SUPREME COURT OF VIRGINIA

RECORD NO. 190107

AMANDA PADULA-WILSON

Appellant,

v.

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

Appellees.

BRIEF OF APPELLEES MICHELE KILLOUGH NELSON, PHD AND FORENSIC PSYCHOLOGY ASSOCIATES, PC

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Appellees, Michele Killough Nelson, Ph.D. and her practice group, Forensic Psychology Associates, P.C. ("FPA"), (collectively referred to as "Dr. Nelson" or the "Appellees") generally agree with the timing of events recited by the Appellant, Ms. Wilson, with the following correction: No evidence was taken on Dr. Nelson's Motion for Sanctions.

STATEMENT OF FACTS

Although the Appellees dispute the accuracy and relevance of many of the facts asserted and disagree with the many legal assertions and conclusions, the Appellees generally agree that the Appellant's Statement of Facts contains the facts asserted by Ms. Wilson in her Complaint. The following allegations of fact from the Complaint are those that are relevant to Dr. Nelson.

Ms. Wilson's Complaint arises out of a contentious custody and visitation proceeding between Ms. Wilson and Michael G. Wilson. *Wilson v. Padula-Wilson*, Chesterfield County Circuit Court (the "Custody Court"), Case No. CL13-2538 (the "Custody Dispute" or "Custody Proceeding"). During the Custody Proceeding, on August 20, 2013, Ms. Wilson lost custody and visitation with all three of her children. Appx. 12, 16. Between 2014 and 2015, Ms. Wilson's visitation with all three children was

limited by the Custody Court. Appx. 12. Her visitation with one child was completely prohibited by the Custody Court between April 2014 and March 2017. Appx. 12.

Dr. Nelson is a psychologist and her role in the Custody Proceeding was limited to two court-ordered evaluations of Mr. and Ms. Wilson in 2013 and a court appointment to make visitation decisions on behalf of the Custody Court between June 2014 and December 2015. Appx. 9-10, 22-23. On June 20, 2014, the Custody Court granted sole custody to Mr. Wilson. Appx. 26. In the same order, the Custody Court instructed Dr. Nelson to make visitation decisions for the Wilson children on behalf of the Custody Court, which she did until the Custody Court entered an order on December 13, 2015 relieving Dr. Nelson of her obligation. Appx. 26, 31.

Ms. Wilson's custody of and visitation with her children was prohibited and/or limited by the Custody Court *before* and *after* Dr. Nelson was involved in the Custody Proceeding. Appx. 12, 9-10, 16, 22-23.

STANDARD OF REVIEW

For an appeal from the granting of a demurrer, this Court will "accept as true all factual allegations expressly pleaded in the complaint and interpret those allegations in the light most favorable to the plaintiff." *Coward v. Wellmont Health System*, 295 Va. 351, 358, 812 S.E.2d 766,

769-770 (2018). However, this Court has emphasized that it will only accept *reasonable* unstated inferences and will reject those that are arbitrary, strained, forced, or contrary to reason. *Coward,* 295 Va. at 358-359 (*emphasis* added). Similarly, this Court has stressed that it will "distinguish allegations of historical fact from conclusions of law" and will not "accept the veracity of conclusions of law camouflaged as factual allegations or inferences." *Id*. at 359. This standard of review applies to all three Assignments of Error in this appeal.

ARGUMENT AND PRINCIPLES OF LAW AND AUTHORITY

Assignment One: The tortious interference with parental rights cause of action was properly dismissed by the Trial Court.

The Richmond Circuit Court ("the Trial Court") made a well-reasoned decision in dismissing Ms. Wilson's tortious interference with parental rights claim. The Trial Court primarily found that tortious interference with parental rights does not exist under the circumstances of this case. Appx. 259-262, 265. The Trial Court also found that Ms. Wilson did not establish any harm or a causal relationship. Appx. 259, 262-264. In addition, the Trial Court ruled that the Appellees had immunity for statements made in the course of the Custody Proceeding. Appx. 264. Finally, the Trial Court alluded to a public policy argument supporting dismissal of the claims to

prevent a "continuous round of litigation after custody cases." Appx. 261-262.

Tort Not Applicable

The Trial Court primarily found that tortious interference with parental rights does not exist under the circumstances of this case and it declined to broadly expand application of this Court's ruling in *Wyatt v. McDermott*, 283 Va. 685, 725 S.E.2d 555 (2012); Appx. 261, 262, 265. The *Wyatt* case involved an action filed by a father against an adoption agency and an adoption attorney. *Wyatt*, 283 Va. at 689. The father claimed that the adoption was arranged without his knowledge or consent. *Wyatt*, 283 Va. at 689-690. Knowing that the father wanted to raise the baby with the mother, the defendants hid the baby's birth from the father, falsified adoption records and transferred the baby to an adoptive family in another state. *Id*. This Court applied the tortious interference with parental rights claim for the first time because the facts of the *Wyatt* case were so egregious.

The *Wyatt* Court defined the elements of a tortious interference with parental rights claim, which are: (i) the complaining parent has a right to establish or maintain a parental or custodial relationship with his/her minor child; (ii) 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; (iii) the outside party's intentional interference caused harm to the complaining parent's parental or custodial relationship with his/her child; and (iv) damages resulted from such interference. *Wyatt*, 283 Va. at 699. The elements or the tortious interference cause of action do not exist in this case.

For the alleged removal or detention of the children, Ms. Wilson argues that Dr. Nelson illegally and wrongfully removed or detained the Wilson children, by causing Ms. Wilson to have limited, supervised or no visitation with them. Appx. 34, 37-38. Presumably, Ms. Wilson is relying on the Custody Court's order requiring Dr. Nelson to make visitation decisions for the Wilson children between June 2014 and December 2015. Appx. 9-10, 22-23. Ms. Wilson has equated Dr. Nelson's court-ordered visitation decisions with a tortious "removal" of her children. However, Ms. Wilson's children were not detained or removed by Dr. Nelson. Ms. Wilson's visitation was limited based on a court order which resulted from a

fully litigated Custody Proceeding. The facts of this case are not even close to the egregious conduct that persuaded the Court in the *Wyatt* case.

In stark contrast to the circumstances in the Custody Proceeding in which Ms. Wilson was informed and involved, the *Wyatt* case dealt with the civil equivalent of a criminal parental abduction. *Wyatt*, 283 Va. at 693-694. The Trial Court agreed that the *Kessel v. Leavitt*, 511 S.E.2d 720 (W.Va. 1998), and *Wyatt* decisions required an outrageous fact pattern, like parental abduction, in order to apply the tort. Appx. 260-262. Dr. Nelson did not remove or abduct the Wilson children. Her conduct was not egregious or outrageous. She made visitation recommendations pursuant to the Custody Court's order. Dr. Nelson's court-ordered decisions regarding visitation were not the equivalent of a civil abduction of the children and do not qualify as a tortious interference.

Although it is not clear which element of the cause of action she related this allegation to, Ms. Wilson also summarily concluded that Dr. Nelson made false allegations about Ms. Wilson. In her 66-page Complaint with 276 paragraphs, Ms. Wilson only arguably identified two alleged false statements from Dr. Nelson: Dr. Nelson falsely told the guardian *ad litem* that Ms. Wilson threatened the guardian *ad litem* and Dr. Nelson falsely claimed that Ms. Wilson was a threat to her children while Mother was

sitting in a police station making a child abuse report. Appx. 5-6, 23. However, there is no allegation about exactly what was said, when it was said, to whom it was said and how it was false. In addition, there is no support for how these alleged false statements relate to a tortious interference claim or have any causal connection to harm.

The Virginia Supreme Court explained that it recognized the tortious interference with parental rights cause of action in the *Wyatt* case to create a mechanism of redress that was otherwise unavailable to the father in *Wyatt*. *Wyatt*, 283 Va. at 693. The *Wyatt* Court's concern regarding the availability of a means of redress does not exist in this case. In the Custody Proceeding, Ms. Wilson had Constitutional protections, including due process of law, and the tools of litigation. Unlike the father in *Wyatt*, Ms. Wilson did not lose custody of or visitation with her children through some elaborate deception. She was informed and participated in the litigation. As stated by the Trial Court, "there was no deception here." Appx. 262.

The *Wyatt* Court essentially excluded the circumstances in *this* case, a custody dispute that properly ran its course through the judicial system, from the tortious interference with parental rights cause of action. This Court distinguished the facts in the *Wyatt* case from custody disputes,

which “do not implicate rights or duties of third parties” and for which Virginia “has well-developed custody laws” to resolve. *Wyatt*, 283 Va. at 693. The issue of custody was fully litigated in a valid Virginia Court and was even appealed to the Virginia Court of Appeals. Appx. 28.

Although Virginia and certain other states recognize tortious interference as a cause of action, none of these cases supports the utilization of a tortious interference cause of action to subsequently challenge the outcome of a fully-litigated custody case and none of them equate a judicial custody or visitation determination with an unlawful removal or detention. *Kessel v. Leavitt*, 511 S.E.2d 720 (W.Va. 1998) (adoption without the consent of the father); *Stone v. Wall*, 734 So.2d 1038 (Fla. 1999) (maternal grandmother and maternal aunt took child without the father’s consent to another state and hid the child); *Anonymous v. Anonymous*, 672 So.2d 787 (Ala. 1995) (minor boy and his parents repeatedly took a girl from her parents’ house, hid her at their own house and lied to the girl’s parents about their knowledge of her whereabouts); *Khalifa v. Shannon*, 945 A.2d 1244 (Md. 2008) (mother and grandmother fled to Egypt with two children); *Plante v. Engel*, 469 A.2d 1299 (N.H. 1983) (maternal grandparents helped mother abduct the children and flee to another state); *Silcott v. Oglesby*, 721 S.W.2d 290 (Tex. 1986) (parental

child abduction). All of these cases involve the egregious conduct and/or abduction scenario noted by the Trial Court to be the purpose of the tort. Appx. 260.

The Trial Court properly found that the facts of this case do not support a tortious interference with parental rights claim.

No Causation

The Trial Court's second basis for denying the claim for tortious interference with parental rights was the fact that Ms. Wilson did not establish any harm to her parental or custodial relationship with her children and did not establish a causal relationship. Appx. 259, 262-264. The third element of a tortious interference with parental rights cause of action requires proof that Dr. Nelson intentionally interfered causing harm to Ms. Wilson's parental or custodial relationship; her actions must cause the harm. *Wyatt*, 283 Va. at 699.

The Trial Court noted that, in the Custody Proceeding, Ms. Wilson had due process rights, including the right to cross-examine witnesses, and that *the Custody Court* made the challenged decisions, not Dr. Nelson. Appx. 262-263. The Custody Court temporarily appointed Dr. Nelson to make visitation decisions; therefore, this was a ruling *of the Custody Court* not some elaborate scheme by Dr. Nelson. Appx. 263. Ms. Wilson had the

opportunity to challenge any evidence or testimony presented to the Custody Court in the ongoing Custody Proceeding. She also had the opportunity to challenge any alleged impropriety with Dr. Nelson's visitation determinations with the Custody Court in the ongoing Custody Proceeding.

Moreover, Ms. Wilson never pled any harm to her parental or custodial relationship. Appx. 263-264. Ms. Wilson still has her custodial rights and there was no pleading of a causal relationship between the alleged actions of the Appellees and any particular harm. Appx. 263-264. Ms. Wilson stated in her Brief that she has not challenged in-court statements; she is not arguing that Dr. Nelson made these alleged false statements in the presence of the Custody Court. Brief of Appellant p. 20. Therefore, there is no relationship between alleged false out-of-court statements and the Custody Court's *in-court* decision to remove or limit her custody and visitation. Ms. Wilson is disappointed with the decisions of the Custody Court and with Dr. Nelson's visitation decisions, as the court-appointed visitation steward. Having exhausted her appellate rights, Ms. Wilson is trying to create a new cause of action to further litigate the issues in the Custody Proceeding and to "punish" the professionals involved in the Custody Proceeding. As the Trial Court stated, Ms. Wilson is essentially

attempting to create a type of "habeas proceeding" to subsequently challenge custody cases "from another angle". Appx. 262.

Privilege Applies

For the third basis to grant the demurrer, the Trial Court ruled that the Appellees had immunity for statements made in the course of the Custody Proceeding. Appx. 264. Relying primarily on the rulings in the *Briscoe v. LaHue*, 460 U.S. 325 (1983) (common law trial witness immunity), *Watt v. McKelvie*, 219 Va. 645, 650-651, 248 S.E.2d 826 (1978) (party and third party statements made at a deposition were considered to be during the course of a judicial proceeding and were absolutely privileged) and *Wilson v. Bernet*, 625 S.E.2d 706, 714 (W.Va. 2005) cases, the Trial Court found that statements made by Dr. Nelson in the course of the Custody Proceeding are also immune and/or privileged. Appx. 264. This Court has explained the underlying reasoning for the protection was that "the public interest is best served when individuals who participate in lawsuits are allowed to conduct the proceeding with freedom to speak fully on the issues relating to the controversy." *Watt*, 219 Va. at 651.

As acknowledged by Ms. Wilson multiple times during the hearing on the Demurrer, it is undisputed that immunity applies to *in-court statements*. Appx. 191, 200, 264. Ms. Wilson has claimed that the out-of-court

statements she is challenging are Dr. Nelson's court-ordered visitation decisions. Ms. Wilson has argued that any statements uttered outside the four walls of the courtroom could not be considered part of a judicial proceeding and would not give rise to immunity or privilege. While Dr. Nelson's statements and decisions regarding visitation were probably made while she was standing outside the courtroom, they were made *under the direction and authority of the Custody Court* and are part of the Custody Proceeding and require protection. *Watt*, 219 Va. at 651.

Not only was Dr. Nelson ordered to make visitation decisions on behalf of the Custody Court, Ms. Wilson admitted that Dr. Nelson was *permitted* to make the visitation decisions and was *required* to do so by the Custody Court. Appx. 202-203. The Trial Court determined that the Custody Court *made the decisions* in the Custody Proceeding that are being challenged with this tort and suggested that Dr. Nelson was acting with colorable judicial authority to make visitation decisions *for the Court*. Appx. 237, 263. Dr. Nelson's challenged out-of-court statements were a mandatory, court-directed part of the Custody Proceedings and are immune from this civil tort.

Ms. Wilson has added a new argument and/or cause of action to her appeal that has not been preserved pursuant to Rule 5:25. She appears to

be arguing that Dr. Nelson committed an unidentified fraud on the Custody Court rendering the June 2014 custody order void *ab initio*. If the Court considers this late argument, there are numerous problems with it. First, there are no facts to support the argument. Ms. Wilson has never identified what fraud Dr. Nelson committed on the Custody Court and how it caused Ms. Wilson alleged harm. Second, the argument conflicts with Ms. Wilson's representation in her Brief that she has only challenged out of court statements. The late addition of this argument further unveils Ms. Wilson's actual intent to appeal the decision of the Custody Court and attack the professionals involved in the case.

Future Litigation

Finally, the Trial Court dismissed the Complaint to avoid a precedent for a "continuous round of litigation after custody cases." Appx. 261-262. The Trial Court stated that allowing "these kinds of torts after a custody case against the people that participated in the custody case is…bad public policy…" Appx. 350-351. The Appellees agree that it would be bad public policy to allow this type of revenge litigation to become common practice.

Allowing these post-custody lawsuits to proceed would encourage endless litigation and lawsuits filed for vexatious purposes against the professionals involved in those custody cases. For example, a Virginia

Circuit Court previously found that Ms. Wilson filed a similar post-custody lawsuit against Dr. Nelson for an improper purpose. Appx. 567-632. The Court found that Ms. Wilson had a "personal motive of animus on behalf of Ms. Wilson as it relates to Dr. Nelson due to her involvement in her personal divorce and custody case." Appx. 628. The Court also found that "the actions of Ms. Wilson were vexatious in pursuing this litigation for the purpose of punishing Dr. Nelson." Appx. 628. The Court found that Ms. Wilson "had expressed a dislike of Dr. Nelson" and that the case was filed against Dr. Nelson "for an improper purpose". Appx. 628-629. This is the type of revenge litigation that will likely become commonplace if this matter is permitted to proceed.

Assignment Two: The Trial Court properly dismissed the defamation claim against the Appellees.

As stated herein, Dr. Nelson's involvement in the Custody Proceeding was limited to two court-ordered evaluations and appointment by the Custody Court to make visitation decisions between June 2014 and December 2015. Appx. 9-10, 22-23. For her defamation claim against Dr. Nelson, Ms. Wilson is relying on excerpts from five emails from Dr. Nelson between April 2015 and July 2015 that are part of Dr. Nelson's monthly court-ordered determination of visitation. Appx. 54-56, 58, 59. None of these emails qualifies as actionable defamation and they are all privileged.

In the excerpts from the five emails, Dr. Nelson is evidently reporting her monthly decision for visitation and explaining her decision. In the emails, Dr. Nelson wrote of her concerns about Ms. Wilson and the Wilson children; her understanding of circumstances; her interpretation of and opinion regarding Ms. Wilson's writings, expressions and actions; and her decisions regarding visitation for the month. Appx. 54-56, 58, 59. It is apparent that the emails were only sent as a part of the Custody Proceeding to facilitate visitation. There is nothing defamatory about the cited statements.

The Trial Court examined the selected statements from the five emails and ruled that the same privilege that applied to the tortious interference with parental rights claim would also bar this defamation claim. The Trial Court noted that the *Briscoe v. LaHue*, 460 U.S. 325 (1983), and *Watt v. McKelvie*, 219 Va. 645 (1978), decisions provided this privilege and protection to Dr. Nelson. Appx. 334-337. Dr. Nelson was acting on behalf of the Custody Court. Dr. Nelson's challenged statements were the decisions she made regarding visitation, *under the direction and authority of the Custody Court* and are, therefore, privileged.

Even without privilege, Dr. Nelson's visitation emails do not qualify as defamation. The elements of a defamation claim are (i) publication of (ii)

an actionable statement (iii) with the requisite intent. *Jordan v. Kollman*, 269 Va. 569, 575, 612 S.E.2d 203 (2005). The statements in the five emails are clearly Dr. Nelson's opinions, thoughts and decisions about visitation pursuant to her appointment by the Custody Court.

The historical basis for a defamation claim is the protection of a person's reputation. *Jordan*, 269 Va. at 575. Therefore, a defamatory statement must be factually false and must harm the subject or the subject's reputation to be actionable. *Hyland v. Raytheon Tech. Servs. Co.*, 277 Va. 40, 46, 670 S.E.2d 746 (2009). In addition, pure expressions of opinion are constitutionally protected and cannot form the basis for a defamation claim. *Hyland*, 277 Va. at 47. Statements that depend on the speaker's viewpoint are considered expressions of opinion. *Jordan*, 269 Va. at 576.

There is no evidence or indication that Dr. Nelson sent the emails regarding her monthly visitation decisions with a malicious intent to defame Ms. Wilson. As acknowledged by Ms. Wilson, Dr. Nelson was ordered by the Custody Court to make visitation decisions in the Custody Proceeding. Appx. 202-203. The visitation emails cited by Ms. Wilson are Dr. Nelson's fulfillment of her obligation to the Custody Court. Ms. Wilson's disagreement with Dr. Nelson's decisions does not render Dr. Nelson's

visitation emails defamatory. Dr. Nelson's documentation of her thoughts and decisions regarding visitation, with the Custody Court's order to do so, are not defamatory statements and were not published with the intent to harm Ms. Wilson.

Assignment Three: The Trial Court properly dismissed Ms. Wilson's negligent retention claim.

A cause of action for negligent retention is based on the principle that an employer may be liable for harm from an employee's negligence, if the employer retained the "dangerous employee" while the employer knew or should have known the employee was dangerous and was likely to cause the alleged harm. *Southeast Apartments Management, Inc. v. Jackman*, 257 Va. 256, 260-261, 513 S.E.2d 395 (1999). The *Southeast Apartments* Court found that there was insufficient evidence of a negligent retention claim against the employer apartment building owners after the employee apartment building maintenance supervisor sexually assaulted a tenant. *Southeast Apartments*, 257 Va. at 261.

Once again, the Trial Court found that Dr. Nelson's actions as the court-appointed visitation decisionmaker were privileged. Appx. 348. In addition, the Trial Court was persuaded by the decision in *Ingleson v. Burlington Medical Supplies, Inc.*, 141 F. Supp. 3d 579 (2015), which requires a physical injury to support a negligent retention cause of action.

Appx. 348-349. Ms. Wilson did not plead any physical injury in the Complaint because there was no physical injury. Instead, Ms. Wilson claims that Dr. Nelson caused her to "lose" her children and has an alleged "propensity" to recommend that children be removed from their parents; this is the only "factual" support for the allegation that Dr. Nelson is "dangerous" and is likely to cause harm. Appx. 64.

In addition, the danger and harm envisioned by this Court for a negligent retention claim is clearly not a visitation decision in a judicial proceeding. This Court specifically chose the phrases "dangerous employee" and "likely to cause the alleged harm" for a purpose and applied them in a case involving a sexual assault by an employee. *Southeast Apartments*, 257 Va. at 260-261. Dr. Nelson's court-ordered visitation decisions in this matter did not cause physical harm and did not render her a dangerous employee. The Trial Court properly rejected Ms. Wilson's arguments that she was physically harmed when she temporarily lost time with her children and that this alleged "physical harm" was *a greater physical injury than the injury from a rape*. Appx. 345-346. Ms. Wilson's negligent retention claim is insufficient, uncorroborated by facts and outrageously inflammatory. Ms. Wilson did not state a cause of action for negligent retention.

CONCLUSION

Through this appeal, Ms. Wilson is attempting to broaden the narrow tortious interference with parental rights cause of action into a new action for "wrongful loss of custody, visitation and/or contact" with her children in the Custody Proceeding. All of her claims are based on this single objective. As determined by the Trial Court, Dr. Nelson's actions in her professional role within the Custody Proceeding do not support any of the causes of actions claimed by Ms. Wilson. In summarizing its decision, the Trial Court stated that Ms. Wilson's claims, if supported, would not only create bad public policy, but they are also not supported by law. Appx. 350-351. The Appellees agree and request that this Court affirm the rulings of the Trial Court.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify as follows:

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4. That on this 19th day of November, 2019, Rule 5:26(e) has been complied with and as such, the correct number of true and accurate copies of this Brief of Appellee have been filed by Hand Delivery with the Supreme Court of Virginia, and the correct number of copies have been served, by email, upon all counsel of record, as listed above.

Angela Boice Axselle, Esq. /s/___