In the
Supreme of Virginia

RECORD NO. 190107

AMANDA PADULA-WILSON,

Appellant,

v.

SCOTT DAVID LANDRY, ET AL.

Appellees.

BRIEF OF APPELLANT

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Rule

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I. Assignments of Error

1. The Circuit Court erred when it granted all the Defendants demurrers and dismissed the tortious interference of parental rights claims and when it ruled that a) the tort does not exist under the fact pattern in this case b) there was absolute immunity for all of the Defendants because their out-of-court actions were in the course of judicial proceedings and c) a court ultimately made custody and visitation decisions even if the Defendants made the decisions over years, and so there was due process, no causal relationship, and no harm.

[Preserved *inter alia* at App. 110-112 ¶¶ 1-3, 113 ¶ 11, 186:20-190:06, 205:02-214:09, 217:05-219:03, 222:16-225:12, 229:16-243:09, 352:12-355:15, 472-489]

2. The Circuit Court erred when it granted Nelson's demurrer and dismissed the defamation claims and when it ruled that her statements in emails were subject to privilege and immunity.

[Preserved *inter alia* at App. 112-113 ¶¶ 7-8, 113 ¶ 11, 332:22-333:12, 336:11-15, 352:12-355:15, 482-489, 492-493]

3. The Circuit Court erred when it granted Defendants demurrers and dismissed the negligent retention claim and when it ruled that physical injury was required and had not been pled.

[Preserved *inter alia* at App. 113 ¶¶ 9-10, 345:04-346:22, 493]

II. Nature of the Case and Material Proceedings Below

This lawsuit was filed on 8/19/2015, served, then non-suited prior to any hearing on 2/9/17, re-filed on 8/7/2017, and served July 2018. The Richmond Circuit Court recused itself on 8/22/2018, and this Court designated the Honorable Charles Maxfield to hear the case on 9/5/2018. (Appendix "App." 362-363). Defendants filed demurrers to the claims. (App. 364, 410, 419). Additionally, defendants Nelson and Landry filed pleas in bar of immunity and sanctions motions against plaintiff. (App. 419, 464). On December 14, 2018, Judge Maxfield heard argument on the demurrers and evidence on the sanctions motions. (App. 119). The court did not hear the pleas in bar of immunity. The trial court did not take evidence on the demurrers, but accepted the facts pled in the complaint as true. The trial court granted the demurrers to all counts (tortious interference of parental rights, negligent and intentional infliction of emotional distress, defamation, and negligent retention) based primarily whether these torts could exist in a case stemming from a custody case and on judicial privilege and denied the sanctions motions in a final order entered on December 14, 2018. (App. 106). This appeal ensued with the Notice of Appeal filed on December 20, 2018. (App. 647).

III. Statement of Facts

"A demurrer admits the truth of all material facts properly pleaded. Under this rule, the facts admitted are those expressly alleged, those which fairly can be viewed as impliedly alleged, and those which may be fairly and justly inferred from the facts alleged." *Rosillo v. Winters*, 235 Va. 268, 270 (1988). The facts pled in the Complaint were as follows:

Amanda Padula-Wilson ("Mother") is the Mother of Alexander Wilson ("A.W.")(D.O.B. 10/4/1999), Carter Wilson ("C.W.")(D.O.B 8/1/03), and Avery Anna Grace Wilson ("A.G.W")(D.O.B 7/9/08). (App. 3 ¶ 1, 8 ¶ 5). At all times relevant hereto Mother had a right to maintain a parental or custodial relationship with her children. (App. 33 ¶ 128). In March 2013, Mother had custody of the children and Father had supervised visitation. (App. 13 ¶ 38).

Landry was subsequently appointed as a guardian *ad litem* ("GAL") and Gasper was hired as a reunification specialist between father and C.W. (App. 13 ¶ 39, 17 ¶ 54). C.W. complained to Gasper and Landry that he was abused by Father. (App. 13 ¶ 40).

On April 18, 2013, both Landry and Gasper made a written recommendation of custody to Mother. (App. 14 ¶ 42, 18 ¶ 56, 70, 73). Subsequently Defendants found out that Mother placed them on a website and became angry. (App. 14-15 ¶¶ 43-46). On April 24, 2013, six days after both Gasper and Landry made a

written recommendation for custody to Mother with no new information except that they had been put on this website, both Gasper and Landry changed their recommendation to custody to Father and supervised visitation to Mother while falsely calling her an alienator and a flight risk. (App. 14-15 ¶¶ 45-46, 18 ¶ 59, 71, 75). Both stated on the record that the reason they were changing their recommendation from six days prior is because they were placed on the website. (App. 18 ¶ 59, 71, 75).

The custody court refused to remove custody from Mother and thereafter, Defendants began a campaign to remove custody from Mother in bad faith by willfully and maliciously making up false accusations about Mother because they were angry that Mother put them on a website. (App. 15-17 ¶¶ 47-53, 18-20 ¶¶ 60-66, 71).

On or about August 18, 2013, while Mother was on vacation with the children in Hilton Head, Landry entered Mother's house without her permission and outside of court Landry made up false accusations about Mother to Gasper and conspired with Gasper to falsely call Mother psychotic and delusional even though Gasper and Landry had not seen Mother outside of court since early April 2013 after which they recommended custody to Mother. (App. 16 ¶¶ 48-51). In an emergency court hearing on August 20, 2013, Gasper testified that Mother was totally delusional and a flight risk. (App. 16 ¶ 50, 19 ¶ 62, 76). Gasper testified on

record that she had no first-hand information and was basing her determination on what she heard from Landry. (App. 16 ¶ 50, 19 ¶ 62). As a result of Landry and Gasper's out of court conspiracy to commit perjury, and actual perjury in court of calling Mother delusional and a flight risk, the custody court removed Mother's children from her on August 20, 2013 with no contact for almost eight months. (App. 12 ¶ 30, App. 16 ¶ 52, App. 19-20 ¶¶ 61-64). Additionally, the court ordered to send the children to a therapist mutually chosen by both parents. (App. 20 ¶ 68).

Father solely hired Defendants Wert and Campanella in Fall of 2013, both well-known hired-gun therapists in custody cases, contrary to the order that both parents must choose the children's therapist. (App. 20-21 ¶¶ 68-70). Father later testified that he broke the order based on the advice of Landry and Gasper and so Landry and Gasper conspired to break the court order in order to further deny Mother her parental rights. (App. 21 ¶ 72). Landry and Gasper then told Wert, Nelson, and Campanella outside of Court that Mother was totally delusional and psychotic even though none of them had seen Mother and it was completely false. (App. 17 ¶ 53, 20 ¶ 65-66, 22 ¶ 76).

On December 2, 2013, Nelson did a mental exam of Mother and found that Mother had no evidence of "depression, mania, anxiety, or psychosis." (App. 22-23 ¶¶ 77-78).

On December 21, 2013, During the period when Mother had no contact with her children, C.W. (then age 10) called 911. On the 911 call, C.W. can be heard crying and screaming and when C.W. asks his father, "What are you doing? What?" His father responds, "Right now I'm about to break your hand." (App. 23 ¶ 80, 105[1]). While Mother still had no contact with the children, CPS investigated and did a report[2] in February 2014 where C.W. reported his father abused him. (App. 24 ¶ 86, 78). Defendant Wert called CPS and told them the Father was not an abuser which did cause CPS to close their investigation. (App. 25 ¶ 88).

Mother was allowed supervised visitation in March 2014 which was the first contact Mother was allowed with her children in almost eight months other than a short visit with the children with Nelson in November 2013. (App. 12 ¶ 30, 24 ¶87, 25 ¶ 89). On April 23, 2014 Mother identified expert Arlo West to Father which included his report that C.W.'s scream on the 911 call was a pain scream. (App. 25 ¶ 93). On April 25, 2014, Father sent Mother an email that he would no longer allow Mother to see A.W. (App. 25 ¶ 94). Then Campanella, Father's hired gun therapist who had never met Mother, sent an email stating she would not allow Mother to see A.W. unsupervised despite the fact that A.W.'s supervised visit report on April 22, 2014 said that was his favorite thing he did all week.

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[1] The actual audio from the 911 call is provided on a flash drive and CD in the court's record.
[2] The CPS report is included as an exhibit starting at page 78 of the Appendix.

(App. 25-26 ¶¶ 95-97). As a result of Defendant Campanella's conduct, Mother was not allowed to see A.W. from April 22, 2014 until March 2017. (App. 25-26 ¶¶ 95-97).

The custody court issued at a minimum supervised visitation to Mother with the visitation schedule set by Nelson and Campanella in a June 20, 2014 final order. (App. 26 ¶ 98).

Nelson, Wert, and Campanella then broke the June 20, 2014 court order and refused to allow Mother any contact with Mother's children at various times despite the fact that the June 20, 2014 court order entitled Mother to at least supervised contact (App. 3-7, 26 ¶ 99, 37-38, 40-41, 46 ¶¶ 169-170). As a result, of Nelson, Wert, and Campanella breaking the June 20, 2014 court order, Mother did not have any authorized contact with A.W. from April 22, 2014 until March 2017 or any contact with C.W. and A.G.W. for periods spanning months (App. 3-7, 25-26 ¶ 95, 26 ¶ 99, 29 ¶ 108, 31 ¶ 114, 37-38, 40-41, 46 ¶¶ 169-170, 102). Nelson stated she was limiting and/or removing Mother's parental rights based on what Wert and Campanella told her. (App. 27 ¶ 101, 45 ¶ 162).

Nelson had not seen Mother since December 2013 except for one cross-examination of Nelson by Mother (who is an attorney) in an unrelated custody case, Wert had met Mother one time ever in September of 2013 for less than one hour, and Campanella had never met mother outside of her being cross-examined

by Mother in May 2014, and yet all were willing to break the June 20, 2014 court order and withhold the children contrary to the court order starting on June 20, 2014 and going throughout 2015, and make up totally false accusations about Mother in bad faith, maliciously and intentionally in order to interfere with Mother's parental rights. (App. 3-7, 22 ¶ 76, 25-26 ¶ 95, 26-28, ¶¶ 97, 99, 102, 29 ¶ 108, 31 ¶ 114, 37-38, 40-41, 46 ¶¶ 169-170, 102)

Mother, *pro se*, appealed the June 20, 2014 order, and the Court of Appeals overturned the order on April 14, 2015 after ruling that a trial court cannot abdicate its duties to third parties to determine custody and visitation. (App. 28 ¶ 103). *Padula-Wilson v. Wilson*, 2015 WL 1640934 (Va. Ct. App. 2015).

On May 27, 2015, after the Court of Appeals overturned the order allowing Nelson to determine custody and visitation, Mother, who is an attorney, filed a wrongful death suit against Nelson and Wert for their role in a child's death which made Nelson angry. (App. 29 ¶ 106, 82-101).

Because Nelson was angry about the wrongful death suit that she had just received on May 27, 2015, Nelson kept Mother from her children throughout summer 2015 while making false accusations about Mother contrary to the order which entitled Mother to at least supervised contact. (App. 29 ¶ 106-108, 35 ¶ 133, 55 ¶ 230, 56-57 ¶ 236, 58-59 ¶ 250, 102). The trial court removed Nelson from the case on December 23, 2015. (App. 31 ¶ 114).

On December 13, 2016, three years after Defendants called Mother delusional and psychotic, Mother (as an attorney) got the Court of Appeals to overturn a second case that also involved Wert and Nelson. *Reilly v. Reilly*, Record No. 1369-15-2 (Va. Ct. App., Dec. 13, 2016). (App. 32 ¶ 120).

Due to the negative momentum Mother's custody case had gathered, it took tremendous time and cost to turn the case around which occurred when the custody court entered its final order in March 2017 when the court ultimately awarded joint custody and visitation to Mother and Father of two of the children in a 50/50 shared custody and visitation arrangement on a 5 on 5 off schedule (App. 31-32 ¶¶ 119, 121). By March 2017, A.W. was almost an adult and Mother had had no authorized contact of A.W. for three years because of defendants' actions and so Mother never regained custody of him. (App. 3 ¶1, 12 ¶ 33, 31-32 ¶¶ 119, 121).

IV. Argument

1. The Circuit Court erred when it granted all the Defendants demurrers and dismissed the tortious interference of parental rights claims and when it ruled that a) the tort does not exist under the fact pattern in this case b) there was absolute immunity for all of the Defendants because their out-of-court actions were in the course of judicial proceedings and c) a court ultimately made custody and visitation decisions even if the Defendants made the decisions over years, and so there was due process, no causal relationship, and no harm.

A. Tortious interference of Parental Rights exists under the fact pattern in this case

The standard of review of a circuit court's decision to grant a demurrer is *de novo*. *Harris v. Kreutzer*, 271 Va. 188, 196 (2006).

The circuit court did not hear evidence and so the court accepted as true the facts in the complaint. *Rosillo v. Winters*, 235 Va. 268, 270 (1988).

Tortious interference of parental rights was recognized by this Court in *Wyatt v. McDermott* in 2012 as a modern embodiment of an action derived from common law. 283 Va. 685 (2012). There has been only one other tortious interference of parental rights case decided by this Court. *Coward v. Wellmont*, 295 Va. 351 (2018).

The trial court's primary concern was that he felt the fact pattern in this case constitutes an expansion of *Wyatt v. McDermott*, 283 Va. 685 (2012) because this case derived from a custody case. Mother objected. (*See* App. 110-111, 217:05-218:03, 222:16-225:12, 353:07-355:15, 472-475).

In *Wyatt*, this Court made it clear that not only was it acceptable to bring this tort after a custody case, but in a tort between parents, a prior custody case was actually required. ("In other words, when no judicial award of custody has been made to either parent, thereby causing the parents' parental and custodial rights to be equal, no cause of action for tortious interference can be maintained by one parent against the other parent.") *Wyatt v. McDermott*, 283 Va. 685, 702 (2012).

In *Wyatt v. McDermott*, this Court recognized tortious interference of parental rights after a biological mother, her parents, two licensed attorneys, and an adoption agency acted to conceal a potential adoption and the birth of Wyatt's baby in order to prevent Wyatt from establishing a relationship with his child. *Id.* at 703.

> Wyatt was ultimately awarded custody by the juvenile and domestic relations court, the Utah courts have awarded custody of E.Z. to the Zarembinskis. Wyatt has been involved in a protracted custody battle the facts and proceedings of which are extensive; the salient details are simply that, at the time of the certification order, adoption proceedings were still pending in Utah, and E.Z. remains with the Zarembinskis in Utah to this date.

Id. at 690-691.

In other words, exactly like this case, *Wyatt* involved a custody case at the time it was decided by this Court – not an adoption which had not yet taken place at the time *Wyatt* was decided.

Additionally, in *Wyatt*, this Court cited numerous other cases that also derived from or were after a custody case. *See*, *Khalifa v. Shannon*, 404 Md. 107, 945 A.2d 1244 (2008)(Father allowed to sue mother and grandparents for tortious interference of both children after he was awarded custody of one child and visitation of another, but Mother broke custody court orders and denied him both children). *Plante v. Engel*, 124 N.H. 213, 469 A.2d 1299 (1983)(Father allowed to sue grandparents after he was granted custody of children and grandparents broke court order and took children). *Silcott v. Oglesby*, 721 S.W.2d 290 (Tex. 1986)(Father allowed to sue grandfather where grandfather received temporary custody but father received ultimate custody and then grandfather broke court orders and did not return child).

Additionally, a wealth of case law from other states allow tortious interference of parental rights after a custody case including if the interference occurred during a custody case. *See, Spencer v. Terebelo*, 373 So.2d 200 (La. Ct. App. 1979)(Father allowed to sue Mother while they were in the midst of a custody case where she was awarded temporary custody but Father did not know his children's whereabouts for 38 days during the custody case), *Wolf v. Wolf*, 690 N.W.2d 887 (Iowa 2005)(Father allowed to sue Mother while Mother took child while in midst of custody case even though both had joint legal custody), *Shields v. Martin*, 109 Idaho 132, 706 P.2d 21 (1985)(Father allowed to sue Mother for

breaking a custody court order and police officer for aiding and abetting breaking a custody court order), *D & D Fuller CATV Constr., Inc. v. Pace*, 780 P.2d 520 (Colo. 1989), (Mother allowed to sue grandparents after they broke temporary custody court order and kept child from her), *Wood v. Wood*, 338 N.W.2d 123 (Iowa 1983)(Mother allowed to sue father when child was not returned within the time limits prescribed by their divorce decree), *Ruffalo v. United States*, 590 F. Supp. 706 (W.D.Mo.1984)(non-custodial Mother was allowed to sue government who placed her child in the witness protection program which did keep Mother from exercising her court ordered visitation rights to her child for four years), *L.S.J. v. E.B.*, 672 S.W.2d 937 (Ky. Ct. App. 1984)(Non-custodial Mother allowed to sue foster parents when they brought court proceedings to seek temporary custody of the child, enjoin her from visitation, and then ultimately terminate her parental rights contrary to foster care agreement).

The elements set forth in *Wyatt v. McDermott* to maintain a tortious interference of parental rights suit were as follows:

> (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.

283 Va. 685, 699 (2012).

Mother had a right to maintain a relationship with her children. Defendants Nelson, Wert and Campanella broke the custody court order entitling Mother to at least supervised visitation and withheld one of the children completely from Mother for three years and the other two children for months at a time which altogether totaled over a year. (App. 3-7, 12, 25-27 ¶ 95 & ¶ 99 & ¶ 101, 29 ¶ 108, 31 ¶ 114, 37-38, 40-41, 46 ¶¶ 169-170, 102).

Landry and Gasper made a recommendation of custody to Mother and then six days later changed their recommendation to father with supervised visitation to Mother stating to the custody court they did so because they were put on a website. (App. 14-15, ¶ 42 & ¶45, 18 ¶ 56 & ¶ 59, 70-71, 73-75). Subsequently, Landry conspired with Gasper outside of court to falsely call Mother totally delusional, psychotic, and a flight risk after they became angry that Mother put them on a website which did cause Mother to lose contact with all of her children for almost eight months. (App. 16 ¶¶ 48-50, 19 ¶¶ 61-62 & 64, 25 ¶ 89).

The time and effort to turn the case around to get Mother's children back was extensive and has not only had a high monetary and emotional cost, but pursuant to the March 2017 custody court order, in order to get her children 50 %

of the time, Mother had to sell her house and move to a more expensive area at great cost to her. (App. 31-33 ¶¶ 119-125). Additionally, it has also hampered Mother's ability to obtain billable work[3] as an attorney since in order to turn the case around Mother had to appeal the case to the Court of Appeals, and as such it is difficult to get paying clients because a simple google search brings up the Court of Appeals case which states that Mother was called delusional and lost her kids. (*Id*).

Therefore, Mother met all of the elements and her case should be allowed to go forward. Additionally, like *Wyatt*, this case stemmed from a custody case where several parties acted outside of court to deny Mother her parental rights by intentional deception. Also, several defendants acted in concert to break court orders to deny Mother her right to see her children contrary to the court order which did cause Mother to not be allowed to have contact with one of her children for three years and no contact with the other two children for months at a time. (App. 12 ¶¶ 30-35). As such, Mother respectfully requests that this Court reverse the trial court, rule that mother has pled facts to state a claim against the defendants and allow her tortious interference of parental rights claims to go forward.

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[3] Mother's custody cases for clients before this Court and the Court of Appeals are *pro bono*. Mother's tort cases are contingency.

B. The Defendants out-of-court actions were not in the course of judicial proceedings and so they did not have immunity

All of the actions sued for are out-of-court actions by the defendants. In court actions merely show intent. The egregious conduct was extensive involving multiple acts over a period of years as detailed in the 104 pages of the Complaint and exhibits. For the purposes of brevity, only the most salient facts are listed here. Outside of court and outside of his authority, Landry entered Mother's house without her permission while she was on vacation in Hilton Head with her children, and then Landry conspired outside of court with Gasper to falsely call Mother delusional, psychotic, and a flight risk in bad faith with malicious intent because they were mad that Mother put them on a website. (App. 3-7, 16 ¶¶ 48-50, 19 ¶¶ 61-62). As a result of Gasper's perjury and Landry's out-of-court conspiracy with Gasper to call Mother delusional, psychotic, and a flight risk, the custody court removed Mother's children with no contact with all three children for almost eight months. Landry and Gasper then told father to break a court order to further interfere with Mother's parental rights and told Wert, Campanella and Nelson outside of court that Mother was delusional and psychotic when they knew it was false – all to intentionally interfere with Mother's parental rights. (App. 17 ¶ 53, 20 ¶ 65 & 68, 21 ¶ 72, 22 ¶ 76). Nelson, Campanella and Wert outside of court acted with malice and bad faith and broke the final June 20, 2014 court order that entitled Mother to at least supervised visitation and instead wrongfully withheld

the children with no contact – with one of those children, A.W., being wrongfully withheld for three years and the other two children wrongfully withheld for months while allowing the children to spend a week including overnights with a convicted pedophile. (App. 3-7, 12, 25-27 ¶ 95 & ¶ 99 & ¶ 101, 29 ¶ 108, 31 ¶ 114, 37-38, 40-41, 46 ¶¶ 169-170, 102). This was despite the fact that A.W.'s last supervised visit report with Mother stated that A.W. states the visit with Mother was his favorite thing he did all week. (App. 25-26 ¶95).

The trial court found that this tort could not exist under the facts in this case because there was absolute immunity for all of the defendants' actions because their actions occurred in the course of judicial proceedings. The court acknowledged that the actions sued for were out-of-court actions, but stated, "…judicial proceedings, it's not just testimony in court. So I think absolute immunity prevents there being any tortious behavior in this case." (App. 264:21-24).

The trial court based its argument on *Wilson v. Bernet* – a West Virginia Supreme Court case that was cited by this Court in *Coward v. Wellmont*, 295 Va. 351, 360 (2018). *Coward* did not cite to *Wilson v. Bernet* to change decades of law on what constitutes a judicial proceeding but instead cited to *Wilson v. Bernet* for the proposition that "The facts in *Kessel* involved "egregious conduct that barely fell short of outright kidnaping and abduction." *Wilson v. Bernet*, 218 W. Va. 628,

625 S.E.2d 706, 714 (2005). The West Virginia *Wilson v. Bernet* court states that experts have immunity in trial testimony and judicial proceedings if they are not engaged in criminal activities. 625 S.E.2d 706, 713 (W. Va. 2005).

Wilson v. Bernet explained its reasoning that

> the most compelling reason to grant adverse expert witnesses immunity for their testimony and trial participation is the built-in mechanism, in the litigation process, itself, to ascertain the truth and credibility of an adverse witness's testimony.
> The law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result. . . . <u>This policy can logically apply, however, only to trial testimony of adverse witnesses</u>.

Id. at 712. (emphasis added).

None of the acts that Defendants are sued for have any built-in mechanism to expose the falsity of Defendant's accusations. Mother had no ability to know that Landry was entering her house without her permission while she was on vacation in Hilton Head with the children or that he was calling Gasper on the phone and conspiring with her to falsely call Mother delusional and psychotic - much less combat those false accusations with any judicial safeguards. Nor did Mother receive any notice or have any ability to impeach Landry and Gasper's statements to Nelson, Campanella and Wert that Mother was totally delusional and psychotic and an alienator because all of those actions occurred outside of court

and without any type of notice. Likewise, Mother had no notice of the discussions on the phone between Nelson, Wert and Campanella and could not impeach their statements to each other. Additionally, when they broke the June 20, 2014 court order to withhold the children from Mother contrary to the order, that was the very antithesis of a judicial safeguard.

Wilson v. Bernet noted that

> [T]his Court's opinion decidedly does NOT create a blanket civil liability "exoneration" or "immunity" for experts who engage in criminal or similarly outrageous misconduct, and who injure others by that misconduct. Experts who commit perjury, conspire to obstruct justice, commit forgery, etc., remain civilly liable for all damages inflicted on victims of the experts' misconduct.

625 S.E.2d 706, 716 (W. Va. 2005)(concurring opinion).

In other words, Defendants would be liable even under the West Virginia standard because their conduct of making up completely false fabrications about Mother to third parties with the intent to pull Mother's parental rights was such outrageous misconduct, a conspiracy to commit perjury, and actual perjury – that Defendants would be liable under *Wilson*.

Wilson noted, "For example, under this Court's opinion in the instant case, the late Fred Zain, West Virginia's "poster boy" of corrupt experts, *see Matter of Investigation of West Virginia State Police Crime Laboratory, Serology Div.*, 190

W.Va. 321, 438 S.E.2d 501 (1993), would be civilly liable to his victims." 625 S.E.2d 706, 716 (W. Va. 2005)(concurring opinion).

Trooper Zain was investigated for falsifying DNA evidence and writing falsified reports which led to many false convictions. *Matter of Investigation of West Virginia State Police Crime Laboratory, Serology Div.*, 190 W.Va. 321, 438 S.E.2d 501 (1993). Likewise, here, Defendants falsified evidence which led to Mother wrongfully losing her children. As such, Defendants should be held liable for their actions.

However, the trial court took the *Wilson* citation in *Coward* to mean that this Court overturned decades of law of what constitutes a judicial proceeding. Mother objected. *See* (App. 231:12-243:09, 352:12-355:15, 482-489, 110-112 ¶¶ 1 & 3).

In court actions in the Complaint show defendants' intent, but only out-of-court actions are the subject of the suit.

Out-of-court actions that do not have judicial protections are not judicial proceedings. In *Harris v. Kreutzer*, a psychologist court ordered to perform a Rule 4:10 exam[4] was allowed to be sued for negligence. 271 Va. 188 (2006).

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[4] The 4:10 Report itself is immune because pursuant to Rule 4:10 of the Rules of the Supreme Court the report is required to be submitted to the court and must be read into evidence if offered by the party who submitted to the exam. Thus the 4:10 report is essentially trial testimony and subject to judicial privilege. There is no equivalent in a custody case as while Va. Code § 20-124.2(D) allows a judge to appoint a mental evaluator, no report is required or must be submitted.

Therefore, under Virginia law, this Court does not consider a meeting with a psychologist in a court ordered meeting a judicial proceeding.

In *Tomlin v. McKenzie*, Tomlin sued a court-ordered therapist for malpractice and defamation after he was ordered to see therapist McKenzie by the Chesapeake J&DR court in the context of a custody case between him and his ex-wife. 251 Va. 478, 479-480 (1996). Tomlin alleged that the therapist conspired with his ex-wife to deny him visitation of his daughter, exactly as is alleged in the case at bar against all of the defendants. *Id*. at 481. McKenzie alleged that she was entitled to absolute immunity because all of the acts were in the context of court proceedings by a court agent exactly as is alleged in the case at bar. *Id*. at 480-481 (emphasis added). This Court reversed the trial court stating,

> accepting as true the allegations in the first two counts of the motion for judgment that McKenzie conspired with Giffin to violate court orders and to interfere with Mr. Tomlin's visitation with his child, and engaged in other intentional and wanton misconduct, we think the trial court erred in applying sovereign immunity on this state of the record.
> Second, and more importantly, the motion for judgment alleges acts of professional malpractice and defamation which, if accepted as true for purposes of the plea in bar and if ultimately proven at trial, are entirely inconsistent with the proper conduct of a family therapy practitioner. Such conduct would be no less unacceptable, and perhaps even more egregious, if one were subjected to it under the compulsion of a court-ordered referral.

Id. at 481-482.

Since the conduct alleged in the case at bar is like the conduct alleged in *Tomlin*, under *Tomlin* Defendants have no claim to immunity, they were not acting inside the scope of their authority and are liable for their actions.

In *Taylor v. Davis*, this Court decided that a criminal defendant could sue his court appointed attorneys for legal malpractice when they failed to present to the court the correct law which did result in Mr. Taylor being convicted of a crime he did not commit. 265 Va. 187 (2003). Under defendants' arguments, no legal malpractice claims could survive when they involved an attorney's conduct during a judicial proceeding. If an attorney can be sued for his negligence during court proceedings, then it is logical that defendants can be sued for their intentional acts committed in bad faith outside of court.

Virginia law as to what constitutes a judicial proceeding is well established.

> Courts differ as to what constitutes a 'judicial proceeding' within the rule of absolute privilege. Generally the privilege of judicial proceedings is not restricted to trials of civil actions or indictments, but it includes every proceeding before a competent court or magistrate in the due course of law or the administration of justice which is to result in any determination or action of such court or officer. The rule is broad and comprehensive, including within its scope all proceedings of a judicial nature whether pending in some court of justice, or before a tribunal or officer clothed with judicial or quasi judicial powers. It applies to communications made before tribunals having attributes similar to those of courts. <u>But the rule does not apply to a tribunal which is not judicial or quasi judicial in its character or nature; nor to</u>

> proceedings which, although official and public, are not in substance judicial.

Penick v. Ratcliffe, 149 Va. 618, 627-628 (1927)(Emphasis added).

Therefore, the privilege only applies to a tribunal which is judicial or quasi-judicial in nature. The privilege does not extend to administrative arenas that do not contain judicial safeguards. *Elder v. Holland*, 208 Va. 15, 22 (1967). "Those safeguards include such things as the power to issue subpoenas, liability for perjury, and the applicability of the rules of evidence." *Lockheed Info. Mgmt. Sys. v. Maximus, Inc.*, 259 Va. 92, 101 (2000).

Likewise, in the case at bar, none of the out-of-court actions of the Defendants had any of the judicial safeguards inherent in a judicial proceeding and so they are not afforded immunity or privilege.

Further the General Assembly has specifically stated that where a child-protective services ("CPS") worker accuses someone of child abuse and as a result takes away that child, then that CPS worker is not immune from civil liability from their participation in a judicial proceeding if they are acting in bad faith or malicious intent. Va. Code § 63.2-1512. It is illogical that CPS workers who act in bad faith or maliciously for wrongfully removing a child are accountable for their actions in a judicial proceeding, but the defendants in this case would not be liable for their actions in bad faith and with malice which did tortiously interfere with Mother's parental rights and did cause her to have no contact with one child

for three years and no contact with the other two children for a total of approximately a year and supervised contact for an additional year.

As such, Mother respectfully requests that this Court rule that Defendants actions were not in the course of judicial proceedings and allow Mother's claims for tortious interference of parental rights to proceed.

C. The Defendants caused the harm of tortious interference of parental rights when they made visitation decisions regarding the children, broke court orders to keep the children from the Mother and conspired out-of-court to mislead the court contrary to due process.

1) The Defendants and not the custody court caused the tortious interference of parental rights, and the extrinsic fraud upon the court was contrary to due process

The trial court ruled that the custody judge made a decision and so even if the defendants made visitation decisions, they didn't cause harm of tortious interference of parental rights. Mother objected. *See* (App. 110-111 ¶¶1-2, 186:20-190:06, 205:02-214:09, 229:16-231:02, 353:07-355:17, 473-475).

Nelson, Wert and Campanella made the visitation decisions – not the custody court. Indeed, the Court of Appeals overturned the custody court in *Padula-Wilson v. Wilson*, 2015 WL 1640934 (Va. Ct. App. 2015) because the trial court erred when it abdicated its duty to make custody and visitation determinations to Defendants. (App. 28 ¶ 103). Additionally, Nelson, Wert and

Campanella broke the June 20, 2014 final order[5] entitling Mother to at least supervised contact with her children and instead removed all contact of the children from their Mother thereby causing the tortious interference of parental rights. Further, Landry and Gasper caused the tortious interference of parental rights when they conspired outside of court to falsely call mother delusional and psychotic solely to intentionally and with bad faith interfere with Mother's parental rights because they were angry they were put on a website. Thus, the Defendants caused the tortious interference of parental rights.

Defendants actions may be the cause in fact of a tortious interference of parental rights claim even when a court order decides custody or visitation. *See*, *Wyatt v. McDermott*, 283 Va. 685 (2012)(actual loss of custody caused by Utah custody court, but defendants liable for their out of court actions which enabled Utah courts to take away Wyatt's daughter). *See also*, *Kessel v. Leavitt*, 511 S.E.2d 720 (W. Virginia, 1998)(actual loss of parental rights caused by Canada court order, but defendants liable for their out of court actions which enabled Canadian courts to take away Kessel's child).

In *Wyatt v. McDermott*, this Court, decided that grandparents, two licensed attorneys and an adoption agency were liable for tortious interference of parental

[5] The June 20, 2014 final order was eventually overturned in part by the Court of Appeals and the final order in the case was entered in March 2017. (App. 28 ¶ 103, 32 ¶ 121).

rights after they made up false facts about a dad and to a dad outside of court in order to prevent him from pursuing his parental rights while they were simultaneously filing court papers in order to transfer custody of the child. 283 Va. 685, 703 (2012). At the time this Court decided *Wyatt*, custody of the child had been transferred by a Utah custody court to a Utah couple and an adoption in the court was pending. *Id.* at 690-691. Wyatt found out about the child's birth and filed for custody in a Virginia court when the child was 8 days old. *Id*. at 690. While Wyatt was ultimately awarded custody by the Virginia custody court, a Utah court granted someone else custody of the child which is what ultimately kept Wyatt from his child. *Id*. Therefore, in the seminal Virginia case for tortious interference of parental rights, the third parties were liable for their out-of-court actions of making up false facts with the intent to interfere with that person's parental rights even though a court ultimately made the custody decision which is exactly like the case at bar.

Additionally, in *Kessel v. Leavitt*, which was relied upon by this Court in *Wyatt v. McDermott*, an attorney, an uncle and grandparents were held liable after they used deception to keep dad away from his child until a custody court could transfer custody. 511 S.E.2d 720, 736-738 (W. Virginia, 1998). Ultimately though, dad found out where the child and court case were pending and filed paperwork with that court to keep the adoption from going through. *Id*. at 738.

That court in Canada found as a matter of law that dad's consent to adoption was unnecessary, and the court allowed the adoption to go forward so that it was the Canadian court that ultimately took Kessel's child from him. *Id*. Kessel had the right of appeal, but he chose not to and so lost his child as a result of the court order allowing the adoption. *Id*. Kessel then sued for tortious interference of parental rights in *Kessel v. Leavitt* and the grandparents, and uncle were liable for tortious interference of parental rights despite the fact that ultimately it was the Canadian court's order that took Kessel's child from him because BUT FOR the defendants intervening deception, Kessel would not have lost his child. *Id.* at 767-768.

Likewise, in the instant case, BUT FOR the defendants intervening deception, Mother would not have lost her children.

A court order will act as a superseding cause that cuts off liability "only if all material information has been presented to the court and reasonable minds could not differ as to this question." *Tyner v. Dep't of Soc. & Health Servs*., 1 P.3d 1149, 1158 (2000). Materiality is a question of fact for the jury. *Id*. at 1148. Where, as here, defendants have intentionally conspired outside of court to mislead a court in order to deprive a parent of custody of her children, then the court order is not a superseding cause.

Virginia has consistently held that when a fraud has been committed upon a court, then the judgement is void *ab initio*. *See e.g.*, *Evans v. Smyth-Wythe Airport Comm'n*, 255 Va. 69, 73 (1998). To impeach a judgement, a fraud "must be one extrinsic of the matter tried in the cause – one practiced upon the court in the procurement of judgement." *Taylor v. Taylor*, 159 Va. 338, 344 (1932). Fraud is committed on the court when "the misconduct tampers with the judicial machinery and subverts the integrity of the court itself." *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 142 (1992)(Fraud upon the court found when sworn interrogatory was a blatant misrepresentation).

This Court has held that where an attorney misleads a judge, then there has been an extrinsic fraud upon the court. In *Gulfstream Bldg. Associates v. Britt*, an attorney failed to submit a plat to the court that was contrary to its position in a prior case that occurred in 1966 and as a result, his client was awarded title to a lot based on adverse possession. 239 Va. 178, 184 (1990). The attorney also failed to join a party to the suit that would have likely submitted the contrary plat. *Id*. In 1984, the current owner of the land brought an ejectment action based on the 1966 court judgement. *Id*. at 181-182. Gulfstream sued to declare the 1966 judgement void based on fraud. *Id*. at 181. This Court affirmed the trial court and held that extrinsic fraud upon the court was committed in the 1966 controversy because the attorney "engaged in conduct which prevented 'a fair submission of the

controversy to the court'" by not presenting the contrary plat or joining the party that would have submitted the contrary plat. *Id*. at 184.

Additionally, this Court has set aside a default judgement that was not appealed in the proper time period for fraud committed upon a court after the trial court asked an attorney the missing defendant's position and the attorney misled the court. *National Airlines v. Shea*, 223 Va. 578 (1982). This Court stated the attorney's "response was a disingenuous half-truth. He had a duty to be aboveboard with the court and fair with opposing counsel. Further, Mr. McNamara failed to call the court's attention to the applicability of the Warsaw Convention, which he knew to be adverse to his clients' position." *Id*. at 583.

Likewise, a guardian *ad litem* who makes intentional misrepresentations to a custody court has committed extrinsic fraud on the court. As such, there is no due process where extrinsic fraud was used to procure the court order where the custody was removed.

Landry intentionally made numerous misrepresentations to the custody court including but not limited to Landry falsely called Mother an alienator when he knew it was false because he was angry he was put on a website. Landry colluded with Gasper to call Mother delusional and psychotic to the custody court even though neither had observed Mother. Gasper testified that she had no first-hand knowledge but did so based on what Landry told her. Additionally Landry

attempted to keep out material evidence from the custody court including but not limited to evidence of allegations of child abuse, and that the children were being taken to stay with a convicted pedophile by making objections that had no basis in law (actual court transcript showing Landry making an objection to keep out evidence of the convicted pedophile based on time is limited with ensuing discussion of lunch at Exhibit D at Appendix 72)[6]– all because Landry was angry that Mother put him on a website. There was no right during the custody proceedings to cross-examine Landry or otherwise impeach Landry as the guardian *ad litem* for the fraud he committed on the court which did cause Mother the loss of her children.

The reason fraud on the court committed by an attorney can be used to collaterally attack a judgement is because there is no right to "cross-examination and impeachment to ferret out and expose false information presented to the trier of fact." *Peet v. Peet*, 16 Va. App. 323, 327 (1993). "A collateral challenge to a judgment obtained by extrinsic fraud is allowed because such fraud perverts the judicial processes and prevents the court or non-defrauding party from discovering the fraud through the regular adversarial process." *Id*. Whereas, in contrast,

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[6] Padula-Wilson: "Mike testified in his deposition that his dad is a convicted –" Landry: "I'm going to interpose an objection, because a lot of the testimony is restating what's already been in evidence and time is very limited here." (Appendix 72).

custody judgements based intrinsic fraud, which usually includes perjury, forged documents and other incidents of trial presented to the court, are not challengeable on collateral attack because there is the right to cross-examine and otherwise impeach the witness to expose the truth prior to judgment. *Id*.

However, intrinsic fraud can still be the source of a separate tort. *See e.g*., *Womack v. Eldridge*, 215 Va. 338 (1974)(Plaintiff allowed to sue for intentional infliction of emotional distress when defense counsel hired a private investigator to take plaintiff's picture to show to the boys at trial and ask if plaintiff was the one who sexually molested them when there was absolutely no indication that plaintiff had anything to do with the crime which then did cause plaintiff to have to go to court on the Commonwealth's behalf to testify that he did not molest the boys). *See also*, *Tomlin v. McKenzie*, 251 Va. 478 (1996)(father allowed to sue court appointed therapist in a custody case for defamation and other torts after father alleged that the therapist conspired with father's ex-wife to take away his child).

Tortious interference of parental rights after a custody case may be a case within a case such as in *Tomlin*, *Womack* or as in many attorney malpractice cases. *See e.g*., *Smith v. McLaughlin*, 289 Va. 241 (2015), *Taylor v. Davis*, 265 Va. 187 (2003), *Sere v. Trapini*, Record No. 170842 (Va. S. Ct., 2018)(unpublished)(cases where attorneys were allowed to be sued for malpractice based on their performance in judicial proceedings). However, just as it is not a court that causes

the attorney malpractice when it issues an order that causes the litigant to lose the case because of the attorney malpractice, the court does not cause the tortious interference of parental rights when third parties engage in deception to interfere with a parent's rights during a custody case. It is the defendants' deception that causes the loss the of the child. Additionally, tortious interference of parental rights cases stemming from custody cases may be brought because there is no *res judicata* since the identity of the remedy is different (custody of the child versus money) which means the current action could not have been brought during the custody case and claim preclusion does not apply. *D'Ambrosio v. Wolf*, 295 Va. 48, 54 (2018). Additionally, the parties are different and so both claim and issue preclusion do not apply. *Id*. at 56. Landry was not a party by virtue of him being the guardian *ad litem*, since attorneys are not in privity with their clients. *Lane v. Bayview Loan Servicing*, 831 S.E.2d 709, 715 (Va. S. Ct., 8/22/2019).

When an extrinsic fraud has been committed upon a court and as a result a parent wrongfully loses their children, as occurred here, then there has been no due process and the prior custody court order cannot be a superseding cause when technically the fraud upon the court has made that court order void *ab initio*. Additionally, an order is void *ab initio* and thus there is no due process when "the character of the order is such that the court had no power to render it, or if the mode of procedure used by the court was one that the court could "not lawfully

adopt." *Evans v. Smyth-Wythe Airport Comm'n*, 255 Va. 69, 73 (1998). As the Court of Appeals ruled in the underlying custody case,

> Based upon the plain language of Code § 20-124.2 and the established principle that the responsibility to adjudicate cases resides with the judiciary, it was error for the circuit court to order third parties to have complete discretion to decide the mother's visitation without providing for any judicial review of their decisions.

Padula-Wilson v. Wilson, 2015 WL 1640934 (Va. Ct. App., 4/14/15).

The Court of Appeals based its decision on this Court's opinion in *Raiford v. Raiford*.

> A court of equity cannot abdicate its authority or powers, nor confide nor surrender absolutely to anyone the performance of any of its judicial functions. It may rightfully avail itself of the eyes and arms of its assistants in the proper preparation for judicial determination of the many complicated, difficult, and intricate matters upon which its judgment is invoked, but in it resides the authority, and to it solely belongs the responsibility, to adjudicate them.

193 Va. 221, 230 (1952).

As such, "the character of the order is such that the court had no power to render it" and "the mode of procedure used by the court was one that the court could not lawfully adopt" and thus, the order was obtained without due process.

A void *ab initio* order procured by extrinsic fraud or because the court had no power to render "may be impeached directly or collaterally by all persons, anywhere, at any time, or in any manner" and so it is appropriate to raise the issue

that there was no due process during the custody case[7] in this suit. *Singh v. Mooney*, 261 Va. 48, 52 (2001)(citation and internal quotation marks omitted).

In *Nelson v. Green*, Defendants attempted to state that Plaintiff had not alleged proximate cause regarding his substantive due process deprivation of parental rights because an independent prosecutor prosecuted the action and the state courts entered a protective order and therefore the proximate chain of causation was broken. 965 F. Supp. 2d 732, 746 (W.D. Va. 2013). However, the *Nelson* court starkly disagreed stating that even when prosecutors retain all discretion to seek an indictment, police officers may be liable when they have lied or misled the prosecutor, failed to disclose exculpatory evidence to the prosecutor, or unduly pressured the prosecutor to seek the indictment. *Id.* at 746-747. The *Nelson* Court confirmed that when Plaintiff alleges "the defendant misled or coerced the intervening decision-maker such that the decision-maker's conduct [i.e. a court order] was tainted" then proximate cause has been alleged despite any intervening court cases or court orders. *Id.* at 748.

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[7] The June 20, 2014 order is no longer in place and so voiding the custody arrangement is moot. Additionally, as stated in *Wyatt*, tortious interference of parental rights can never be used regain the child. 283 Va. 685, 693 (2012). However, the fact that the custody court used a mode of procedure that it was not allow to adopt shows that there was no due process when Defendants were interfering with Mother parental rights.

Therefore, just as in *Nelson*[8], Defendants actions had the effect of misleading and compromising the state courts that entered custody orders in this case and were the proximate cause of Mother's injuries and so Mother requests that this Court grant find that the Defendants caused Mother's tortious interference of parental rights and allow her tortious interference of parental rights claims against all of the Defendants to go forward.

2) The harm caused by the defendants was substantial

The trial court ruled that there was no harm pled because "she's still the joint legal custodian with visitation rights." (App. 263:18-19). Mother objected. (App. 205:02-209:16, 211:05-25, 353:22-354:04).

In *Coward v. Wellmont*, this Court's second and only other tortious interference of parental rights opinion besides *Wyatt*, this Court held that the tortious interference of parental rights had to involve "egregious conduct that barely fell short of outright kidnaping and abduction." 295 Va. 351, 360 (2018).

The defendants all engaged in egregious conduct. The egregious conduct was extensive involving multiple acts over a period of years as detailed in the 104

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[8] *Nelson*, which stemmed from a child abuse petition, sustained defendant's demurrer because "the discussion and holding in *Wyatt* was wholly within the context of a custody battle, rather than the adjudication of a child abuse petition." 965 F. Supp. 2d 732, 755 (W.D. Va. 2013). The *Nelson* court reasoned that child abuse petitions were different because "false positives—mistaken reports of child abuse followed by DSS investigations—are less harmful than false negatives" where harm to a child could result. *Id*. at 743.

pages of the Complaint and exhibits. For the purposes of brevity, only the most salient facts are listed here. On or about August 18, 2013, Landry entered Mother's house while she was on vacation with the children at Hilton Head without Mother's permission. (App. 16 ¶48). While Mother was in Hilton Head with the children, Landry conspired out-of-court on a phone call with Gasper to falsely call Mother delusional, psychotic and a flight risk when they knew it was false because they were mad they were put on a website even though neither had seen Mother out of court since April 2013 when both recommended custody to Mother. (App. 16 ¶¶ 48-51, 19 ¶¶ 61-62, 20 ¶ 67). As a result of Gasper's perjury and Landry's out-of-court conspiracy with Gasper to call Mother delusional, psychotic, and a flight risk, the custody court removed Mother's children with no contact with all three children for almost 8 months. (App. 19 ¶ 62-64). Landry and Gasper then outside-of-court told Campanella, Wert and Nelson that Mother was totally delusional, psychotic and a flight risk even though they knew it was false. (App. 17 ¶ 53, 20 ¶ 65). After almost eight months, Mother had limited supervised contact with all three children for one month, then limited supervised contact with only two children thereafter until the court entered the final order on June 20, 2014 as a result of defendant's actions. (App. 25 ¶ 89 & 94-95). The June 20, 2014 final order entitled Mother to at least supervised visitation to all three children. (App. 26 ¶ 98). Nelson, Campanella and Wert then all broke the

final June 20, 2014 order and refused to allow Mother any contact with A.W. which did result in Mother having no authorized contact with A.W. until March 2017. (App. 25 ¶ 95, 26 ¶ 99, 27 ¶ 101). This was despite the fact that A.W.'s last supervised visit report with Mother stated that A.W. states the visit with Mother was his favorite thing he did all week. (App. 25-26 ¶ 95). Additionally, Nelson, Campanella and Wert broke the June 20, 2014 final order and withheld the other two children from Mother with no contact for months at a time while allowing the children to stay overnight for a week at a time with a convicted pedophile. (App. 26 ¶ 99, 27 ¶ 101, 29 ¶ 108-109, 46 ¶ 169-170, 102).

Pursuant to Va. Code § 18.2-47(A), abduction is defined as "Any person who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes another person with the intent to deprive such other person of his personal liberty or to withhold or conceal him from any person, authority or institution lawfully entitled to his charge, shall be deemed guilty of "abduction." (Emphasis added).

Thus, based on the foregoing, as required by *Coward*, egregious conduct that barely falls short of outright kidnaping and abduction by the defendants has been pled.

Additionally, substantial harm has been pled. Mother appealed the June 20, 2014 order to the Court of Appeals which reversed in part and remanded the case

for the court to determine custody and visitation. (App. 28 ¶ 103). In the custody court's final order in March 2017 Mother was given joint legal and physical custody of two of the children with a 50/50 visitation schedule (App. 32 ¶ 121). However, when the final order was entered, Mother had not been allowed any contact with the third child (who by that time was almost an adult) for almost three years due to Defendants actions and so did not receive legal or physical custody of that child. (App. 3 ¶1, 12 ¶ 33, 31-32 ¶¶ 119, 121).

Mother was denied all contact with one of her children for three years, and the other two children from August 20, 2013 until March 2014, and then months at a time after that due to defendants' actions. (App. 12 ¶¶ 30-35). The time and effort to turn the case around and get Mother's children back was extensive and has not only had a high monetary and emotional cost, but pursuant to the March 2017 custody court order, in order to get her children 50 % of the time, Mother had to sell her house and move to a more expensive area at great cost to her. (App. 31-33 ¶¶ 119-125). Additionally, it has also hampered Mother's ability to obtain billable work[9] as an attorney since in order to turn the case around Mother had to appeal the case to the Court of Appeals, and as such it is difficult to get paying

[9] Mother's custody cases for clients before this Court and the Court of Appeals are *pro bono*. Mother's tort cases are contingency.

clients because a simple google search brings up the case and saying that Mother was called delusional and lost her kids. (*Id*).

As such Mother respectfully requests that this Court reverse the Circuit Court and allow the tortious interference of parental rights claims against the Defendants to go forward.

2. The Circuit Court erred when it granted Nelson's demurrer and dismissed the defamation claims and when it ruled that her statements in emails were subject to privilege and immunity.

The standard of review of a circuit court's decision to grant a demurrer is *de novo*. *Harris v. Kreutzer*, 271 Va. 188, 196 (2006).

Defamation in Virginia requires "(1) publication of (2) an actionable statement with (3) the requisite intent." *Tharpe v. Saunders*, 285 Va. 476, 480 (2013)(citations omitted). "[S]tatements may be actionable if they have a 'provably false factual connotation and thus 'are capable of being proven true or false.'" *Cashion v. Smith*, 286 Va. 327, 336 (2013). While defamatory statements are interpreted according to their "plain and natural meaning," defamation can occur "by inference, implication, or insinuation." *Carwile v. Richmond Newspapers*, 196 Va. 1, 7 (1954). "Simply couching . . . statements in terms of opinion does not dispel [factual] implications." *Schaecher v. Bouffault*, 290 Va. 83, 103 (2015)(quoting *Raytheon Tech. Servs. Co. v. Hyland*, 273 Va. 292, 303 (2007).

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.

Id. at 103-104 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990)).

Mother argued that even though Nelson couched some of her statements as opinions, the facts she stated and relied upon were provably false and were made intentionally, maliciously, and in bad faith with knowledge that the facts were false. (App. 324:13-333:19).

"A demurrer admits the truth of all material facts properly pleaded. Under this rule, the facts admitted are those expressly alleged, those which fairly can be viewed as impliedly alleged, and those which may be fairly and justly inferred from the facts alleged." *Rosillo v. Winters*, 235 Va. 268, 270 (1988). The Complaint alleged as follows:

On March 27, 2015 Mother, who is an attorney, cross-examined Nelson in an unrelated custody case and brought out Nelson's misconduct in that other case (App. 54 ¶ 220). Because Nelson was upset about her misconduct in that case being brought before the court, Nelson wrote in an April 30, 2015 email "I was concerned about what I understood about Ms. Wilson's role in that interaction, so

no contact of any sort is authorized for her with "A.W." in May 2015" even though Mother's interaction with A.W. was all positive, giving him a hug and talking with him about his driver's license. (App. 54-55, ¶¶ 221-227).

On May 27, 2015, Mother filed a wrongful death lawsuit against Nelson for a client. (App. 55 ¶ 229). On May 29, 2015 because Nelson was angry that Mother had filed a wrongful death suit against her, Nelson intentionally and in bad faith wrote in an email outside of court to third parties with knowledge that it was false, "Specifically, there are concerns that C.W.'s deterioration has at least been contributed to by information his mother has discussed with him" and "I understand that Ms. Wilson and [A.W.] had another brief interaction recently. Given his reactions the last two times he has seen her, and the impact of those reactions on him, I do not authorize any contact between them for June 2015." (App. 55-56, ¶¶ 230-235). Mother did not discuss any information with C.W. that would have made him deteriorate and the interaction with A.W. was positive. (App. 56, ¶ 231).

On June 17, 2015, Nelson intentionally and in bad faith wrote in an email outside of court to third parties with knowledge that it was false because she was angry about being sued for the wrongful death, "I do not authorize overnight visits or additional visitation for this month. I remain concerned about the tone of Ms. Wilson's e-mails regarding coparenting and her boundaries with the children. It

was inappropriate of her to discuss this with the children before the father" and "I do not authorize her taking the children today or in the future. It is unfortunate, but the attitudes inherent in her intended actions, at least based on the writings provided to me, are not in the children's best interests." (App. 56-57, ¶¶ 236-241). Mother's emails were in no way inappropriate since they were almost an exact quote of Nelson's email, they did not set forth any intended actions outside of a direct quote form Nelson, nor did Mother discuss anything with the children before the Father. (App. 57 ¶ 237).

On June 26, 2015, Mother received an email from Nelson's attorneys accepting service for this case. (App. 57-58 ¶¶ 242-243).

On July 1, 2015, because Nelson was angry about being sued in this case, Nelson intentionally and in bad faith wrote in an email outside of court to third parties with knowledge that it was false "ongoing concerns about Ms. Wilson's boundaries with the children." (App 58 ¶¶ 244-249). Mother did not violate any boundaries with her children. (App. 58 ¶ 245).

On July 30, 2015 because Nelson was angry about being sued in this case, Nelson intentionally and in bad faith wrote in an email outside of court to third parties with knowledge that it was false while father had the children staying with a convicted pedophile with Nelson's blessing, "Ms. Wilson … has kept [children] overnight… without communicating her specific intentions appropriately to Mr.

Wilson, and has shared inappropriate information about the custody proceedings with the children. Further within this past month she has also apparently spoken directly with the children suggesting the children are not safe with their therapists, and discussed negative things about their father with them… it appears that the tone of her communications with them has become problematic, her lack of boundaries with them is a risk factor to them… Therefore, I do not authorize any time with Ms. Wilson and any of the three Wilson children." (App. 58-60 ¶¶ 250-256). Mother sent numerous emails to Father telling him when she would and would not have the children and received an email from Father offering for the children to spend the night. Mother shared no information regarding the custody proceedings to the children, never suggested that the children were unsafe with the therapists and never discussed negative things about their Father with them. (App. 59 ¶ 251).

No defendants argued in their briefs or their initial argument at the trial court that the defamation statements should be subject to absolute privilege because they were in the course of judicial proceedings. Indeed, when the Court questioned defense counsel for Wert, Wert denied that such privilege existed.

> THE COURT: What about immunity also? Does that concept protect under defamation also?... We're just talking about general immunity for statements made in connection with litigation, the argument under Briscoe, Supreme Court, and *Watt v. McKelvie*, does that not apply to defamation?

> MS. HAGUE: I didn't specifically address that, Your Honor, and didn't research that. If – there's been no allegation in this case that the e-mail from Dr. Wert to Mr. Wilson was then republished in court or made in court, so I don't think I could make that argument, as much as I would like to, I don't think I could make that judicial privilege argument with respect to this statement on the defamation claim.
>
> THE COURT: I'm just talking about if parties involved in a custody case and there's, you know, social workers, therapists, whatever, discuss it and say something, aren't all their discussions privileged?
>
> MS. HAGUE: I think the qualified privilege may apply …. <u>I don't think I can argue that the pure judicial privilege that would protect statements made in court or republished in court would apply to this because that's not what the plaintiff has alleged. She's alleged this an e-mail independent of the court proceedings</u>.

(App. 314:19-316:10)(emphasis added).

Likewise, the defamation allegations against Nelson were also alleged in e-mails independent of the court proceedings. However, even though counsel for Nelson did not brief or argue that absolute judicial privilege applied to defamation, upon questioning by the trial judge, Nelson's counsel readily agreed. (App. 334:18-335:05).

> THE COURT: Anybody, when we went through this whole idea of immunity, not qualified immunity but just general immunity for statements made in connection with litigation, and that's a common law privilege recognized in *Watt v. McKelvie*, tell me why wouldn't that apply here.

> MS. AXSELLE: Your Honor, I think it would apply especially to Dr. Nelson --
>
> THE COURT: Seems to me isn't that saying that you can't be accused of defamation if you're in litigation with somebody.
>
> MS. AXSELLE: Yes, Your Honor.

(App. 334:18-335:05).

The trial court did not rule that Nelson's statements were not published, or not demonstrably false, but instead ruled that Nelson had immunity[10] and privilege to publish her false statements about Mother in emails outside of court to numerous third parties based on *Briscoe v. LaHue*, 460 U.S. 325 (1983) and its progeny. (App. 337:11-24). Mother objected. *See* (App. 112-113 ¶¶ 7-8, 332:22-333:12, 336:11-15, 352:12-355:04, 492-493).

According to the trial court, judicial privilege "[s]eems to me isn't that saying that you can't be accused of defamation if you're in litigation with somebody." (App. 335:02-04). In other words, according to the trial court, anyone who is involved in litigation, whether it be a witness or a party, can never sue anyone under any circumstance no matter how far removed from the litigation

[10] The trial court uses the words privilege and immunity interchangeably. However, the trial court did not hear the plea in bars on immunity and is actually referring to absolute judicial privilege under *Briscoe v. LaHue*, 460 U.S. 325 (1983) and *Watt v. McKelvie*, 219 Va. 645 (1978). (App. 334:18-335:05, 337:11-24).

because there happens to be litigation occurring in the background where someone might also be a witness.

Judicial privilege "does not apply to a tribunal which is not judicial or quasi judicial in its character or nature; nor to proceedings which, although official and public, are not in substance judicial." *Penick v. Ratcliffe*, 149 Va. 618, 628 (1927). The privilege does not extend to administrative arenas that do not contain judicial safeguards. *Elder v. Holland*, 208 Va. 15, 22 (1967). "Those safeguards include such things as the power to issue subpoenas, liability for perjury, and the applicability of the rules of evidence." *Lockheed Info. Mgmt. Sys. v. Maximus, Inc.*, 259 Va. 92, 101 (2000). The privilege does not apply where judicial safeguards do not exist. *Id*. *See also*, discussion on judicial proceedings law, *supra*. The out-of-court emails by Nelson to third parties were not in the course of judicial proceedings, had no judicial safeguards, and are not subject to privilege. The emails occurred outside of court and occurred while no proceedings at the trial level were occurring. Nelson's defamatory emails occurred from April 30, 2015 to July 30, 2015. (App. 54-60 ¶¶ 223-256). As alleged in the Complaint, the custody court issued a final order on June 20, 2014 (App. 26 ¶ 98) and the Court of Appeals overturned the custody case on April 14, 2015 (App. 28 ¶ 103). Indeed, the custody case (*Padula-Wilson v. Wilson*, Record No. 150719 (Va. S. Ct.)) was in this Court until August 12, 2015 when the petition was refused, and so the trial

court did not even have jurisdiction while Nelson was sending her defamatory e-mails. And yet the trial court still granted Nelson absolute judicial privilege and dismissed the defamation claims against her on that basis.

Additionally, the emails were sent in bad faith with knowledge that they were false, and so there was no qualified privilege. (App. 54-60 ¶¶ 223-256). "A qualified privilege attaches to '[c]ommunications between persons on a subject in which the persons have an interest or duty.'" *Cashion v. Smith*, 286 Va. 327, 337 (2013). Qualified privilege is lost, however, if any of the following elements are true:

> (1) the statements were made with knowledge that they were false or with reckless disregard for their truth, (2) the "statements [we]re communicated to third parties who have no duty or interest in the subject matter," (3) the statements were motivated by personal spite or ill will, (4) the statements included "strong or violent language disproportionate to the occasion," or (5) the statements were not made in good faith

Id. at 339. (citations omitted).

It was clearly alleged in the complaint that the statements were made with knowledge that they were false with reckless disregard for the truth in bad faith based on personal spite. Whether these elements exist are a question of fact to be answered by a jury. *Cashion v. Smith*, 286 Va. 327, 339 (2013).

Based on the foregoing Mother respectfully requests that this Court allow her defamation claims to go forward to a jury.

3. The Circuit Court erred when it granted Defendants demurrers and dismissed the negligent retention claim and when it ruled that physical injury was required and had not been pled.

In light of this Court's recently decided opinion in *A.H. v. Church of God in Christ, Inc.*, Mother does not believe that she can make a credible argument on this assignment of error and thus candor to this Court requires that she withdraw the error. Record No. 180520 (Va. S. Ct., Aug 15, 2019).

V. Conclusion

It is astonishing that defendants could intentionally act to prevent a mother from seeing one child for three years and the other children for months at a time totaling over a year by breaking the court order which entitled Mother to visitation of her children. It is egregious that defendants intentionally falsified that Mother was totally delusional and psychotic when they knew it was false in order to intentionally interfere with Mother's parental rights. The reason this can happen is because there is no accountability for people like defendants. If this can happen to Mother, a licensed attorney who now actively practices in the Commonwealth's courts, it can happen to anyone. The only way to dissuade this type of behavior is to provide accountability to defendants by allowing Mother's tortious interference of parental rights and defamations claims to go forward to trial.

> It would be a reproach to our legal system if, for the abduction of a child in arms, no remedy ran to its parent, although `for a parrot, a popinjay, a thrush' and even `for

> a dog' an ample remedy is furnished to their custodian for the loss of their possession.

Pickle v. Page, 169 N.E. 650, 653 (1930)(*quoting Barham v. Dennis*, 78 Eng. Rep. 1001 (K.B. 1600)).

Defendants acts are intentional, outside their authority, in bad faith, and outside any judicial proceedings and so there is no privilege or immunity. It was the out-of-court deception and breaking of court orders by the defendants that did cause the tortious interference of parental rights. The custody court was also a victim to their deception and allowing the defendants to point fingers at the custody court and say it was the cause not only blames an innocent trial judge who was misled by their actions, but it also erodes public confidence in the justice system who will also follow the trial court's lead and blame the custody court instead of where the blame actually lies – on the defendants.

For this reason, Mother respectfully requests that this Court will deny the demurrers, allow her tortious interference of parental rights and defamation claims to go forward to trial, find that tortious interference of parental rights exists under the fact pattern of this case, find there was no immunity or privilege for the defendants actions, find the defendants were the cause of the tortious interference of parental rights, find there was no due process, and find the harm was egregious.

Respectfully submitted by,

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Certificate

I hereby certify that on this 25th day of October, 2019, pursuant to Rules 5:26 and 5:32(a)(3)(i), three paper copies of the Brief of Appellant and three paper copies of the Appendix have been hand-filed with the Clerk of the Supreme Court of Virginia and electronic copies of the Brief and Appendix were filed, via VACES. On this same day, an electronic copy of the Brief of Appellant was served, via email, and electronic copies on CD of the Brief and Appendix were served, via UPS Ground Transportation, upon:

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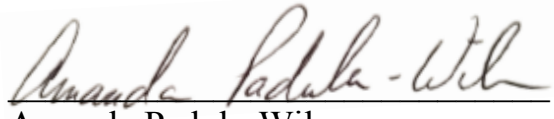

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