In The

Supreme Court of Virginia

RECORD NO. 190107

AMANDA C. PADULA-WILSON,

***Appellant*,**

v.

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

Appellees.

BRIEF OF APPELLEE CARA CAMPANELLA

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HONORABLE CHIEF JUSTICE AND
JUSTICES OF THE SUPREME COURT OF VIRGINIA

Appellee, Cara Campanella, by counsel, pursuant to Rule 5:28 of the Rules of the Supreme Court of Virginia, in opposition to the Appellant, Amanda C. Padula-Wilson, states that the Circuit Court for the City of Richmond properly sustained Appellee's Demurrer to the Complaint and properly dismissed this case. Therefore, the Circuit Court decision should be sustained.

STATEMENT OF THE CASE

I. Proceedings Below

Appellee, Cara Campanella, is a licensed Virginia therapist. (App. 9, ¶¶ 11-13). This appeal involves claims arising from therapy services provided to minor children as part of a contentious divorce and custody case. Amanda Padula-Wilson, appellant, filed a complaint against Scott David Landry, Michele Killough Nelson, Forensic Psychology Associates, PC, Jill A. Ferrante Gaspar, Laura Wert, Westwood Group, LLC and Ms. Campanella in August 2015. On September 14, 2016, Ms. Campanella who at all times relevant provided therapy services through the Westwood Group, LLC, filed a Motion to Quash and Motion to Dismiss by Special Appearance. In February 2017, Padula-Wilson took a voluntary non-suit before the hearing on Campanella's Motions.

Ms. Padula-Wilson refiled the complaint (the "Complaint") against Scott David Landry, Michele Killough Nelson, Forensic Psychology Associates, PC, Jill A. Ferrante Gaspar, Laura Wert, the Westwood Group, LLC and Ms. Campanella on August 7, 2017. (App. 2). The Complaint is 66 pages long and includes 276 paragraphs. Ms. Padula-Wilson asserted claims for: Tortious Interference of Parental Rights (Count I); Intentional and Negligent Infliction of Emotional Distress & Tortious Interference of Parental Rights – Violation of Code of Virginia § 32.1-127.1:03 "Health Records Privacy" (Count II); Defamation (Count III); and Negligent Retention (Count IV). (App. 33, 43, 49, 61). The negligent retention claim in Count IV is not directed to Campanella. (App. 61). The claims in Counts I, II and III as alleged against Campanella arise out of her appointment to provide therapy services to one of the children of Padula-Wilson and her former husband during their divorce and custody battle.

On August 16, 2018, Ms. Campanella filed a Demurrer and Plea in Bar in response to the Complaint. (App. 107). Ms. Campanella argued that Ms. Padula-Wilson failed to allege facts sufficient to state a claim for tortious interference of parental rights because she did not allege the required conduct and damages. Following oral argument on December 14, 2018, the Demurrer was sustained

without leave to amend on Count I, Count II and Count III. (App. 106, 110). Ms. Padula-Wilson filed her Notice of Appeal on December 20, 2018. (App. 110).[1]

II. Allegations in the Complaint

1. Background and Custody Proceeding

Ms. Padula-Wilson is the mother of three children: (1) A.W.; (2) C.W.; and A.G.W. (App. 3, ¶ 1). She has been married to Michael Gregory Wilson, who is the father of the three children, since August 15, 1999. (App. 9, ¶ 11).

Ms. Padula-Wilson is an attorney and, before August 2013, was a stay-at-home mom who homeschooled the children for three years and served as their primary parent. (App. 11, ¶ 26). On August 20, 2013, Ms. Padula-Wilson lost custody and visitation rights with her children. (App. 12, ¶ 30; App. 16, ¶ 52). She was awarded supervised visitation rights with C.W. and A.G.W, from March 2014 to December 2014. (App. 12, ¶ 31). From December 2014 to January 2015, Ms. Padula-Wilson had unsupervised visitation rights to C.W. and A.G.W. (App. 12, ¶ 34).

[1] This Court certified two assignments of error that Ms. Campanella will not address in this Brief. (App. 1.) The assignment of error relating to defamation was directed solely at Ms. Nelson. The third assignment of error relating to the negligent retention claim has been abandoned by Ms. Padula-Wilson. (App. 1; Appellant Brief 48.)

From March 2014 to April 2014, Ms. Padula-Wilson was allowed limited supervised visitation with A.W. (App. 12, ¶ 33). From April 2014 to March 2017, however, Ms. Padula-Wilson had no contact with A.W. (App 12, ¶ 34).

Ms. Padula-Wilson makes several allegations in the Complaint that her children were wrongfully withheld from her. Specifically, she alleges that: (1) her children were "wrongfully withheld from [her]" during the summer of 2015 "while [her husband] took the children to stay with a convicted pedophile"; and (2) the children were wrongfully withheld from her "by Defendants while they allowed a woman named Brooke Heath to live with, be around the children and pick the children up from school." (App. 12-13, ¶¶ 35-36; App. 30, ¶¶ 111–12).

2. Allegations against Cara Campanella

Cara Campanella is a licensed psychologist who works at the Westwood Group with Ms. Wert, its managing partner. (App. 25, ¶ 91). Mr. Wilson hired Ms. Campanella in November or December 2013 over Ms. Padula-Wilson's objection. (App. 25, ¶ 90). Ms. Padula-Wilson has never met Ms. Campanella outside of legal proceedings. (App. 25, ¶ 92). Ms. Padula-Wilson is also "regularly court appointed." (App. 10, ¶ 18).

In April 2014, Ms. Campanella sent an email indicating that she no longer wanted A.W. to visit with Ms. Padula-Wilson "outside a therapeutic setting," and on May 8, 2014, Ms. Campanella testified at a custody hearing that A.W. "should

only be allowed visitation" with Ms. Padula-Wilson in a therapeutic setting." (App. 26, ¶¶ 96–97). Following the custody hearing, Judge Gill, in a final order dated June 20, 2014, "ordered custody to [Mr. Wilson] with supervised visitation by and between [Ms. Padula-Wilson] and the Wilson children to be determined by Michele Nelson and . . . [Ms.] Campanella." (App. 26, ¶¶ 97–98).

Ms. Campanella withdrew from the custody case after December 23, 2015. (App. 31, ¶ 115).

STANDARD OF REVIEW

To survive a challenge by demurrer, a "pleading must be made with 'sufficient definiteness to enable the court to find the existence of a legal basis for its judgment.'" *Eagle Harbor, L.L.C. v. Isle of Wight County*, 271 Va. 603, 611 (2006) (quoting *Moore v. Jefferson Hosp., Inc.*, 208 Va. 438, 440 (1967)). In reviewing a circuit court's decision to sustain a demurrer, Virginia appellate courts apply a "*de novo* standard of review because it is a pure question of law." *Mark Five Const. ex rel. Am. Econ. Ins. Co. v. Castle Contractors*, 274 Va. 283, 287 (2007). *Accord Cline v. Dunlora S., LLC*, 284 Va. 102, 106 (2012). "This Court accepts as true the factual allegations of the complaint, its attachments, and the reasonable inferences that follow, but not the pleader's legal conclusions."[2] *Id.* A

[2] In determining whether the pleading states a cause of action, the court may also view any exhibits accompanying the pleading. *TC MidAtlantic Dev., Inc. v. Commonwealth, Dep't of Gen. Servs.*, 280 Va. 204, 210 (2010).

reasonable inference is one that is not '"strained, forced, or contrary to reason."' *Coward v. Wellmont Health Health Sys.*, 295 Va. 351, 359 (2018) (quoting *Cty of Chesterfield v. Windy Hill*, *Ltd.*, 263 Va. 197, 200 (2000)). This Court applies a *de novo* review to all conclusions of law, including those '"conclusions of law camouflaged as factual allegations or inferences."' *Id.* at 359 (quoting *AGCS Marine Ins. v. Arlington Cty.*, 293 Va. 469, 473 (2017)).

In reviewing a matter on demurrer, an appellate court does not "admit 'inferences or conclusions from facts not stated."' *Friends of the Rappahannock v. Caroline Cty. Bd. of Sup'rs*, 286 Va. 38, 44 (2013) (quoting *Arlington Yellow Cab Co. v. Transportation*, *Inc.*, 207 Va. 313, 319 (1966)). *See also Bd. of Sup'rs of Fluvanna Cty. v. Davenport & Co. LLC*, 285 Va. 580, 585–86 (2013) ("[L]ike the trial court, we are confined to those facts that are expressly alleged, impliedly alleged, and which can be inferred from the facts alleged").

ARGUMENT

I. The Circuit Court Did Not Err in Sustaining the Demurrer as to the Intentional Interference with Parental Rights Claim.

This Court should hold that the trial court was correct in sustaining the demurrer as to the intentional interference with parental rights claim because: (A) Ms. Padula-Wilson failed to plead sufficient facts to state a claim of intentional interference with parental rights; (B) the alleged communications by Ms. Campanella which allegedly amounted to intentional interference with parental

rights were subject to either absolute or qualified privilege; (C) and, in any event, Ms. Campanella cannot be liable for intentional interference with parental rights where the alleged interference occurred due to the trial court's issuance of valid custody orders, a superseding cause.

A. Ms. Padula-Wilson Failed to State a Claim for Intentional Interference with Parental Rights against Ms. Campanella.

Ms. Padula-Wilson's failed to assert a claim of intentional interference with parental rights under existing case law. This Court first recognized the tort of intentional interference with parental rights in *Wyatt v. McDermott*, 283 Va. 685 (2012). In that case, the biological mother and her parents sought the help of a licensed attorney and an adoption agency to facilitate the adoption of the mother's soon to be born child. *Id.* at 689–90. The mother, along with the aforementioned parties, engaged in an "astonishing and profoundly disturbing" course of conduct by which they intended to conceal a planned adoption from the biological father. *Id.* at 689–90, 703. This included "preventing notice of [the child's] birth and hiding their intent to prevent the legal establishment of [the father's] paternal rights." *Id.* at 703.

After the father brought suit against the third-parties involved in the adoption scheme,[3] the circuit court sustained the defendants' demurrer as to the

[3] This did not include the mother. *Wyatt*, 283 Va. at 691.

father's claim of intentional interference with parental rights, finding that no such tort existed at common law. *Id.* at 691. This Court reversed.

In recognizing the tort of intentional interference with parental rights,[4] this Court emphasized that there was a gap in the law, which under certain circumstances, would deprive parents of obtaining legal relief for intentional acts of third-parties that interfered with parental rights. This Court explained:

> An examination of our law shows that the redress of [the wrong of third-party interference with a parental relationship] is in some circumstances otherwise unavailable in the Commonwealth. Wrongful custodial interference is codified in Code § 18.2-49.1 as a criminal offense, but this statute provides no civil recovery. Virginia also has well-developed custody laws to manage intra-familiar disputes, but custody disputes do not implicate rights or duties of third-parties, such as are at issue here. The Commonwealth provides for causes of action for fraud and constructive fraud, but a third-party can wrongfully interfere with parental rights without engaging in fraudulent behavior.

Id. at 693–94 (emphasis added). The *Wyatt* court concluded that recognizing the *distinct* tort of intentional interference with parental rights under Virginia law was

[4] As this Court described in *Wyatt*, 238 Va. at 699, the tort of intentional interference with parental rights has four elements: (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 right"'; (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."' (Quoting *Kessel v. Leavitt*, 511 S.E.2d 720, 765–66 (W. Va. 1998)).

necessary to prevent parental rights from being '"right[s] without a remedy—a thing unknown to the law."' *Id.* at 693 (quoting *Norfolk City v. Cooke*, 68 Va. (27 Gratt.) 430, 439 (1876)).

Given that the tort of intentional interference with parental rights was intended merely to fill a gap in the law, it should be interpreted as having a narrow scope. Indeed, the *Wyatt* court strongly suggested that the tort should be narrowly construed when it stated: (1) "[t]here remain many cognizable scenarios in which intentional tortious interference with parental rights could be invoked not as a legal redundancy, *but as a unique remedy*"; and (2) that the harm to be remedied by the tort was the "separat[ion] from a child by a third party for a substantial period of time *without due process of law*." *Id.* at 694 (emphasis added). Based on these statements, it is clear that the *Wyatt* court never intended that the tort of intentional interference with parental rights be broadly applied so as to overlap with existing legal remedies, or to provide a claimant-parent a second-bite at the apple after he or she received an adverse outcome in a legal proceeding. Rather, the tort was intended to be a remedy of last resort to provide some relief when the intentional actions of a third-party caused a child to be separated from his or her parents without due process.

Finally, the *Wyatt* court made it clear that, in adopting the tort of interference with parental rights, it did not intend that the tort would become a bludgeon in

custody disputes. After surveying jurisdictions that had declined to recognize the tort on the grounds that it would escalate intramiliar conflict, *see Larson v. Dunn*, 460 N.W.2d 39, 46 (Minn. 1990); *Zacharias v. Gammill*, 844 P.2d 137, 140 (Okla. 1992), this Court stated that it shared these courts' "concern for the well-being of children caught in intra-familiar dispute[.]" *Wyatt*, 283 Va. at 701. For this reason, the *Wyatt* court noted that the tort could not be alleged by one parent against another parent with "substantially equal right." *Id.* at 702. Furthermore, although not stated explicitly, this Court's concern that the recognition of the tort would cause undue escalations in custody disputes is consonant with its assertion that the harm to be remedied by the tort was separation of the child "for a substantial period of time *without due process of law*." *Id*. at 693 (emphasis added). By clear implication, this Court did not intend to extend the tort to situations in which the alleged interference occurred as a result of a lawful custody order, prior to which the parents had been provided notice and an opportunity to be heard, or in other words had been afforded due process of law.

Since *Wyatt* was decided, this Court has addressed the tort of intentional interference with parental rights on one other occasion in *Coward v. Wellmont Health Sys.*, 295 Va. 351 (2018), and in that case, the court further narrowed the scope of the tort. In *Coward*, 295 Va. at 355–56, a mother agreed to put her child up for adoption. She, along with the biological father, subsequently signed an

adoption agreement and a Petition and Agreed Order under circumstances that did not indicate she was "coerced" in any way. *Id.* at 355–57. The Juvenile & Domestic Relations court subsequently entered the order. *Id.* at 357. Less than two weeks after entry of the order, mother changed her mind about placing the child up for adoption. *Id.* She filed suit against various defendants, including the adoptive parents of the child, and alleged, among other things, intentional interference with parental rights. *Id.*

After the Circuit Court sustained a demurrer as to the intentional interference count, this Court affirmed. In so holding, this Court reasoned that a third-party is only liable for the tort of intentional interference with parental rights when he or she interferes with parental rights "*with knowledge* that the parent *does not consent*." *Id.* at 361. Since the complaint lacked factual assertions against most of the defendants that they interfered with the mother's parental rights with either knowledge that the mother did not consent or knowledge that the "child [was] away from home against the will of the mother," *Id.* at 773–74, this Court concluded that the demurrer was proper.

Importantly, the *Coward* court reiterated its agreement with the reasoning in *Kessel v. Leavitt*, 511 S.E.2d 720 (1998), in which the West Virginia Supreme Court of Appeals clarified that the tort of intentional interference with parental rights applied only to a tortious interference "as that concept is summarized both in

the text of and the comments to the Restatement." *Coward*, 295 Va. at 360; *Kesell*, 511 S.E.2d at 760–66. Comment a. to Restatement (Second) of Torts § 700, which articulates the tort of intentional interference with parental rights, states that the tort may be maintained "by the parent who is entitled to the custody of a minor child against one who by force abducts the child from its home, or one who induces the child to leave its home with knowledge that the parent has not consented." Thus, according to the Restatement, the tort of intentional interference with parental rights can only be maintained by a parent when: (1) the parent has "custody of a minor child"; and (2) the child has either been physically abducted by a third-party or induced to leave home by a third-party with knowledge that the other parent has not consented. *See Bouchard v. Sundberg*, 834 A.2d 744, 757–58 (Conn. App. Ct. 2003) (tort of custodial interference must involve an "extralegal" taking of custody of the child); *Lapides v. Tabbic*, 758 A.2d 1114, 1118, 1121 (Md. Ct. Spec. App. 2000); *Murphy v. I.S.K. Con. Of New England*, *Inc.*, 571 N.E.2d 340, 351–52 (Mass. 1991) (consistent with the Restatement, the claim for intentional interference can be maintained with parental interests only when there is evidence of "abduction, enticement, harboring, and secreting of a minor child from the parent having legal custody"); *Ashby v. State*, 779 N.W.2d 343, 358 (Neb. 2010) (biological parent cannot "assert a claim for intentional interference with his parental rights before gaining a custody order.").

The narrowness of the tort of intentional interference with parental rights, as articulated in the Restatements, is reflected in the Supreme Court of Appeals of West Virginia's decision in *Wilson v. Bernet*, 625 S.E.2d 706 (W. Va. 2005), which was decided after the Supreme Court of Appeals' decision in *Kessel* but before this Court's decision *Coward*. In *Wilson*, the court held that an "adverse expert witness's trial testimony and participation in child custody and visitation proceedings [does not] normally constitute[] the type of wrongful conduct contemplated by the *Kessel* court." *Id.* at 714. And, in so holding, it reasoned that such activity fell far short of the "egregious conduct" conduct in *Kessel*, consisting of the "intentional, deliberate, conspiratorial, and elaborately orchestrated . . . taking and concealment of the child," as well as other conduct that "fell short of outright kidnaping and abduction." *Id.* Given that the *Coward* court cited approvingly of the Supreme Court of Appeals of West Virginia's decision in *Kessel*, this Court should also deem the analogous arguments in the Supreme Court of Appeals decision in *Wilson* persuasive.

Coward and *Wyatt*, when read against the backdrop of *Kessel*, *Wilson* and the Restatements, suggest that the tort of intentional interference with parental rights was intended to be applied narrowly to egregious cases in which a third party intentionally deprives a parent from contact with a child without due process and under circumstances where the injury could not be remedied by other legal

relief. Here, the allegations in Ms. Padula-Wilson's Complaint fall far short of this standard.

According to the Complaint, Ms. Campanella was engaged to provide therapy services to the children in November or December 2013. (App. 25, ¶ 90). She allegedly sent an email in April 2014 that she did not want one of the children to visit with mother outside of a therapeutic setting. (App. 26, ¶ 96). She allegedly testified consistent with this recommendation in a May 8, 2014 custody hearing. (App. 26, ¶ 97). The result of this alleged wrongful conduct was an Order that Padula-Wilson have supervised visitation with the children. (App. 26, ¶ 98). Cara Campanella withdrew from the custody case after December 23, 2015. (App. 31, ¶ 115). While the Complaint includes other generalized statements describing conduct in conclusory fashion, the above is the only alleged conduct by Ms. Campanella identified with the specificity required to support any theory of liability including a claim of intentional interference with parental rights. Despite the specificity, the character of the conduct does not establish the elements of a claim for intentional interference with parental rights.

Padula-Wilson does not allege that Ms. Campanella's evaluation and alleged conduct of offering her recommendation following her evaluation was tortious. Unlike the wrongdoers in *Wyatt* and *Coward*, Ms. Campanella is not alleged to

have lied or been deceitful.[5] She is not alleged to have undertaken conduct intended to exercise an undue influence with the result being the permanent deprivation of parental rights.[6] She did not tell lies intending to trick a biological parent into giving up their rights. To the extent her conduct is characterized as such, the characterization is a label rather than an accurate descriptor of conduct. Similarly, any allegation that Ms. Campanella engaged in a conspiracy with other

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[5] The Complaint contains several conclusory allegations that Ms. Campanella made false and deceitful accusations. (App. 3 ¶ 2; App. 26-27, ¶ 99; App. 28, ¶ 105; App. 29, ¶107; App. 40, ¶ 139). These allegations, however, are not pleaded with sufficient factual specificity for this Court to establish that Ms. Campanella engaged in deceit during the custody proceedings. Even if, however, this Court finds that the allegations are sufficient to show that Ms. Campanella engaged in a pattern of deceit that resulted in the court issuing a custody order it would not have issued if the false allegations had been made, Ms. Padula-Wilson still has failed to allege a factual basis for an intentional interference with parental rights claim because she has not shown that other relief was unavailable. For example, she has not explained why Ms. Campanella could not have been subject to cross-examination or contempt sanctions for knowingly making misstatements to the trial court.

[6] In the Complaint, Ms. Padula-Wilson states that Ms. Campanella "conspired to violate the June 20, 2014 court order," when she "approved" of trips that the children took with a "convicted pedophile." Ms. Padula-Wilson does not describe, however, the terms of the court order that Ms. Campanella violated. Although she states that Judge Gill "ordered custody to [Mr. Wilson] with supervised visitation by and between [Ms. Padula-Wilson] and the Wilson children" pursuant to the June 20, 2014, order, Ms. Padula-Wilson has made no allegations that she was deprived supervised visitation following the order. (App. 26, ¶¶98-99). At one point in the Complaint, she states that Ms. Campanella "acted contrary to the June 20, 2014 court order when she withheld A.W. from [Ms. Padula-Wilson] contrary to the court order in order to tortiously interfere with [Ms. Padula-Wilson's] rights regarding A.W." (App. 40, ¶139). Such a conclusory statement, however, does not meet the specificity necessary to be entitled to a presumption of correctness on appeal.

individuals alleged to have interfered with her parental rights is conclusory and, therefore, cannot survive demurrer.

Although Ms. Padula-Wilson temporarily lost custody of her children, this was only after she was given an opportunity to be heard in a custody proceeding before the Circuit Court. Because she was not "unduly separated from a child by a third party for a substantial period of time without due process of law," *Wyatt*, 283 Va. at 693, any interference alleged to have been caused by Ms. Campanella's actions cannot amount to intentional interference with parental rights.

B. Even if the Conduct in this Case Did Amount to Cognizable Intentional Interference with Parental Rights, Ms. Campanella is Entitled to Absolute Or Qualified Immunity from Liability Because Her Out-of-court Actions Were in the Course of Judicial Proceedings.

1. Ms. Campanella is Entitled to Absolute Judicial Immunity for the Statements She Allegedly Made Regarding Ms. Padula-Wilson in this Case.

This Court should uphold the Circuit Court's decision to sustain the demurrer on the intentional interference with parental rights count because the statements Ms. Campanella made to the court that allegedly caused the court to deprive Ms. Campanella of custody of her children were absolutely privileged. It is well-settled that there exists an absolute privilege with respect to statements made in the course of judicial proceedings. *Donohoe Const. Co. v. Mount Vernon Assoc.*, 235 Va. 531, 537 (1988); *Mansfield v. Bernabei*, 284 Va. 116, 125 (2012);

Penick v. Ratcliffe, 149 Va. 618, 632 (1927). While, typically, such immunity applies in the context of a defamation claim, the case law is clear that judicial immunity bars all civil liability stemming from statements made in the course of judicial proceedings. *See Watt v. McKelvie*, 219 Va. 645, 648 (1978) (statements individuals make in the course of deposition testimony are immune from "civil liability"). *See also Clodgo by Clodgo v. Bowman*, 601 A.2d 342, 345 (Pa. Super. Ct. 1992) ("'While it is true that immunity from civil liability in judicial proceedings has been applied most frequently in defamation actions, many courts . . .have extended the immunity from civil liability to other alleged torts when they occur in connection with judicial proceedings.'") (Quoting *Moses v. McWilliams*, 549 A.2d 950, 957 (Pa. Super. Ct. 1988)).

In determining whether absolute privilege applies to a particular communication, this Court applies a three-step inquiry: (1) whether the communication occurred during a judicial proceeding; (2) whether the communication is material, relevant or pertinent to the judicial proceeding; and (3) whether the communication was disclosed to interested persons. *Penick*, 149 Va. at 632; *Mansfield v. Bernabei*, 284 Va. 116, 125 (2012).

With regard to the first step, the *Penick* court noted that a "judicial proceeding" 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 office." *Penick*, 149 Va. at 627. This 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 cloaked with judicial or quasi judicial powers." *Id.* The broad application of this privilege serves the public policy goal of creating circumstances in which "individuals who participate in law suits" feel free to "speak fully on the issues relating to the controversy." *Watt*, 219 Va. at 651. *See Penick*, 149 Va. at 636 (purpose of the privilege is the policy demand that "within all reasonable limits a litigant should have the right to state his case as he sees it.").

In *Mansfield v. Bernabei*, 284 Va. 116, 122, 126 (2012), this Court recognized that "absolute judicial privilege clearly extends outside the courtroom," and went on to hold that a draft copy of a complaint that was circulated prior to the filing of the complaint was protected under absolute judicial privilege. While this Court has not addressed whether out-of-court statements made by witnesses are protected by absolute judicial privilege, courts from other jurisdictions have found that they are so privileged. *Alexandru v. Strong*, 837 A.2d 875, 884 (App. Ct. Conn. 2004) (absolute privilege applies to "statements made in pleadings or other documents prepared in connection with a court proceeding"); *Woodward v. Weiss*, 932 F. Supp. 723, 727 (D.S.C. 1996) (pretrial statements made by expert witnesses,

as well as statements made in affidavits and declarations entitled to absolute immunity); *Wilson*, 625 S.E.2d at 709–11 (same).[7] *See also Bowman*, 601 A.2d at 344 (communications by medical experts were entitled to judicial immunity and could not be used as grounds for a medical malpractice action); *Sanfilippo v. Brewerton*, No. 2:17-0183-RMG-BM, 2017 WL 9250346, *2 (D.S.C. 2017) (judicial immunity "extends to pretrial statements made by expert witnesses, as well as statements made in affidavits or declarations.")

Here, Ms. Padula-Wilson states in her Complaint that Ms. Campanella was a "court appointed" witness in the custody case who also provided therapy for A.W. and A.G.W. (App. 9, ¶¶ 12-13; App. 10, ¶ 18). Given that each of the allegedly tortious communications were made in the course of the custody proceedings in which Ms. Campanella was a witness, the statements Ms. Campanella made should be deemed to have been made in the course of "judicial proceedings" for purposes of judicial immunity.[8]

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[7] Ms. Padula-Wilson asserts in her brief that applying the reasoning in Supreme Court of Appeals of West Virginia's reasoning in *Wilson v. Bernet*, 625 S.E.2d 706, 709–11 (W Va. 2005), to hold that pretrial communications made by expert witnesses can qualify for judicial immunity would "change decades of law on what constitutes a judicial proceeding." (Appellant Brief 17). Ms. Padula-Wilson cites no case law or other authority for this claim, and the claim itself contradicts the trend in recent years of extending judicial immunity to statements made outside the courtroom. *See Mansfield v. Bernabei*, 284 Va. 116, 122, 126 (2012) ("absolute judicial privilege clearly extends outside the courtroom.").

With regard to the second step, it is clear that Ms. Campanella's statements were relevant to the judicial proceedings. This Court has adopted a "liberal rule in determining the degree of relevancy or pertinency necessary to bring a matter within the privilege." *Donahoe Const. Co., Inc. v. Mount Vernon Assoc.*, 235 Va. 531, 539 (1988). Under this liberal standard, the privilege will extend to a statement made in the course of a judicial proceeding unless the statement is '"so palpably wanting in relation to [the matter in controversy] that no reasonable man can doubt its irrelevancy and impropriety."' *Id.* (quoting *Massey v. Jones*, 192 Va. 200, 208 (1944)). Here, the allegedly tortious statements made by Ms. Campanella were all regarding Ms. Padula-Wilson's custody of the Wilson children. Indeed, because Ms. Padula-Wilson alleges that Ms. Campanella's communications in this matter resulted in the erroneous deprivation of custody by court order, she cannot also argue that Ms. Campanella's statements were not relevant to a judicial proceeding.

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[8] In her brief, Ms. Padula-Wilson asserts that several cases support the proposition that the out-of-court Ms. Campanella made in this case "are not judicial proceedings.," (Appellant Brief 20), including: *Harris v. Kreutzer*, 271 Va. 188 (2006); *Taylor v. Davis*, 265 Va. 187 (2003) and *Tomlin v. McKenzie*, 251 Va. 478 (1996). None of these cases apply. In both *Harris* and *Taylor*, this Court did not even address the issue of judicial privilege, so there is no way of knowing whether the issue had even been preserved for appellate review. In *Tomlin*, 251 Va. at 481–82, the issue was whether *statutory* and *sovereign* immunity barred recovery against a court-referred social worker. At no point in *Tomlin* decision did this Court discuss the scope of a "judicial proceeding" for purposes of common law immunity.

Finally, with regard to the third element, the alleged communications in this case were all disclosed to "interested persons." *Penick*, 149 Va. at 632. Ms. Campanella's alleged comments were all directed to either the court, Mr. Wilson or other witnesses that had been retained by Mr. Wilson to do work related to the custody dispute. Consequently, this Court should hold that, because the alleged communications were made to interested persons in the course of the judicial proceedings, Ms. Campanella is absolutely immune from being held liable in tort for making these statements.

2. Ms. Campanella Is Entitled to Qualified Privilege For the Statements She Made Because Those Statements Were Made to Interested Persons and Were Made Without Malice.

Even if Ms. Campanella's statements are not protected by absolute privilege, they are entitled to qualified privilege. "The principle of qualified privilege protects a communication from allegations of defamation if made in good faith, to and by persons who have corresponding duties or interests in the subject of the communication." *Gov't Micro Res., Inc. v. Jackson*, 271 Va. 29, 43 (2006). *Accord Smalls v. Wright*, 241 Va. 52, 54 (1991). Similar to absolute privilege, qualified privilege is generally asserted in defamation cases; however, it has and ought to be applied as a defense to other torts where the alleged injury arises from a party's statements or communications. *See Walsh v. Consolidated Freightways, Inc.*, 563 P.2d 1205, 1211 (Or. 1977) (communications

were entitled to qualified privilege against claim of intentional interference with contractual relations). *Accord MGD*, *Inc. v. Dalen Trading Co.*, 596 N.E.2d 15, 19 (Ill. App. Ct. 1992).

Here, the qualified privilege shields Ms. Campanella from liability for her communications regarding Ms. Padula-Wilson. Each of the communications Ms. Campanella allegedly made about Ms. Padula-Wilson were directed to the court, other mental health professionals involved in the custody proceeding, or to Mr. Wilson. Since these parties clearly had a common interest in the communications, which all had to do with custody of the Wilson children, this Court should hold that Ms. Campanella is shielded from liability for intentional interference with parental rights based on qualified privilege.

Although qualified privilege can be overcome by evidence that the "statements were made with malice," *Gov't Micro Res.*, *Inc.*, 271 Va. at 43, Ms. Padula-Wilson has not pleaded allegations with specificity to show that Ms. Campanella was motivated by malice, i.e., that she made the statements '"with knowledge that [they] [were] false [or] with reckless disregard of whether [they] [were] false or not."' *Shenandoah Pub. House*, *Inc. v. Gunter*, 245 Va. 320, 324 (1993) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)).

Here, the only allegations that Ms. Campanella acted with malice are conclusory in nature, including: (1) Ms. Campanella and Mr. Wilson "intentionally

and purposefully made numerous false accusations with reckless disregard and/or knowledge that the accusations were false," (App. 26, ¶ 99; App. 28, ¶ 105; App. 29, ¶ 107; App. 40 ¶ 139); and (2) most "information shared by" Ms. Campanella was fabricated, (App. 27-28, ¶ 102). Since Ms. Padula-Wilson has failed to allege specific facts that would permit an inference of malice, Ms. Campanella's statements in this matter are entitled to qualified privilege against an intentional interference with parental rights claim. *See Young v. City of Mount Rainier*, 238 F.3d 567, 577 (4th Cir. 2001) (plaintiff did not state a claim requiring "deliberate indifference" merely by "throw[ing] in words or phrases such as 'deliberate indifference,' 'malicious,' 'outrageous,' and 'wanton' when describing the conduct").

C. Ms. Padula-Wilson's Intentional Interference with Parental Rights Claim Must Fail Because the Alleged Interference was in Response to the Order of a Court of Law.

The tort of intentional interference with a parental right does not apply under this set of facts because the alleged interference resulted from the court's order. It is well-settled that a court order can break the causal chain necessary to establish liability. *Townes v. City of New York*, 176 F.3d 138, 146 (2d Cir. 1999) (42 U.S.C. § 1983 claim predicated on wrongful conviction failed because the court's "refusal to suppress the evidence" was a superseding cause of the conviction); *Schibel v. Eymann*, 399 P.3d 1129, 1133 n. 1 (Wash. 2017).

Here, because the alleged interference with Ms. Padula-Wilson's parental rights was effectuated by the discretionary custody determinations of the trial court, this Court should hold that the trial court's issuance of a custody order was a superseding cause of Ms. Padula-Wilson's loss of custody or visitation rights with her children. *See Surles v. Mayer*, 48 Va. App. 146, 172 (2006) ("Ultimately, this Court 'afford[s] great deference to the trial court's determination of what is in the best interests of the child."') (quoting *Yopp*, 43 Md. App. 427, 439 (2004)).

In her brief, Ms. Padula-Wilson acknowledges that a "court order will act as a superseding cause that cuts off liability." (Appellant Brief 27). She contends, however, that the orders are superseding '"only if all material information has been presented to the court and reasonable minds could not differ as to this question."' (Appellant Brief 27) (quoting *Tyner v. Dep't of Soc. & Health Servs.*, 1 P.3d 1149, 1158 (Wash. 2000)). And, since "materiality is a question for the jury" and she has alleged that "defendants have intentionally conspired outside of court to mislead a court in order to deprive" her of custody of her children, she claims that the court orders cannot be a superseding cause of the parental interference. (Appellant Brief 27).

This argument is flawed. First, the only case relied on for support, i.e., *Tyner*, is a Washington state decision, which is not binding on this Court. But even if the statement in *Tyner* is consistent with Virginia law, Ms. Campanella has

not shown that material information was withheld from the trial court. She has not, for example, alleged that she was not given an opportunity to be heard in the custody proceedings and present her own evidence and arguments in support of a favorable custody determination. Rather, the allegations in this matter amount to a mere disagreement with the evidence and testimony that was communicated to the court, which is not enough to show that the court order was not a superseding cause.

Next, Ms. Padula-Wilson argues that the court order cannot be a superseding cause in this case because it was "*void ab initio*" due to a fraud perpetrated on the court. As Ms. Padula-Wilson correctly notes, the only type of fraud that will invalidate a judgment or court order is fraud that is '"extrinsic of the matter tried in the cause one practiced upon the court in the procurement of judgment."' (Appellant Brief 28) (quoting *Taylor v. Taylor*, 159 Va. 338, 344 (1932)). That is, she must show that the alleged fraud prevented a '"fair submission of the controversy to the court."' *Gulfstream Bldg. Assoc., Inc. v. Britt*, 239 Va. 178, 184 (1990) (quoting *Jones v. Willard*, 224 Va. 602, 607 (1983)).

Some examples of extrinsic fraud include: (1) "[k]eeping the unsuccessful party away from the court by a false promise of a compromise; (2) "keeping [a party] in ignorance of the suit"; (3) an attorney "fraudulently pretends to represent a party, and connives at his defeat"; or (4) an attorney "corruptly sells out his

client's interest." *McClung v. Folks*, 126 Va. 259, 270 (1919). The common element in each of these examples is the prevention of a party from having an opportunity to participate in an action. If, however, a party has an opportunity to make a case, he cannot claim extrinsic fraud but "must be prepared to meet and expose perjury then and there." *Id.* *See Peet v. Peet*, 16 Va. App. 323, 326 (1993) (intrinsic fraud includes "perjury, use of forged documents, or other means of obscuring facts presented before the court and whose truth and falsity as to the issues being litigated are passed upon by the trier of fact.").

Here, the allegations of fraud in the Complaint concern Ms. Campanella's making of false statements to the court and other individuals involved in the custody proceedings. At most, such conduct was intrinsic fraud and Ms. Padula-Wilson has not cited any authority to the contrary.[9] Because intrinsic fraud does not void a judgment or court order, *Peet*, 16 Va. App. at 326, this Court should

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[9] Ms. Padula-Wilson cites several cases to support her argument that the Complaint shows that Ms. Campanella and other defendants committed extrinsic fraud on the court. First, she sites *Gulfstream Bldv. Assoc. v. Britt*, 239 Va. 178, 184 (1990) for the proposition that misleading a judge is extrinsic fraud. In that case, however, the finding of extrinsic fraud was based on an attorney withholding a critical document and failing to join a party who could have revealed the existence of that document. *Id.* at 184. Here, there are no specific allegations suggesting that Ms. Campanella took affirmative acts to ensure that certain evidence was not presented to the court, which makes *Gulstream Bldg. Assoc.* inapposite. Next, Ms. Padula-Wilson cites *National Airlines v. Shea*, 223 Va. 578 (1982). But that case did not even discuss whether there was an extrinsic fraud on the court, but involved setting aside a default judgment for fraud pursuant to a statute related to a remedy particular to the entry of a default judgment.

hold that the court orders in this matter were superseding causes of any alleged interference with Ms. Padula-Wilson's children.

CONCLUSION

Ms. Padula-Wilson's Complaint was rife with accusations of ill-intent and incorporated operative language from the Court's prior decisions addressing a claim of tortious interference with parental rights. Missing from the Complaint were substantive allegations of conduct by Cara Campanella that would satisfy the elements of a tortious interference with parental rights. Ms. Campanella's involvement with the custody proceedings and her actions as part of that involvement simply do not demonstrate tortious interference with parental rights. The trial court properly sustained Ms. Padula-Wilson's Demurrer, with prejudice.

Accordingly, for all of the foregoing reasons, appellee Cara Campanella respectfully asks that this Court affirm the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2019, pursuant to Rule 5:26, three paper copies of the Brief of Appellee have hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief was filed, via VACES. On this same day, an electronic copy of the Brief of Appellee was served, via email, upon:

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