supporting case law orally during the motion hearing. A different Superior Court judge granted Joss's motion, concluding that qualified examiners are entitled to absolute quasi judicial immunity. The judge reasoned that qualified examiners perform essential judicial functions and, under c. 123A, serve as "independent" experts who function "as though appointed by the court." Chapman, 482 Mass. at 303. Additionally, unprompted the judge noted in a footnote that Joss's statements appeared to be "protected by the litigation privilege." Mackie subsequently appealed.

On appeal, Mackie similarly argued that Joss had waived any claim to absolute quasi judicial immunity by failing to raise it in his written motion to dismiss. Mackie also contended that Joss was entitled to neither quasi judicial immunity nor

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<sup>11</sup> A few immaterial differences in the causes of action, not worth reciting here, have no bearing on the court's decision.

qualified immunity. In response, Joss's counsel argued that he had not waived quasi judicial immunity because the motion judge understood during the motion hearing that Joss was seeking absolute immunity rather than qualified immunity, such that the judge did not raise the issue "sua sponte." Joss's counsel further maintained that, as a qualified examiner, Joss performed "an essential judicial function" and was therefore entitled to quasi judicial immunity. Additionally, although the issue had only been raised by the motion judge, Joss's counsel claimed he was protected by the litigation privilege as a witness in a judicial proceeding.

In a separate decision, the same Appeals Court panel that decided Rouse-Weir's case likewise vacated the order of dismissal in Joss's case and remanded it for further proceedings.<sup>12</sup> The panel concluded that Joss, like Rouse-Weir, was entitled only to qualified immunity and not to absolute prosecutorial immunity. The Appeals Court explained that, while qualified examiners are hired by the prosecuting party, they do not qualify for absolute prosecutorial immunity because their statutory role "makes them at most analogous to a complaining witness" in a criminal case. See Kalina, 522 U.S. at 129. The

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<sup>12</sup> The Appeals Court remanded Joss's case for consideration of whether Mackie had alleged any violation of a clearly established statutory or constitutional right for the purpose of determining whether qualified immunity applied.

panel also determined that Joss was not entitled to absolute quasi judicial immunity, the issue addressed by the parties on appeal, reasoning that qualified examiners "are not appointed by an arm of the court," but are instead hired by "one of the parties before the court."

Discussion. 1. Standard of review. We review the allowance of a motion to dismiss de novo. See Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011). In conducting our review, we accept as true all the facts alleged in the complaint and draw all reasonable inferences in the plaintiff's favor. See Flagg v. AliMed, Inc., 466 Mass. 23, 26 (2013). "To survive a motion to dismiss for failure to state a claim, the claimant must plausibly allege an entitlement to relief above the speculative level." Hornibrook v. Richard, 488 Mass. 74, 78 (2021), citing Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008).

While the procedural history of both cases raises several theories of immunity, we focus on two: (1) absolute quasi judicial immunity; and (2) the litigation privilege. We begin with a discussion of the principles governing each.

2. Quasi judicial immunity. Judicial immunity is a well-settled principle in our common law. See Allard v. Estes, 292 Mass. 187, 189-190 (1935). Judges are entitled to judicial immunity, meaning they are "exempt from liability to an action

for any judgment or decision rendered in the exercise of jurisdiction vested in [them] by law." LaLonde v. Eissner, 405 Mass. 207, 210 (1989), quoting Allard, supra. Notwithstanding its name, this immunity is not limited to judges. See Comins v. Sharkansky, 38 Mass. App. Ct. 37, 39 (1995). Rather, judicial immunity has been extended to persons who perform quasi judicial functions. See Hornibrook, 488 Mass. at 80 (court-appointed conservator); LaLonde, supra at 210-211, 212 (court-appointed psychiatrist); Temple v. Marlborough Div. of the Dist. Court Dep't, 395 Mass. 117, 133 (1985) (court clerks); Sarkisian v. Benjamin, 62 Mass. App. Ct. 741, 745 (2005) (guardian ad litem).

To determine whether a person performs a quasi judicial function warranting absolute immunity, we apply a functional analysis. LaLonde, 405 Mass. at 212. This approach evaluates the "nature of the duties performed, and whether they are 'closely associated with the judicial process.'" Cok v. Cosentino, 876 F.2d 1, 3 (1st Cir. 1989), quoting Cleavinger v. Saxner, 474 U.S. 193, 200 (1985). See LaLonde, supra (defendant entitled to quasi judicial immunity where he rendered expert opinion to judge). Quasi judicial immunity is granted to persons whose roles are "an integral part of the judicial process," because these persons "must be able to act freely without the threat of a law suit." Id. at 211. In other words, those "appointed to perform essential judicial functions are

entitled to absolute immunity." Id. at 213. However, this immunity does not apply "when such persons perform acts which are clearly outside the scope" of their role in the adversarial process. Cok, supra.

3. Litigation privilege. In Bassichis v. Flores, 490 Mass. 143, 149-152 (2022), this court examined the scope of the litigation privilege, which broadly protects attorneys and witnesses from "civil liability generally" for their statements during judicial proceedings (citation omitted). Specifically, the privilege ensures that statements made by witnesses during judicial proceedings, as long as they are relevant to the case, are "absolutely privileged, even if uttered maliciously or in bad faith." Aborn v. Lipson, 357 Mass. 71, 72 (1970), quoting Mezullo v. Maletz, 331 Mass. 233, 236 (1954). See Bassichis, supra at 150, 154; Correllas v. Viveiros, 410 Mass. 314, 319 (1991).

Furthermore, the litigation privilege "extends beyond statements that are made in the court room itself to 'communications preliminary to a proposed judicial proceeding.'" Bassichis, 490 Mass. at 150, quoting Sriberg v. Raymond, 370 Mass. 105, 108 (1976) (adopting construction of privilege as laid out in Restatement [Second] of Torts). The purpose of the litigation privilege is twofold: to encourage "zealous advocacy" by attorneys and to promote "full disclosure" by

witnesses, without the fear of civil liability. Bassichis, supra at 151-152.

4. Analysis. a. Joss. Mackie argues that Joss is not entitled to absolute quasi judicial immunity because, as a qualified examiner, Joss was not appointed, hired, or paid by the court, but rather "hired by the [DOC]."<sup>13</sup> We disagree with this argument because it disregards established precedent consistently noting that "[a]lthough appointed by the Commissioner of Correction, . . . an expert who serves as a qualified examiner is recognized to be independent and to serve as though appointed by the court." Chapman, 482 Mass. at 303. See Commonwealth v. Felt, 466 Mass. 316, 322 & n.9 (2013); Gangi v. Commonwealth, 462 Mass. 158, 162 (2012); Johnstone, 453 Mass. at 551; Commonwealth v. Sargent, 449 Mass. 576, 580 (2007); Commonwealth v. Connors, 447 Mass. 313, 314 n.2 (2006).

The "functional analysis" central to determining the scope of quasi judicial immunity examines the nature of the person's duties and his or her relationship to the judicial process, rather than who hires (or pays) him or her. For example, in

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<sup>13</sup> In his complaint, Mackie alleged that Joss "was hired by the [DOC] as a [qualified examiner] and assigned to interview [Mackie] . . . by a private firm, which is subject to [a] contract [with], hired by and paid by the DOC." The DOC, in its amicus brief, similarly explains: "The DOC contracts with a vendor for the provision of [qualified examiner] services. . . . The [qualified examiners] are paid for their services through DOC's contract with its vendor."

LaLonde, 405 Mass. at 212 & n.9, we held that a psychiatrist appointed by the Probate Court to evaluate a family and report findings to the court was entitled to quasi judicial immunity, even though a member of the family was ordered by the court to pay for the expert's services.

With that aperture in mind, applying a "functional analysis" here we conclude that qualified examiners perform an "essential judicial function[]." LaLonde, 405 Mass. at 212-213. First, qualified examiners are essential to SDP commitment proceedings, as recognized in Johnstone, 453 Mass. at 551-552, where we highlighted their indispensable role. See id. (qualified examiners are "integral to nearly every step of the civil commitment process"). Detailing the critical role played by qualified examiners under c. 123A, we explained:

"The statutory scheme . . . expressly sets the qualified examiners apart from other sources of expert evidence. Indeed, the role of the qualified examiners within that scheme persuades us that the Legislature intended them to serve in a capacity similar to that of a gatekeeper, deciding whether a person warrants commitment as a sexually dangerous person. Implicit in this view is the conclusion that, if both qualified examiners determine that a person is not sexually dangerous, the Commonwealth cannot meet its burden of proof."

Id. at 552. In this respect, qualified examiners serve a purpose beyond that of a regular expert witness. Their testimony is "the essential basis for a finding of sexual dangerousness." Green, petitioner, 475 Mass. 624, 630 (2016).

Second, both legal precedent and the statutory framework of c. 123A establish that the role of qualified examiners is not only essential, but quasi judicial. Although appointed through the DOC, qualified examiners act as independent experts functioning as an arm of the court, not beholden to any party. See Chapman, 482 Mass. at 303. Moreover, much like how a judge may, in certain circumstances, act as a gatekeeper, qualified examiners' "gatekeeper" role underscores their quasi judicial functions. See id. at 307-308; Green, 475 Mass. at 630; Johnstone, 453 Mass. at 551-552; LaLonde, 405 Mass. at 212-213. Because qualified examiners play such an independent (and essential) role in SDP commitment proceedings, the question of their immunity raises the same practical and policy concerns identified in Lalonde, supra at 211-212. That is, without quasi judicial immunity, "human nature indicates that [qualified examiners], faced with the threat of personal liability, will be less likely to offer the disinterested objective opinion that the court seeks." Id. at 212.

Given these considerations, qualified examiners discharging their duties pursuant to c. 123A are entitled to absolute quasi judicial immunity.<sup>14</sup> Because Mackie's complaint pertains solely

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<sup>14</sup> We recognize that Joss is also protected by the litigation privilege for reasons discussed below. Because a qualified examiner's report must be filed with the court in

to Joss's conduct as a qualified examiner, he is entitled to absolute quasi judicial immunity.

b. Rouse-Weir. Mackie argues that Rouse-Weir is not entitled to absolute quasi judicial immunity because, as a probable cause expert, she was not acting on behalf of the judiciary.<sup>15</sup> As a source of friction with Mackie's argument, probable cause experts play an essential role in SDP commitment proceedings, analogous to the integral "gatekeeper" function performed by qualified examiners. See Chapman, 482 Mass. at 303; Bruno, 432 Mass. at 511, 513. The nature of their role alone, however, does not determine what type of immunity, if any, to which probable cause experts are entitled. As

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advance of trial, G. L. c. 123A, § 13 (a), the "reports are admissible at the trial of the petition," Johnstone, 453 Mass. at 549, and qualified examiners may testify at trial. Accordingly, they are protected by the litigation privilege. See Bassichis, 490 Mass. at 152, 158 (privilege protects testifying witnesses for communications made during judicial proceeding and conduct during course of litigation).

<sup>15</sup> Mackie continues to argue that because the defendants only moved to dismiss the complaints on qualified immunity grounds, any alternative immunity theories have been waived. However, as noted earlier, both defendants raised the issue of absolute quasi judicial immunity at the hearings on their motions to dismiss. The litigation privilege extends to witnesses in judicial proceedings, who are "absolutely privileged" to publish even defamatory statements related to the proceedings, as their testimony is essential to the "administration of justice." Restatement (Second) of Torts § 588 & comment a (1977). Furthermore, "we may consider any ground apparent on the record" that supports the trial court's decision. Feeney v. Dell Inc., 454 Mass. 192, 211 (2009).

discussed, whether these experts qualify for quasi judicial immunity requires a functional analysis. While there is some overlap between their responsibilities and those of qualified examiners, the quasi judicial immunity granted to qualified examiners does not automatically apply to probable cause experts. This is due to significant differences in their roles within c. 123A proceedings.

At the probable cause stage, the Commonwealth can consult as many experts as necessary until it finds one willing to testify that the person is sexually dangerous. See Chapman, 482 Mass. at 304 ("a finding of probable cause . . . can rest on the opinion of any expert [the Commonwealth] retained to testify that the individual is sexually dangerous"). Indeed, a probable cause expert's testimony must "establish probable cause" regarding sexual dangerousness for the Commonwealth to seek to have the person committed as an SDP. Bruno, 432 Mass. at 511, 513. In contrast, qualified examiners operate independently, see Chapman, 482 Mass. at 303; they do not need to agree with the Commonwealth on the question of sexual dangerousness, and may even disagree with each other.<sup>16</sup> These differences are significant in determining the scope of potential immunity.

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<sup>16</sup> See, e.g., LeSage, petitioner, 488 Mass. 175, 177 (2021) (two qualified examiners produced differing opinions as to petitioner's possible sexual dangerousness); Chapman, 482 Mass.

Notwithstanding, we need not decide whether probable cause experts are entitled to absolute quasi judicial immunity because they are independently protected by the litigation privilege. On this point, we are persuaded by the Appeals Court's articulation of when the litigation privilege applies -- that is, a court must analyze the facts on "a case-by-case basis" to determine "whether a proceeding is sufficiently judicial or quasi judicial in nature" (citation omitted). Patriot Group, LLC v. Edmands, 96 Mass. App. Ct. 478, 484-485 (2019). Probable cause hearings are a "formal adversary proceeding." Bruno, 432 Mass. at 512-513. See G. L. c. 123A, § 12 (c), (d). The respondent has the right to counsel, the right to present evidence, and the right to cross-examine. G. L. c. 123A, § 12 (d) (1)-(3). See Bruno, supra. Because "a proceeding that include[s] the right to counsel, the right to present evidence, the right to cross-examine adverse witnesses, and the threat of perjury, constitute[s] a quasi judicial proceeding" (quotations and citation omitted), Patriot Group, LLC, supra at 485, the litigation privilege applies to probable cause hearings conducted pursuant to G. L. c. 123A, § 12.

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at 297 (both qualified examiners concluded that defendant was not sexually dangerous); McIntire, petitioner, 458 Mass. 257, 259 (2010), cert. denied, 563 U.S. 1012 (2011) (same); Johnstone, 453 Mass. at 546 (same).

The litigation privilege protects experts who testify at probable cause hearings, allowing them "to testify without fear of civil liability." Bassichis, 490 Mass. at 152. This privilege also extends to "communications preliminary to litigation," Sriberg, 370 Mass. at 109, including reports prepared by probable cause experts in anticipation of a hearing. Importantly, the privilege applies even if the expert's statements were made "maliciously or in bad faith." Mezullo, 331 Mass. at 236. See Bassichis, supra at 150.<sup>17</sup>

In this case, Rouse-Weir was engaged by the district attorney's office to evaluate whether Mackie met the criteria of an SDP. Her opinion was necessary to initiate the SDP commitment proceedings. See Bruno, 432 Mass. at 511, 513 (requiring use of experts at SDP probable cause hearings).

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<sup>17</sup> Mackie argues against immunity, claiming that potential liability would deter negligent or fabricated reports and perjury. While we acknowledge the public policy concerns surrounding immunity in such cases, we note that "our judicial system has inherent safeguards that minimize the risk of decisions based on inaccurate, misleading, or negligently conducted evaluations." LaLonde, 405 Mass. at 212. Additionally, G. L. c. 123A, § 12 (d) (3), provides respondents with the right to cross-examine witnesses who testify against them to highlight any deficiencies in the witnesses' reports or testimony. LaLonde, supra. Furthermore, respondents also have the right to "seek appellate review," providing an additional safeguard against decisions based on negligent or fabricated reports. Id. at 213. In summary, various procedural protections exist to shield respondents from the risk that a probable cause expert might intentionally misrepresent facts or act improperly during SDP commitment proceedings.

After meeting with Mackie twice, Rouse-Weir prepared evaluation reports in which she concluded -- and later reaffirmed -- that Mackie was an SDP. Based on her opinion, the court found probable cause that Mackie was an SDP and detained him pending trial.

The conduct Mackie challenges, including Rouse-Weir's allegedly false testimony and her submission of an allegedly inaccurate report, arises solely from her communications preliminary to or during the probable cause hearing. As such, the litigation privilege shields Rouse-Weir from liability.<sup>18</sup>

Judgments affirmed.

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<sup>18</sup> Because we determine that Rouse-Weir is protected by the litigation privilege, we do not reach the questions whether a probable cause expert under G. L. c. 123A is entitled to absolute prosecutorial immunity, quasi judicial immunity, qualified immunity, or any other form of immunity.