In The

Supreme Court of Virginia

RECORD NO. 190107

AMANDA C. PADULA-WILSON,

***Appellant*,**

v.

SCOTT DAVID LANDRY, MICHELE KILLOUGH NELSON, FORENSIC PSYCHOLOGY ASSOCIATES PC, JILL A. FERRANTE GASPER, LAURA E. WERT, THE WESTWOOD GROUP LLC, and CARA B. CAMPANELLA,

Appellees.

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Summary of Argument

Under Virginia law, a common-law cause of action exists where a third party to the parent-child relationship intentionally interferes with a parent's custodial rights, thereby causing harm. Fundamentally and foundationally, this cause of action requires intentional and tortious conduct by a third party that separates a minor child from a custodial parent for a substantial period of time without due process.

In this case, Amanda Padula-Wilson ("Padula-Wilson") seeks a substantial damage award against Scott David Landry ("Landry"), the court-appointed guardian *ad litem* who investigated, assessed, and advocated for the best interests of the minor children in a bitterly contested custody fight. The circuit court correctly concluded that the cause of action for tortious interference with parental rights does not apply where the alleged interference resulted from a judicial decision that was reached following contested proceedings that were conducted consistent with the requirements of due process. Therefore, the circuit court properly sustained Landry's demurrer and dismissed with prejudice the tortious interference with parental rights claim.

Additionally, because Padula-Wilson's claim against Landry arises exclusively from his conduct as the court-appointed guardian *ad litem* for her minor children in ongoing judicial proceeding, the absolute judicial privilege

applies, and her tortious interference claim against Landry is barred as a matter of law. For these reasons, this Court should ***affirm*** the circuit court's judgment.

Statement of the Case

On August 19, 2015, Padula-Wilson filed a complaint in the Circuit Court for the City of Richmond against Landry, Laura E. Wert, the Westwood Group LLC, Michele Nelson, Forensic Psychology Associates, Jill A. Ferrante Gasper, and Cara Campanella. Padula-Wilson only asserted a tortious interference with parental rights claim against Landry; she asserted this claim and those for intentional and negligent infliction of emotional distress, defamation, and negligent retention against the other defendants. On February 9, 2017, Padula-Wilson voluntarily nonsuited the complaint pursuant to Code § 8.01-380. She refiled an almost identical complaint on August 7, 2017 and served it on the defendants in July 2018.[1] After the judges of the Circuit Court for the City of Richmond entered a disqualification order[2], this Court designated the Honorable Charles Maxfield to preside in this case.[3]

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[1] *See* Appendix ("Appx.") at 2-104.

[2] *Id*. at 362.

[3] *Id*. at 363.

All of the defendants filed timely demurrers and pleas in bar in response to the complaint[4], which Padula-Wilson opposed.[5] On December 14, 2018, following a lengthy hearing[6], Judge Maxfield sustained the demurrers to all counts in the complaint, denied the motions for sanctions, and entered final judgment dismissing the case with prejudice.[7] On December 20, 2018, Padula-Wilson filed her objections to the final order and her notice of appeal to this Court.[8] On September 16, 2019, this Court awarded Padula-Wilson an appeal.

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[4] *Id*. at 364-409, 464-67, 634-41 (Nelson and Forensic Psychology Associates, PC), 410-18, 520-45 (Wert and Westwood Group, LLC), and 419-62, 547-65 (Landry).

[5] *Id.* at 469-519. Additionally, Landry and Nelson filed motions for sanctions against Padula-Wilson. *Id*. at 567-632.

[6] *Id*. at 119-361.

[7] *Id*. at 106-09.

[8] *Id*. at 110-14, 647-48.

Issues Presented

Virginia law recognizes the tort of intentional interference with parental rights. In this case, Padula-Wilson seeks to hold a court-appointed guardian *ad litem* for her children liable in damages for the temporary removal of the children from her physical custody and the temporary suspension of her visitation with the children, which are decisions the court made after contested hearings in a custody and visitation proceeding. The circuit court concluded that the cause of action for tortious interference with parental rights, which this Court recognized in *Wyatt v. McDermott*, does not apply to this factual context. Did the circuit court correctly sustain Landry's demurrer and dismiss this claim against him with prejudice?

In this case, the circuit court ruled that the court-appointed guardian *ad litem* was immune from civil liability because the conduct, statements, and communications that formed the basis for the tortious interference with parental rights claim against him were protected by the absolute judicial privilege. Was the circuit court correct?

Statement of Facts

This action is one of two lawsuits filed by Padula-Wilson stemming from contested child custody and visitation proceedings between Padula-Wilson and her former husband in the Chesterfield County Circuit Court.[9] The custody and visitation proceedings involved three minor children – Alexander Padula-Wilson (AW), Carter Michael Wilson (CW), and Avery Anna Grace Wilson (AGW) (collectively, the "Wilson children").[10] When the custody and visitation proceeding commenced, there was a shared legal custody arrangement, but Padula-Wilson had primary physical custody and Mr. Wilson had visitation.[11]

On March 15, 2013, following a joint motion by Padula-Wilson and Mr. Wilson, the Chesterfield circuit court appointed Landry as guardian *ad litem* for the Wilson children.[12] The Chesterfield Juvenile & Domestic Relations General District Court (Chesterfield JDR court) appointed Dr. Nelson of Forensic Psychology Associates to provide a mental health evaluation of Padula-Wilson to

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[9] Padula-Wilson filed the other lawsuit against these same defendants as parent and next friend of her two minor children. The circuit court sustained the defendants' demurrers and dismissed that lawsuit with prejudice on November 9, 2018. Padula-Wilson did not appeal adverse final judgment in that case.

[10] *See* Appx. at 3, 13.

[11] *Id*. at 13.

[12] Landry replaced a prior GAL that the Chesterfield circuit court had appointed for this identical purpose. The Chesterfield circuit court removed the prior GAL based on Padula-Wilson's objections.

assist in the determination of the Wilson children's best interests with respect to custody and visitation.[13] On August 21, 2013, Dr. Wert, a child psychologist with Westwood Group, was engaged to provide therapy to CW.[14] In approximately November 2013, Campanella, a licensed professional counselor, was engaged to provide therapy to AW and AGW.[15]

In April 2013, CW told Landry that Mr. Wilson had physically abused him.[16] Landry investigated this claim and concluded that it was unsubstantiated.[17] On April 19, 2013, Landry filed a motion with the Chesterfield circuit court on behalf of the minor children, which recommended that Padula-Wilson and Mr. Wilson share joint legal custody, with sole physical custody to Padula-Wilson and visitation to Mr. Wilson.[18] Landry conditioned this recommendation, however, on Padula-Wilson's "compliance with the visitation Ordered by the Court and cooperation with Mr. Wilson with regard to matters within the purview of joint legal responsibilities such as decisions relating to academic and medical matters

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[13] Appx. at 364, 374-77.

[14] *Id*. at 521.

[15] *Id*.

[16] *Id*. at 13-14.

[17] *Id*. at 434-35.

[18] *Id*. at 14, 70.

and appropriate web postings about the children whether identified by name or not…."[19]

Shortly after filing this motion, Landry became aware that Padula-Wilson had created and was using an "evolving" website to post information about the child custody and visitation proceedings that could be harmful to the Wilson children.[20] After reviewing the website and obtaining the views of the mental health professionals involved in the custody case, Landry became increasingly concerned that Padula-Wilson was using the website to alienate the children from their father.[21] Because he concluded that these actions were contrary to the children's best interests, Landry recommended to the court that Mr. Wilson receive temporary physical custody of the children with supervised visitation for Padula-Wilson.[22] On August 12, 2013, the Chesterfield circuit court adopted Landry's recommendations.[23]

Unfortunately, Padula-Wilson's conduct continued to worsen and, as a result, the court thereafter temporarily suspended her visitation with the children.[24] The court subsequently restored Padula-Wilson's visitation with the children on an

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[19] *Id.* at 70.

[20] *Id*. at 14-15, 71.

[21] *Id*. at 71, 434-37.

[22] *Id*. at 71.

[23] *Id*. at 16, 71.

[24] *Id*. at 435-37.

incremental basis.[25] In June 2014, the court granted Landry's motion to withdraw as the children's guardian *ad litem* in the custody proceedings.[26] In March 2017, the court entered its final order, which awarded joint legal and physical custody of the minor children to Padula-Wilson and Mr. Wilson, with holidays and summer breaks split using a normal "five-on, five-off" visitation schedule.[27]

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[25] *Id*. at 25, 31-32.

[26] *Id*. at 32, 379-381.

[27] The oldest of the children, AW, had reached adulthood by the time the final custody order was entered in March 2017.

Standard of Review

This appeal arises from the sustaining of a demurrer. Therefore, this Court accepts as true all factual allegations expressly pleaded in the complaint and interprets those allegations in the light most favorable to Padula-Wilson, subject, however, to two significant limitations. First, the Court only accepts unstated *reasonable* inferences as true; it gives no weight to *unreasonable* inferences, which are, by definition, "strained, forced, or contrary to reason." *Coward v. Wellmont Health Sys*., 295 Va. 351, 358-59, 812 S.E.2d 766, 769-70 (2018). Second, the Court assumes the truth and accuracy of allegations of historical fact; it does not, however, assume the correctness of conclusions of law "camouflaged as factual allegations or inferences." *Id*. This Court reviews all conclusions of law *de novo*. *Id*.

Argument and Authorities

A. Padula-Wilson cannot, as a matter of law, state a tortious interference with parental rights claim against Landry based on his conduct as the Wilson children's court-appointed guardian *ad litem*.

(1) *The cause of action for tortious interference with parental rights was adopted to redress egregious and disturbing conduct that causes harm to the parent-child custodial relationship and for which there is no other remedy; it has no application to the facts of this case.*

In *Wyatt v. McDermott*, 283 Va. 685, 725 S.E.2d 555 (2012), this Court recognized the existence of a common law cause of action for tortious interference with parental rights. In doing so, the Court adopted the reasoning of the Supreme Court of Appeals of West Virginia in *Kessel v. Leavitt*, 204 W. Va. 95, 511 S.E.2d 720 (1998), which in turn relied upon and adopted the Restatement (Second) of Torts § 700 (1977). *Wyatt*, 283 Va. at 699, 725 S.E.2d at 562; *Kessel*, 204 W. Va. at 135-37, 511 S.E.2d at 760-62. Therefore, the facts of *Kessel* and *Wyatt* provide relevant guideposts to determine if this theory of tort liability applies to the fact pattern in the present case.

The facts in *Kessel* "involved 'egregious conduct that barely fell short of outright kidnapping and abduction.'" *Coward*, 295 Va. at 359-360, 812 S.E.2d at 770 (quoting *Wilson v. Bernet*, 218 W. Va. 628, 625 S.E.2d 706, 714 (2005)). Similarly, the facts in *Wyatt* were, in the Court's words, "astonishing and profoundly disturbing." Furthermore, state and federal court decisions addressing

tortious interference with parental rights uniformly do not support Padula-Wilson's assertion that the cause of action applies to the facts presented in this case.

The tortious interference with parental rights claim in *Wyatt* arose from the biological mother's attempt to secretly place her baby for adoption without informing the biological father, who wanted to raise the baby with the mother. *Wyatt*, 283 Va. at 689-90, 725 S.E.2d at 556-57. The mother, however, with the encouragement of attorneys and unbeknownst to the father, put the baby up for adoption and made material misrepresentations in the adoption paperwork concerning the biological father's information. *Id.* at 690-91, 725 S.E.2d at 557. As a result, the child was placed with a couple in Utah. *Id*. In recognizing the existence of tort liability for interference with parental rights, this Court specifically noted the egregious and disturbing facts the biological father confronted:

> It is both astonishing and profoundly disturbing that in this case, a biological mother and her parents, with the aid of two licensed attorneys and an adoption agency, could intentionally act to prevent a biological father – who is in no way alleged to be an unfit parent – from legally establishing his parental rights and gaining custody of a child whom the mother did not want to keep, and that this father would have no recourse in the law. The facts as pled indicate that the Defendants went to great lengths to disguise their agenda from the biological father, including preventing notice of his daughter's birth and hiding their intent to have an immediate out-of-state adoption, in order to prevent the legal establishment of his own parental rights….[W]e hope that the threat of a civil action would help deter

> third parties such as attorneys and adoption agencies from engaging in the sort of actions alleged to have taken place.

Wyatt, 283 Va. at 703, 725 S.E.2d at 564.

Thus, unlike Padula-Wilson in the present case, the biological father in *Wyatt* was separated completely from his child as a result of the defendants' actions, and the baby remained in the physical custody of the adoptive parents at the time this Court issued its decision in that case. *Id*. at 690-91, 725 S.E.2d at 557. In contrast, Padula-Wilson's parental rights were never permanently severed. Although her visitation with the children was limited at times, Padula-Wilson never lost her parental rights. *See Padula-Wilson v. Wilson*, Va. Ct. App. No. 1203-14-2, 2015 WL 1640934, at *9 (Va. Ct. App. Apr. 14, 2015), *cert. denied*, U.S. No. 15-854, 2016 WL 854238 (U.S. Mar. 7, 2016) (rejecting Padula-Wilson's argument that her parental rights were terminated in the custody dispute). The benign facts of the present case simply do not present the type of "egregious" and "disturbing" circumstances that this Court hoped to deter in *Wyatt* by recognizing the existence of civil liability for tortiously interfering with parental rights.

Following *Wyatt*, the United States District Court for the Western District of Virginia analyzed the cause of action of tortious interference with parental rights in *Nelson v. Green*, 965 F. Supp. 2d 732, 753-755 (W.D. Va. 2013). In *Nelson*, the plaintiff asserted a tortious interference with parental rights claim against a social worker and employees of the Department of Social Services claiming that the

defendants coerced his daughter into falsely accusing him of sexual abuse, which resulted in an administrative finding of child abuse and the restriction of visitation with his daughter. Finding that "[t]his state law claim does not apply to the circumstances of this case, so far removed from the facts that informed the *Wyatt* court's discussion," the federal court dismissed the claim. *Id*. at 755.

This Court again analyzed the tort of intentional interference with parental rights in *Coward v. Wellmont Health Sys*., *supra*. The facts in *Coward* involved a claim for tortious interference with parental rights arising from the contested adoption of a baby. In *Coward*, the birth parents signed an adoption agreement which contained the complete termination of their parental rights. *Coward*, 295 Va. at 355-56, 812 S.E.2d at 768. After signing the agreement, the biological mother changed her mind and successfully obtained custody of the child. *Id*. at 357, 812 S.E.2d at 769. She thereafter sued the adoptive parents, their attorney, and various medical professionals involved in facilitating the adoption. *Id*. at 357-58, 812 S.E.2d at 769. This Court affirmed the dismissal of the claims against the attorney and the medical professionals on demurrer. *Id*. at 368, 812 S.E.2d at 775.

In reaching its decision, this Court emphasized that it adopted the Restatement (Second) of Torts § 700 (1977) to define the scope and contours of a cause of action for tortious interference with parental rights. *Id.* at 359-62, 812 S.E.2d at 770-72. The Restatement states that an action for tortious interference

with parental rights may be maintained against one who either abducts a child or otherwise induces a child not to return to his parent. *Restatement (Second) of Torts* § 700 (1977), cmt. *a*. In this case, however, Landry never abducted the children or induced them not to visit with Padula-Wilson. Moreover, as noted above, Padula-Wilson always maintained her parental rights and was never permanently separated from her children as required by the Restatement formulation of the tort this Court adopted in *Wyatt*.

(2) *The facts of this case are insufficient to state a prima facie claim for tortious interference with parental rights*

A cognizable tortious interference with parental rights claim requires the pleading of the following elements with sufficient supporting factual allegations: (1) the complaining parent has a right to establish or maintain a parental or custodial relationship with his/her minor child; (2) a party outside of the relationship between the complaining parent and his/her child intentionally interfered with the complaining parent's parental or custodial relationship with his/her child by removing or detaining the child from returning to the complaining parent, without that parent's consent or by otherwise preventing the complaining parent from exercising his/her parental or custodial rights; (3) the outside party's intentional interference caused harm to the complaining parent's parental or custodial relationship with his/her child; and (4) damages resulted from such interference. *Wyatt*, 283 Va. at 699, 725 S.E.2d at 562. As demonstrated below, as

a matter of law, Padula-Wilson did not and cannot allege sufficient facts to support the second, third, and fourth elements of this cause of action.

(a) <u>Landry did not remove or detain Padula-Wilson's children from returning to her or otherwise interfered with her parental rights</u>

Although clocking in at a hefty 66 pages (excluding exhibits) and 276 paragraphs, Padula-Wilson's complaint contains numerous boiler-plate legal conclusions stating that the defendants "intentionally interfered with [her] parental relationship with her children by removing or detaining the children from returning to [her] without her consent, or by otherwise preventing [her] from exercising her parental rights."[28] Presumably, Padula-Wilson adopted this boilerplate language from *Coward*, where this Court emphasized that an interference with parental rights is "tortious" only when interference occurs "*with knowledge* that the parent *does not consent*" and with "knowledge that the child is away from home against the will of the parent." *Coward*, 295 Va. at 361, 812 S.E.2d at 771 (quoting Restatement (Second) of Torts § 700, cmt. *a* and *b*)) (emphasis added). Indeed, the Court stated that this "against-the-will-of-the-parent" requirement is an "overarching limitation" on the cause of action for tortious interference with parental rights because "none of the multitude of cases cited in *Wyatt* and *Kessel*

[28] Appx. at 33 (Complaint, at ¶129).

imposes liability without an allegation and supporting proof that the defendant intentionally acted against the will of the complaining parent." *Id*.

This case is factually dissimilar to *Wyatt* and *Coward* in several important respects. Here, a parent sued her children's court-appointed guardian *ad litem* for tortious interference with parental rights based on the temporary restrictions regarding her custodial and visitation rights. The circuit court correctly recognized that liability for interference with parental rights cannot be imposed on the guardian *ad litem* because, given his vital and particular role in custody and visitation matters, the conduct of his investigation and substance of his recommendations to the court concerning the best interests of the children will frequently conflict with and be against the will of one or both parents.

In Virginia, the circuit court or the juvenile and domestic relations district court is empowered to appoint a "discreet and competent attorney-at-law" as guardian *ad litem* for minor children in pending custody and visitation matters. *See* Va. Code Ann. § 16.1-266(F). Once appointed, the guardian is expected to vigorously represent and protect the child's legitimate interests and welfare. *See* Rule 8:6; *Ferguson v. Grubb*, 39 Va. App. 549, 561, 574 S.E.2d 769, 774 (2003). The guardian *ad litem* must comply with the Virginia Rules of Professional Conduct, except when they conflict with the particular and specific duties imposed

upon the guardian.[29] Additionally, the guardian *ad litem* is expected to comply with written performance standards, which were adopted by the Judicial Council of Virginia and reviewed by this Court in 2003, and, among other tasks, require the guardian to:

- conduct an independent investigation in order to ascertain the facts of the case;
- appear in court prepared to fully and vigorously represent the child's interests;
- prepare the child to testify under appropriate circumstances consistent with the child's interest and welfare;
- provide the court sufficient information including specific recommendations for court action based on findings from interviews and independent investigation;
- and communicate, coordinate, and maintain a professional working relationship to the greatest extent possible with all parties without sacrificing independence.

See STANDARDS TO GOVERN THE PERFORMANCE OF GUARDIANS AD LITEM FOR CHILDREN (2003, as revised 2018), at ¶¶ B, F, G, H, and I ("GAL Standards"). Therefore, as a court-appointed guardian *ad litem*, Landry was required to represent and advance, as counsel, the best interests of the Wilson children concerning custody and visitation issues. His preparation and full participation was required at every custody hearing, and he was not permitted to merely defer to or endorse a custody or visitation position advanced by other parties. Thus, the guardian *ad litem* is not a "party outside the relationship between the complaining

[29] *See* GAL STANDARDS, Commentary S-2 and S-3.

parent and her child," which is required as part of the second element of a *prima facie* case of tortious interference with parental rights. *Wyatt*, 283 Va. at 699, 725 S.E.2d at 562.

Additionally, Padula-Wilson did not suffer a termination of her parental rights in any form because she was not divested of "all legal relations to the [children], and the parent has no legal right to even communicate [with] or visit [the children]." *See Padula-Wilson v. Wilson*, Va. Ct. App. No. 1203-14-2, 2015 WL 1640934, at *9. An order providing for supervised or even limited visitation does not sever a parent's legal relationship with her children. *Id*. As the circuit court noted, Padula-Wilson's complaint contains no allegation that Padula-Wilson's parental rights were ever terminated; rather, she alleges only temporary periods of limited or no visitation with the children without the termination of her parental rights. Moreover, the complaint fails to allege that the children were ever "removed" or "detained" from returning to her, let alone that Landry was the party who "removed" or "detained" the children from returning to her.

At best, Padula-Wilson alleges that Landry's actions as the court-appointed guardian *ad litem*, and his assessment and recommendations to the court concerning the best interests of her children contributed to the judicially-imposed limitation of her visitation rights. Tortious interference with parental rights, however, can only arise from an interference with the parent's custodial

relationship, not the parent's visitation rights. *See Wilson*, 218 W. Va. at 636, 625 S.E.2d at 714. Furthermore, the decision to temporarily remove the children from Padula-Wilson's physical custody was made by the court in the underlying judicial proceeding, not by Landry. Accordingly, the circuit court correctly ruled that Padula-Wilson cannot, as a matter of law, establish the second or third elements necessary to maintain her tortious interference claim against Landry.

(b) <u>Padula-Wilson cannot allege recoverable damages</u>

Under Virginia and federal law, a party may only recover damages for an undue separation from a child when that separation occurred *without due process of law*. *See Wyatt*, 283 Va. at 693, 725 S.E.2d 559 ("When a parent has been unduly separated from a child by a third party for a substantial period of time *without due process of law*, however, other legitimate harms may be suffered that are properly recoverable in tort....") (emphasis added); *see also Nelson*, 965 F. Supp. 2d at 754 ("The types of harms contemplated by the court '[w]hen a parent has been unduly separated from a child by a third party for a substantial period of time *without due process of law*,…include[e] loss of companionship, mental anguish, loss of services, and expenses incurred to recover the child.'") (emphasis in original) (quoting *Wyatt*, 283 Va. at 693, 725 S.E.2d at 559).

In this case, the Chesterfield circuit court entered custody and visitation orders at various stages in the underlying judicial proceeding. These orders

temporarily deprived Padula-Wilson of physical custody of the children and temporarily suspended, and later incrementally restored, visitation with the children. Significantly, unlike in *Wyatt* or *Kessel*, the temporary separation of the children from Padula-Wilson occurred pursuant to court orders and with the protection of due process of law. As the circuit court observed, Padula-Wilson took full advantage of numerous due process protections that were available in the custody case:

- She received advance notice of all hearings where custody and visitation issues were addressed;
- She presented evidence supporting her position and opposing the guardian *ad item's* assessment of the children's best interests with respect to custody and visitation;
- The rules of evidence were applicable in the underlying proceedings, and false testimony is punishable by a criminal prosecution for perjury and/or contempt of court;
- She had the opportunity to request reconsideration by the court of its custody and visitation decisions, appeal to the Court of Appeals of Virginia (which she successfully did), and, if necessary, appeal to this Court upon a claim of error.[30]

Thus, the facts of this case stand in stark contrast to those in *Wyatt*, where the defendants went to "great lengths" to surreptitiously and fraudulently arrange an immediate out-of-state adoption of a child by concealing their conduct from the biological father to prevent him from establishing his parental rights. *Wyatt*, 283

[30] Appx. at 235, 252, 262-63.

Va. at 689-91, 725 S.E.2d at 556-57. Padula-Wilson's parental rights were addressed and adjudicated in judicial proceedings with due process of law. Moreover, unlike in *Wyatt*, the Chesterfield Circuit Court, not Landry, made the custody and visitation decisions after presentation of evidence, witness testimony, and documents during full and fair hearings conducted with notice to all interested parties.

Therefore, the temporary disruption of Padula-Wilson's relationship with her children was not caused by any *tortious* conduct. Moreover, because the temporary disruption was caused by judicial decision influenced by her actions and not unilateral action by third parties, Padula-Wilson did not suffer any cognizable damages. The circuit court correctly concluded that, under these facts, Padula-Wilson cannot maintain a tortious interference with parental rights claim against Landry, and this Court should affirm that decision.

B. The absolute judicial privilege precludes tort liability for communications, statements, and conduct by a court-appointed guardian *ad litem* during the course of child custody and visitation proceedings.

The circuit court also concluded that the statements and communications Padula-Wilson relied upon to support her claim of tortious interference with parental rights against Landry were absolutely privileged and, therefore, could not

form the basis for liability.[31] Although Padula-Wilson concedes that Landry is immune from liability for in-court statements, communications, and submissions, she nevertheless maintains that this immunity does not apply because her claim against Landry is based on conduct and communications that occurred "outside of court."[32] This curious argument is not supported by this Court's well-developed body of law defining the scope and contours of the absolute, or judicial, privilege.

In Virginia, "[i]t is well-settled that 'words spoken or written in a judicial proceeding that are relevant and pertinent to the matter under inquiry are absolutely privileged'" against defamation actions. *See Donohoe Constr. Co. v. Mount Vernon Assocs.*, 235 Va. 531, 537, 369 S.E.2d 857, 860 (1988) (quoting *Darnell v. Davis*, 190 Va. 701, 58 S.E.2d 68 (1950)); *see also Penick v. Ratcliffe*, 149 Va. 618, 627, 140 S.E. 664, 667 (1927). Absolute judicial privilege attaches to communications that are "material, relevant, or pertinent" to the issues of the judicial proceeding. *See Mansfield v. Bernabei*, 284 Va. 116, 122, 727 S.E.2d 69, 73 (2012); *Penick*, 149 Va. at 635, 140 S.E. at 669.

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[31] Appx. at 264.

[32] Brief of Appellant at 16. Specifically, Padula-Wilson argues that Landry lied to the court; moved to exclude evidence of alleged physical abuse by Mr. Wilson from hearings in the case; relied on false accusations and evidence to justify the suspension of her custodial and visitation rights; recommended that the children spend time with a convicted pedophile; and "otherwise acted contrary to the children's best interest[s]." *See* Appx. at 3-4.

Moreover, the absolute privilege clearly extends outside the courtroom to "all proceedings of a judicial nature," and is not limited to trials or events occurring inside a courtroom. *See Penick*, 149 Va. at 628, 140 S.E. at 667. In *Donohoe*, the Court concluded that the filing of a mechanic's lien was a judicial proceeding to which absolute privilege applied. *Donohoe*, 235 Va. at 538-39, 369 S.E.2d at 861 (noting that perfection and enforcement of a lien are "inseparable"). *See also, e.g., Mansfield*, 727 S.E.2d at 73-75 (letter and draft complaint); *Watt v. McKelvie*, 219 Va. 645, 651, 248 S.E.2d 826, 829 (1978) (third party statements republished by another during a deposition). Thus, if the statements or communications at issue are relevant, material, or pertinent to an ongoing judicial proceeding, or are preliminary to a judicial proceeding contemplated in good faith, their maker is accorded "complete immunity from liability even though the communication is made maliciously and with knowledge that it is false." *See Lindeman v. Lesnick*, 268 Va. 532, 537, 604 S.E.2d 55, 58 (2004). Moreover, with respect to attorneys, this Court has consistently held that "the public interest and the ends of justice are best served in allowing counsel to freely advocate for their clients." *See Mansfield*, 284 Va. at 121, 727 S.E.2d at 73; *Donohoe* 235 Va. at 537, 369 S.E.2d at 860; *Penick*, 149 Va. at 632, 140 S.E. at 668.

Padula-Wilson completely ignores the relevant criteria for the application of the privilege, which are whether the statements and communications at issue were

(i) made in connection with a judicial proceeding and (ii) relevant to the judicial proceeding. The first element is not in dispute; there is no question that the underlying custody and visitation matter was a "judicial proceeding" to which the absolute privilege applies.[33]

Furthermore, the materiality, relevance and pertinence of the statements, communications, and conduct Padula-Wilson relies upon to support her tortious interference claim against Landry is equally apparent, particularly in the context of his critical role as guardian *ad litem* for the Wilson children. "The guardian *ad litem* serves a vital role in our judicial system…[and must] rise above the fray of the contending parties to ensure that the interests of persons under a legal disability are 'represented and protected.'" *Wiencko v. Takayama*, 62 Va. App. 217, 233, 745 S.E.2d 168, 176 (2013) (quoting VA. CODE ANN. § 8.01-9(A)); *accord Hawkins v. Grese*, 68 Va. App. 462, 483, 809 S.E.2d 441, 451 (2018). The guardian's investigation and reasoned assessment concerning the best interests of the child "may require affirmative judicial action on the part of the guardian *ad litem* in properly fulfilling his or her duties." *Ferguson v. Grubb*, 39 Va. App. 549, 560, 574 S.E.2d 769, 774 (2003). Without a guardian *ad litem*, justice and protection may be denied to those most in need of them; therefore, the guardian must be a "vigorous advocate for the client, but must thoroughly investigate the matter before

[33] *Id*. at 264-65. And Padula-Wilson conceded that the absolute privilege applied to "anything that's occurred in court." *Id*. at 197, lines 8-11.

the court, to determine what would be in the client's best interest – often without assistance from the client." *See Erwin v. Henson*, 202 W. Va. 137, 142, 502 S.E.2d 712, 717 (1998); *accord* GAL STANDARDS*, supra*.

As the court-appointed guardian *ad litem*, Landry was required to adhere to performance standards while representing the Wilson children. Consistent with these standards, he was required to conduct an independent investigation, provide his assessment, make recommendations, and vigorously advocate for custody and visitation arrangements that, in his view, were consistent with the best interests of the Wilson children. Thus, Landry's actions, statements, and communications during his investigation of the Wilson children's best interests in terms of custody and visitation arrangements – even if made or undertaken informally outside the rigors of the courtroom – are protected by the absolute privilege. They were relevant, material, and pertinent to the issues in the judicial proceeding and consistent with Landry's vital role as guardian *ad litem* in the judicial process.

Landry's conduct and communications were not stripped of their privileged status because they were derived from, based upon information obtained, or comprise information communicated outside of court. This view, which Padula-Wilson urges the Court to adopt, completely eviscerates the functionality of the absolute privilege, and would impose liability upon attorneys acting as guardian *ad litem* in judicial proceedings based on actions they are required to undertake to

discharge their duties in that capacity. Furthermore, as noted above, Padula-Wilson's narrow view constricts the application of the privilege to cover only statements or communications made inside the courtroom. This is plainly not the law in Virginia.

Additionally, Padula-Wilson's argument urging a retreat from the established broad and comprehensive scope of the absolute privilege ignores the presence of the myriad of safeguards present in judicial proceedings like the underlying custody and visitation matter. As the circuit court observed:

> There was a proceeding as, as in litigation routinely, people are accused of false testimony and of course that's what cross-examination in a court is for…the plaintiff[ ] had complete due process rights throughout, [including] the right to cross-examine….[a]nd the judge made the decision in this case….[t]he people involved in this case did not take away custodial rights which we all admit she still has….[34]

Thus, even if the statements, communications, and conduct supporting Padula-Wilson's tortious interference claim against Landry occurred outside the courtroom doors, they were submitted to the court for its consideration in the underlying judicial proceedings to inform custody and visitation decisions impacting the Wilson children. Therefore, the very statements, communications and conduct Padula-Wilson argues are not protected by the absolute privilege were subject to testing, verification, and validation by cross-examination under oath, the penalties

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[34] *Id*. at 262-63.

of perjury or pains for contempt of court for false swearing, the presentation of competing testimonial and documentary evidence, and the control of the trial court, whose decisions are reviewable on appeal. *Mansfield*, 727 S.E.2d at 75 n.3; *Elder v. Holland*, 208 Va. 15, 21, 155 S.E.2d 369, 374 (1967). The presence of these safeguards, which Padula-Wilson utilized in the underlying judicial proceeding, further supports the application of the absolute privilege in this case.

The circuit court correctly found that Landry's communications and conduct were relevant and pertinent to the issues in the custody case, which was a judicial proceeding, and, therefore, properly applied the absolute privilege to shield Landry from liability.

Conclusion

The Court can answer the issues in this appeal in a straightforward fashion:

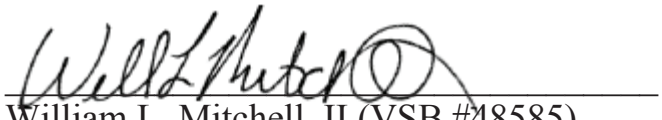
- The circuit court correctly sustained Landry's demurrer and dismissed Padula-Wilson's tortious interference with parental rights claim with prejudice. This tort theory does not apply to a court-appointed guardian *ad litem* in a child custody matter because changes in custody or visitation arrangements do not result in an intentional, tortious interference with parental rights.

- The circuit court properly held that the absolute judicial privilege applied to the conduct, statements, and communications by Landry, acting in his capacity as the court-appointed guardian *ad litem* for children in the underlying custody and visitation proceeding.

Accordingly, Appellee Scott David Landry asks this Court to ***affirm*** the decision of the circuit court.

Respectfully submitted,

SCOTT DAVID LANDRY
Appellee, By Counsel



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Certificate of Service

I HEREBY CERTIFY that on this 19th day of November, 2019, pursuant to Rule 5:26, three paper copies of the Brief of Appellee Scott David Landry have been hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief of Appellee Scott David Landry was filed via VACES. On this same day, a copy of the Brief of Appellee Scott David Landry was served via electronic mail upon the following:

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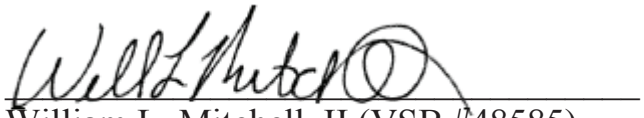

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