In The

Supreme Court of Virginia

RECORD NO. 190107

AMANDA C. PADULA-WILSON,

***Appellant*,**

v.

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

Appellees.

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INTRODUCTION

In its 2012 decision recognizing the tort of tortious interference with parental rights, this Court stated that the "fear that this cause of action would be used as a means of escalating intra-familial warfare can be largely disposed of by barring the use of this tort between parents." *Wyatt v. McDermott*, 283 Va. 685, 701, 725 S.E.2d 555, 563 (2012). Unfortunately, the Court's limitation on this tort has not prevented plaintiffs who are unhappy with a court's determination from attempting to shift the target of the attacks from a child's parents to innocent participants in custody and visitation proceedings like guardians *ad litem*, psychologists, and social workers.

This case is a paradigmatic example of how disappointed litigants in custody and visitation proceedings have attempted to lash out and use the tort to attack other participants in the proceedings in numerous lawsuits throughout the Commonwealth. That potential for abuse not only threatens the ability of courts to conduct orderly and just proceedings, it will also discourage professionals from becoming involved in contentious custody cases. This case poses an opportunity for the Court to draw clear boundaries on this tort and ensure that it can only be maintained in the most egregious situations like those described in *Wyatt*.

STATEMENT OF THE CASE

Appellant Amanda C. Padula-Wilson ("Ms. Wilson") first filed suit on August 19, 2015, in the Circuit Court for the City of Richmond. She nonsuited that case on February 9, 2017. She refiled suit on August 7, 2017. Appendix ("App.") 2-105. Dr. Wert and The Westwood Group filed demurrers to all counts of the Complaint. App. 410-18, 520-46.

Following a hearing on December 14, 2018, the circuit court dismissed all claims against Dr. Wert and The Westwood Group. App. 106-118. This appeal followed.

ASSIGNMENTS OF ERROR

This Court has granted a writ for three Assignments of Error. However, the only assignment of error that applies to Dr. Wert and The Westwood Group is Assignment of Error 1. That Assignment of Error reads:

> The Circuit Court erred when it granted all the Defendants [sic] 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.

Opening Brief ("Opening Br.") 1.

Assignment of Error 2 only relates to Dr. Nelson. Opening Br. 1. Ms. Wilson has withdrawn Assignment of Error 3. Opening Br. 48. Therefore, the arguments in this brief only address Assignment of Error 1.

STATEMENT OF FACTS

This case, alleging tortious interference with parental rights, stems from a bitter custody dispute between Ms. Wilson and her husband, Michael Gregory Wilson ("Mr. Wilson"). App. 2-105. During their marriage, the couple had three children together: A.W., C.W., and A.G.W. App. 3 ¶ 1, 11 ¶¶ 22-23.

In the Complaint, Ms. Wilson alleges that she had custody of the Wilson children and Mr. Wilson had supervised visitation with the children as of March 2013. App. 13 ¶ 38. Five months later, on August 20, 2013, the judge presiding over the Wilsons' custody dispute "removed the Wilson children from Mother and all visitation by and between Mother and the Wilson children." App. 16 ¶ 52.

Notably, Dr. Laura Wert, who is a psychologist with The Westwood Group, was not involved in the custody and visitation proceedings at the time of the circuit court's ruling on August 20, 2013. It was not until August 21, 2013, the day after the court's ruling, that Dr. Wert was engaged to provide therapy to one of the Wilson children, C.W. App. 20 ¶ 68. The other two

children, A.W. and A.G.W., later began therapy with Cara Campanella, a licensed professional counselor, in December 2013.[1] App. 9 ¶ 12; 25 ¶ 90.

After losing custody and visitation with her children, Ms. Wilson filed a motion to change custody which was heard in December 2013. *Padula-Wilson v. Wilson*, Case No. 1203-14-2, 2015 Va. App. LEXIS 123, *2 (Apr. 14, 2015). At the December 6, 2013 hearing, Dr. Wert testified that Ms. Wilson should have "supervised visitation" with the Wilson children. App. 22 ¶ 76. This testimony, advocating for supervised visitation, came at time when Ms. Wilson had no ability to visit with her children pursuant to the earlier ruling of the circuit court. App. 16 ¶ 52. Ms. Wilson was granted supervised visitation in March 2014. App. 25 ¶ 89.

Subsequently, Ms. Wilson filed another motion to change custody, and a hearing was held on May 8, 2014. Ms. Campanella testified at that hearing and recommended that Ms. Wilson be allowed to visit with A.W. in a therapeutic setting. App. 26 ¶ 97. In the weeks prior to that hearing, Ms. Wilson had no contact with A.W. App. 25 ¶¶ 94-95.

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[1] Ms. Wilson alleges that Ms. Campanella was an employee of The Westwood Group. App. 25 ¶ 91. She was not. But, for purposes of this case, that allegation must be taken as true. *Squire v. Va. Hous. Dev. Auth.*, 287 Va. 507, 514, 758 S.E.2d 55, 59 (2014). Ms. Campanella is represented by separate counsel. This brief addresses her alleged conduct only as it relates to the claim against The Westwood Group.

Following the hearing, the circuit court issued a letter opinion on May 16, 2014, reaffirming its earlier decision to grant sole physical and legal custody to Mr. Wilson and visitation to Ms. Wilson. *Padula-Wilson*, 2015 Va. App. LEXIS 123 at *3. In that opinion, the circuit court also ruled that future visitation decisions would be made by Ms. Campanella, App. 26 ¶ 98, and Michelle Nelson, Ph.D. ("Dr. Nelson"), who had been previously engaged to perform a mental evaluation of Ms. Wilson. App. 22 ¶ 77. The circuit court entered an order memorializing its ruling on June 20, 2014. App. 26 ¶ 98.

Ms. Wilson appealed that ruling to the Virginia Court of Appeals. In an April 14, 2015 opinion, the Court of Appeals affirmed in part and reversed in part. *Padula-Wilson*, 2015 Va. App. LEXIS at *39. Relevant here, it found that the circuit court erred in delegating visitation decisions to Dr. Nelson and Ms. Campanella. App. 28 ¶ 103; *Padula-Wilson*, 2015 Va. App. LEXIS at *35-38. The case was remanded for further proceedings. *Padula-Wilson*, 2015 Va. App. LEXIS at *39. On remand, the circuit court issued a final custody order in March 2017, granting both parents joint legal and physical custody over C.W. and A.G.W. App. 32 ¶ 121. There was no mention of A.W. who, by then, was nearly 18. *See* Opening Br. 9.

Ms. Wilson initially alleged claims against Dr. Wert for tortious interference with parental rights, intentional and negligent infliction of

emotional distress, and defamation. App. 33 ¶ 126 – 61 ¶ 259. She also asserted a claim for negligent retention against The Westwood Group. App. 61 ¶ 260 – 65 ¶ 272. All claims were dismissed on demurrer by the circuit court. App. 106-18. Ms. Wilson did not assign error to the dismissal of the emotional distress or defamation claims against Dr. Wert. Opening Br. 1. In her Opening Brief, she expressly abandoned her assignment of error regarding the negligent retention claim against The Westwood Group. Opening Br. 48. Thus, the only remaining claim against Dr. Wert and The Westwood Group in this appeal is for tortious interference with parental rights based on the alleged actions of Dr. Wert and Ms. Campanella in denying, at times, visitation between the children and Ms. Wilson.

As to this claim, the circuit court granted the demurrer without leave to amend and dismissed the case with prejudice because Ms. Wilson had failed to allege a viable cause of action against Dr. Wert or The Westwood Group for tortious interference with parental rights. App. 115. On the record at the hearing on the demurer, the circuit court judge explained the reasoning for his decision. First, Dr. Wert and Ms. Campanella never abducted or otherwise induced the children not to return to Ms. Wilson as contemplated by *Wyatt*. App. 259:8 – 262:21. Second, the circuit court judge concluded tortious interference of parental rights was never intended to apply to

opposing experts based upon their testimony and/or participation in child custody and visitation proceedings. App. 261:15 - 262:5 (citing the reasoning of *Wilson v. Bernet*, 218 W. Va. 628, 625 S.E.2d 706 (2005)). Finally, the circuit court judge explained that the tort would not extend to situations where a party had already been afforded due process of law in a custody proceeding, including cross-examination of witnesses and appeals. App. 261:15 – 262:21.

STANDARD OF REVIEW

When ruling on a demurrer, a circuit court accepts as true all facts properly pleaded and any reasonable inferences from those facts and decides whether the allegations present a valid cause of action. *Squire*, 287 Va. at 514, 758 S.E.2d at 59. However, the circuit court is not required to accept "the veracity of conclusions of law camouflaged as factual allegations or inferences." *Coward v. Wellmont Health System*, 295 Va. 351, 359, 812 S.E.2d 766, 770 (2018) (citation and internal quotation marks omitted). A decision by the circuit court to sustain a demurrer is reviewed under a *de novo* standard of review. *Mark Five Const. ex rel. Am. Econ. Ins. Co. v. Castle Contractors*, 274 Va. 283, 287, 645 S.E.2d 475, 477 (2007).

ARGUMENT

I. The Facts Alleged in this Case Do Not State a Claim for Tortious Interference with Parental Rights

Tortious interference with parental rights is a recently recognized common law cause of action in Virginia. This Court first recognized this tort in 2012 in *Wyatt*, 283 Va. 685, 725 S.E.2d 555. In doing so, this Court adopted the Supreme Court of Appeals of West Virginia's reasoning in *Kessel v. Leavitt*, 204 W. Va. 95, 135-37, 511 S.E.2d 720, 760-62 (1998) which relied upon and adopted the Restatement (Second) of Torts § 700 (1977). *Wyatt*, 283 Va. at 699, 725 S.E.2d at 562; *Kessel*, 204 W. Va. at 139, 511 S.E.2d at 764. Thus, those two cases and the Restatement are instructive in determining whether the facts of this case are consistent with a claim for tortious interference with parental rights.

In *Kessel*, a mother fled from West Virginia to California while pregnant, concealed her baby's birth from the biological father and then, with help from her parents and an attorney, placed her newborn baby for adoption against the wishes of the child's father. 204 W. Va. at 109-112, 511 S.E.2d at 734-737. The child was adopted by a couple in Canada. *Id.* at 111, 511 S.E.2d at 736. The adoption proceeded despite an injunction in West Virginia prohibiting the mother from placing the baby up for adoption. *Id.* at 204 W. Va. at 111, 511 S.E.2d at 736. Accepting the Supreme Court of

Appeals of West Virginia's characterization of the facts in *Kessel*, this Court described the case as involving "'egregious conduct that barely fell short of outright kidnaping and abduction.'" *Coward*, 295 Va. at 359-60, 812 S.E.2d at 770 (quoting *Bernet*, 218 W. Va. at 359-60, 625 S.E.2d at 714).

A similar scenario was presented in *Wyatt*. In that case, the plaintiff, who was the biological father of an unborn baby, made plans to raise the baby with the biological mother. *Wyatt*, 283 Va. at 689, 725 S.E.2d at 556. However, the biological mother, with the assistance of her attorney and unbeknownst to the plaintiff, concealed the baby's birth and thereafter put the baby up for adoption, lying about the father's knowledge of the adoption and his whereabouts. *Id.* at 689-90, 725 S.E.2d at 556-57. Further, pursuant to the advice of counsel, the mother omitted critical contact information for the father on the adoption papers. *Id.* The baby was then placed with a couple in Utah where she remained at the time of the Court's decision in *Wyatt*, despite an award of custody to the father by the Juvenile and Domestic Relations Court of Stafford County, Virginia. *Id.* at 690-91, 725 S.E.2d at 557.

In recognizing the tort of tortious interference with parental rights, this Court specifically noted the egregious and disturbing factual scenario befalling the father in *Wyatt*:

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

Id. at 703, 725 S.E.2d at 564.

This Court again analyzed the tort of tortious interference with parental rights in *Coward*. Like *Wyatt*, the *Coward* case involved a claim for tortious interference with parental rights stemming from the contested adoption of a baby. *Coward*, 295 Va. at 354-358, 812 S.E.2d at 767-769. In *Coward*, the birth parents signed an adoption agreement in which they agreed to a complete termination of their parental rights. *Id.* at 355-56, 812 S.E.2d at 767-68. After signing the paperwork, the biological mother changed her mind and sought to obtain custody of her child. *Id.* at 357, 812 S.E.2d at 769. She won custody and then sued the adoptive parents, their attorney and various medical defendants involved in facilitating the adoption. *Id.* at 357-58, 812

S.E.2d at 769. The case was dismissed on demurrer and the plaintiff appealed to this Court. *Id.* at 358, 812 S.E.2d at 769.

Affirming the dismissal of the claims against the medical defendants and the attorney involved in the adoption, this Court reiterated that it has relied upon the Restatement (Second) of Torts § 700 (1977) in defining a cause of action for tortious interference with parental rights in Virginia. *Id.* at 359, 812 S.E.2d at 770. In doing so, the Court explained that "[t]he Restatement, therefore, authoritatively frames the issue before us." *Coward*, 295 Va. at 360, 812 S.E.2d at 771.

Nothing in *Kessel*, *Wyatt*, or the Restatement (Second) of Torts describes anything like the facts alleged by Ms. Wilson. Each case describes facts far more egregious than anything that has been alleged in this case. To find a cause of action based upon Ms. Wilson's Complaint, the Court would need to expand the tort well beyond its current scope. This Court should reject Ms. Wilson's invitation to adopt such an expansive view of this tort in Virginia.

II. This Court Should Reiterate that Tortious Interference with Parental Rights Requires Physical Abduction or Other Similar Conduct that Removes a Child from a Parent

The elements of the tort of tortious interference with parental rights "presuppose not merely *any* interference of *any* kind, but rather, a *tortious*

interference as that concept is summarized both in the text of and the comments to the Restatement." *Coward*, 295 Va. at 360, 812 S.E.2d at 771. However, the Complaint and Opening Brief in this case ignore one of the fundamental elements of the tort of intentional interference with parental rights: abduction. Here, unlike in *Wyatt*, there are no allegations that the minor children were hidden or transported to a different state to avoid custody proceedings. To the contrary, the allegations all center on actions taken in connection with ongoing custody and visitation proceedings. In the absence of abduction or similar removal of the children, there cannot be a claim for tortious interference with parental rights.

A. This Court's Precedent Describes an Abduction Requirement

Confronted with an egregious set of facts in *Wyatt*, this Court narrowly recognized the tort of tortious interference with parental rights despite strong objections from the dissenting justices. In that case, the complaint alleged a conspiracy to surreptitiously remove a baby from Virginia and transport her to Utah negating the practical effect of a later custody award from the Juvenile and Domestic Relations Court of Stafford County, Virginia. *Wyatt*, 283 Va. at 689-91, 725 S.E.2d at 557. In other words, the child at issue in *Wyatt* was physically taken from Virginia to avoid child custody proceedings and an unfavorable judicial process in the Commonwealth.

In recognizing the tort of tortious interference with parental rights, this Court explained that Virginia's adoption of the tort was consistent with English common law. That common law recognized a tort for abduction. As this Court explained, "Blackstone wrote that the *abduction* of any child, not merely an heir, was remediable by writ of ravishment . . ." *Id.* at 694-95, 725 S.E.2d at 559 (quoting 3 William Blackstone, Commentaries *140-4) (internal quotation marks omitted and emphasis added). This common law tort was then included in the first Restatement on Torts which described a tort for "recovery for the *abduction* of a child" and the Restatement (Second) of Torts which also described a tort in which "one . . . *abducts* or otherwise compels or induces a minor child to leave a parent legally entitled to its custody." *Id.* at 695, 725 S.E.2d at 559 (emphases added; citation and internal quotation marks omitted). Thus, in recognizing this tort, this Court implicitly acknowledged the necessity of abduction or other similar conduct to support a claim for tortious interference with parental rights.

In describing the elements of the tort, this Court did not expressly use the term "abduction." *Id.* at 699, 725 S.E.2d at 562. But, it described the abduction requirement using other words. Specifically, the Court's articulation of the elements stated the tort would lie where one was "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." *Id.* (citation and internal quotation marks omitted).

The use of the phrase "or by otherwise preventing" in this element does not expand the tort beyond abduction as Ms. Wilson seeks in this case. The Court's articulation is subject to the *ejusdem generis* canon of construction. As this Court has previously explained, "where particular words of description are followed by general terms, the latter will be regarded as referring to things of a like class with those described." *Stephen Putney Shoe Co. v. Richmond, F. & P. R. Co.*, 116 Va. 211, 220, 81 S.E. 93, 97 (1914). In other words, when this Court described the elements of the tort as requiring "removing or detaining . . . or by otherwise preventing the complaining parent. . ." the "otherwise preventing" language only encompasses actions that are similar to abduction or detention of the child. It is only this type of egregious taking that can subject a party to liability. *See Coward*, 295 Va. at 359-60, 812 S.E.2d at 770 (referring to the facts of *Kessel* as "egregious conduct that barely fell short of outright kidnaping and abduction." (citations and internal quotation marks omitted)). Thus, to have alleged tortious interference with parental rights under this Court's precedent and the Restatement, Ms. Wilson would have had to allege that Dr. Wert,

Ms. Campanella, and The Westwood Group essentially abducted the minor children. She has not alleged those facts and cannot do so.

B. The Second Restatement of Torts and Persuasive Authority from Other Jurisdictions Confirm that Abduction is a Required Element of Tortious Interference with Parental Rights

In *Coward*, this Court explained that the Second Restatement of Torts "authoritatively frames the issue before us." *Coward*, 295 Va. at 360, 812 S.E.2d at 771. Indeed, "the Restatement's texts and comments [are] important qualifications on the tort." *Id.*

The Second Restatement of Torts sets forth the "modern embodiment" of the tort of abduction recognized in the common law of England. *Id.* (citing *Wyatt*, 295 Va. at 694-95, 725 S.E.2d at 559-60). The Restatement provides that an individual is subject to liability where he "abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody." Restatement (Second) of Torts, § 700. Comment a reinforces that the tort exists 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." *Id.* at cmt a. Thus, abduction is a clear requirement of the tort as framed by the Restatement.

A review of the other cases relied upon by this Court in *Wyatt* to describe the tort similarly reinforces the abduction requirement. In addition

to *Kessel*, as described above, this Court cited to and relied upon *Stone v. Wall*, 734 So. 2d 1038, 1040 (Fla. 1999); *Anonymous v. Anonymous*, 672 So.2d 787, 789, (Ala. 1995); *Khalifa v. Shannon*, 404 Md. 107, 114-39, 945 A.2d 1244, 1248-62 (2008); *Plante v. Engel*, 124 N.H. 213, 217, 469 A.2d 1299, 1302 (1983); *Washburn v. Abram*, 122 Ky. 53, 90 S.W. 997 (Ky. 1906); and *Silcott v. Oglesby*, 721 S.W.2d 290, 293 (Tex. 1986). Every one of the cases cited above described facts involving the abduction of a child.

For example, in *Stone*, a minor child was "removed" from Virginia, and the father was not informed of the child's location, was not informed of the guardianship agreement, and the child was never returned despite the fact the father was "legally entitled to custody of the child." *Stone*, 734 So. 2d at 1040 (citation and internal quotation marks omitted). Likewise, in *Anonymous*, the complaint describes that the defendants lied to the parents about the location of their minor daughter, hid her from her parents while they were searching for her, removed her from a hospital room against medical advice, fled with the minor child when they knew the police were on their way, and other similar abduction-related activities. *Anonymous*, 672 So.2d at 789. In both cases, the children were removed – or abducted – from their home in order to prevent the parents entitled to custody from exercising their rights to see the child.

So too with the other cases cited in *Wyatt*. *Khalifa*, 404 Md. at 110, 945 A.2d at 1245 (Defendants "fled to Egypt with the couple's two minor children"); *Plante*, 124 N.H. at 215, 469 A.2d at 1301 (Defendants were alleged to have aided the child's mother in fleeing "from the State of New Hampshire with the minor children and mov[ing] to another location in contravention of the final order of the Court with the intent to deprive the plaintiff of his rightful custody of his minor children." (internal quotation marks omitted)); *Washburn*, 122 Ky. at 55, 90 S.W. at 997 (defendant went to the plaintiff's house and "without her knowledge or consent took charge of her two sons, Henry L. Turner and W. J. Turner, and carried them to Jefferson county, where they are now without appellant's consent unlawfully kept and detained"); *Silcott*, 721 S.W.2d at 291 ("This is a child abduction case.").

As *Wyatt*, *Kessel*, the Restatement, and cases from other jurisdictions that this Court relied upon in *Wyatt* make clear, there must be an abduction or similar conduct for this tort to apply.

C. Having Failed to Allege any Abduction, Ms. Wilson Has No Claim for Tortious Interference with Parental Rights

Read very liberally, the Complaint alleges that Dr. Wert and Ms. Campanella made false allegations and conspired with Dr. Nelson to prevent Ms. Wilson from seeing the Wilson children. App. 26-27 ¶ 99. Dr. Nelson then removed or limited Ms. Wilson's contact with the children based upon

what she had heard from Dr. Wert and Ms. Campanella. App. 27 ¶ 101. Ms. Wilson alleges that these actions violated the June 20, 2014 order allowing her visitation with her children. App. 26 ¶ 99.[2]

Absent from the Complaint are any allegations that Dr. Wert, Ms. Campanella, or anyone else at The Westwood Group abducted or otherwise removed the minor children from Ms. Wilson. They did not physically take custody of the children. They did not facilitate or encourage anyone else to abduct or remove the children. The only change in the physical or legal custody of the children alleged in the Complaint came via court order *prior to* the involvement of either Dr. Wert or Ms. Campanella. App. 12 ¶ 30, 16 ¶ 52, 20 ¶ 68, 25 ¶ 90. Because Ms. Wilson alleged no abduction or similar conduct, the claims against Dr. Wert and The Westwood Group were appropriately dismissed on demurrer.

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[2] Ms. Wilson further alleges that Dr. Wilson refused to allow the children to have contact with their mother even though "the court order did not state no contact by and between Mother and the Wilson children." App. 21-22 ¶ 74. However, the allegations in the Complaint make clear that there was no court-ordered contact between Ms. Wilson and her children following the entry of the August 20, 2013 order in which Ms. Wilson "lost all custody, visitation [sic] with the Wilson children until March 2014." App. 12 ¶ 30.

III. This Court Should Hold that Tortious Interference with Parental Rights Cannot Be Maintained Against Professionals in Custody and Visitation Proceedings

The tort of tortious interference with parental rights was intended to provide a civil remedy for extra-judicial abductions that prevent a parent from enjoying a custodial relationship with her child. It was not intended, nor should it be used, to attack those who participate in child custody and visitation proceedings. Any attempt to expand the tort to encompass claims in connection with custody and visitation proceedings should be categorically rejected by this Court.

A. Participants in Custody and Visitation Cases Are Increasingly Being Subjected to Improper Suits in Virginia

Since *Wyatt*, unhappy parties in custody and visitation proceedings have attempted to use the tort of tortious interference with parental rights to attack guardians *ad litem*, psychologists, counselors, and other professionals involved in custody and visitation proceedings. This Court has recently refused to grant writs in two cases involving tortious interference of parental rights filed by Ms. Wilson as counsel for Ms. Corbin and Ms. Higgins. *Corbin v. Wert*, Record No. 190329 (July 9, 2019) (suit involving psychologist); *Higgins v. Caudill*, Record No. 190803 (November 1, 2019) (suit involving psychologist, guardian *ad litem*, licensed clinical social worker, and father). Other cases have been filed in circuit courts throughout the

Commonwealth. *See St. Martin v. McCracken*, Case No. CL17-1659, 2019 Va. Cir. LEXIS 84 (Chesapeake City, Mar. 7, 2019) (suit against psychologist, guardian *ad litem*, and other professional providing supervised visitation); *Wilson v. Wert*, CL17002596-00 (Richmond City, Dec. 14, 2018) (order dismissing suit against psychologists and guardian *ad litem*); *Corbin v. Wert*, CL16002861-00 (Henrico Cnty., Jan. 5, 2018) (order dismissing suit against psychologist).[3] Similar claims were made in *Nelson v. Green*, 965 F. Supp. 2d 732, 737 (W.D. Va. 2013) where the plaintiff tried to use the tort to attack four social services employees and a social worker who were involved in reporting suspected child abuse.

B. The Tort Does Not Apply to Adverse Experts in Custody and Visitation Proceedings

Just as this Court looked to the Supreme Court of Appeals of West Virginia in *Wyatt* as a "helpful model" for defining the tort, it should again look to that court in clarifying the scope of the tort. The West Virginia court has already done so in *Bernet*, 218 W. Va. 628, 625 S.E.2d 706 when it rejected claims like Ms. Wilson's in this case.

[3] Although similarly captioned to the cases this Court has considered, the cited circuit court cases were brought by different plaintiffs than the cases before this Court.

Much like this case, the *Bernet* case arose in the aftermath of a contentious custody dispute between George Wilson and his then-wife, Sharon Wilson. During those proceedings, the father alleged that the mother's boyfriend had sexually abused the couple's child. *Id.* at 629, 625 S.E.2d at 707. The mother's attorney then consulted an expert in child psychiatry who concluded that there was no evidence of abuse, and the court found that there had been no abuse. *Id.* at 629-30, 625 S.E.2d at 707-08. The court awarded the mother permanent custody of the child. *Id.* at 630, 625 S.E.2d at 708. The father then sued the mother's attorney, the psychiatrist, and the psychiatrist's employer asserting a cause of action for tortious interference with a parental relationship under *Kessel*, 204 W. Va. 95, 511 S.E.2d 720.

The Supreme Court of Appeals of West Virginia explained that "the primary consideration in maintaining a tortious interference with parental or custodial relationship cause of action against one who has allegedly so tortiously interfered is that the defendant has *removed or detained the child from his/her parent or custodian or otherwise interfered in the parent's or custodian's exercise of such rights*." *Id.* at 636, 625 S.E.2d at 714 (emphasis added). The court concluded that its holding in *Kessel did not* extend to suits

against an adverse expert witness based upon "his/her expert testimony and/or participation in a child custody and visitation proceeding." *Id.*

This ruling makes sense. It is inevitable that one—or both—parents involved in custody and visitation disputes will be unhappy with the outcome. If parents were allowed to project their dissatisfaction by bringing tortious interference suits against the professionals who assist with custody and visitation proceedings, courts would be overrun with these ancillary civil proceedings. Worse, experts would be discouraged from participating in these proceedings for fear of later being targeted with a long and expensive lawsuit by an unhappy parent.

Virginia law supports the same conclusion. Ms. Wilson's broad view of tortious interference with parental rights runs contrary to this Court's frequent recognition that witnesses should be immune to civil liability for participation in judicial proceedings. As the Court recognized in *Donohoe Constr. Co. v. Mt. Vernon Assocs.*, 235 Va. 531, 537, 369 S.E.2d 857, 860 (1988), these protections are necessary to ensure unrestricted speech in litigation. In these and other cases, "the public interest is best served when individuals who participate in lawsuits are allowed to conduct the proceeding with freedom to speak fully on the issues relating to the controversy." *Watt v. McKelvie*, 219 Va. 645, 651, 248 S.E.2d 826, 828 (1978). This is

especially true in custody and visitation proceedings that are often protracted, emotional, contentious, and uncivil. As it should be, a court's first and foremost concern must be the best interest of the child. *Bottoms v. Bottoms*, 249 Va. 410, 413, 457 S.E.2d 102, 104 (1995) ("In all child custody cases, . . . the best interests of the child are paramount and form the lodestar for the guidance of the court in determining the dispute" (citation and internal quotation marks omitted)). Having witnesses and capable experts be willing to participate in those proceedings is crucial to a court being able to effectively accomplish this goal.

Even Ms. Wilson acknowledges the central role of witness immunity in her brief where she implicitly concedes that she cannot maintain an action for any "in court" actions. Opening Br. 20. That concession is consistent with Virginia law. *See Mansfield v. Bernabei*, 284 Va. 116, 125-26, 727 S.E.2d 69, 75 (2012) (holding that statements "material, relevant or pertinent" to the judicial process, even if they occurred prior to proposed judicial proceedings, are absolutely privileged); *Northern Va. Real Estate v. Martins*, 283 Va. 86, 111, 720 S.E.2d 121, 134 (2012) ("We have previously held that 'false, misleading or defamatory communications, even if published with malicious intent, are not actionable if they are material to, and made in the course of, a judicial or quasi-judicial proceeding.'") (quoting *Lockheed*

Info. Mgmt. Sys. Co. v. Maximus, Inc., 259 Va. 92, 101, 524 S.E.2d 420, 424 (2000)); *Smalls v. Wright*, 241 Va. 52, 54, 399 S.E.2d 805, 807 (1991) (recognizing qualified privilege for "communication[s] [ ] made in good faith on a subject in which the communicating party has an interest or owes a duty . . . if the communication is made to another party who has a corresponding interest or duty").

Ms. Wilson's Complaint does not allege any actions taken by Dr. Wert or Ms. Campanella separate and apart from the custody and visitation proceedings. At most, the allegations suggest that there were comments and recommendations made to other participants in the custody and visitation proceedings regarding matters which were material to those proceedings. These comments and recommendations, made in connection with the custody and visitation proceedings, are protected in Virginia under *Mansfield*, *Martins*, and *Smalls*.

However, this Court need not decide the exact scope of a "judicial proceeding" or the scope of either "absolute immunity" or "judicial privilege" to decide this case. The key issue before this Court is not the scope of immunity or privilege but whether to *expand* the tort of tortious interference with parental rights to specifically allow claims against professionals involved in custody and visitation proceedings. Among other reasons discussed

herein, this Court should reject this attempted expansion for the same reasons the Court has always protected witnesses involved in judicial proceedings. This Court should refuse the invitation to expand the tort to include claims relating to experts in custody and visitation disputes because doing so would only discourage, rather than encourage, capable and qualified professionals to be willing to participate in these proceedings and to be open and candid in their assessments.

Ms. Wilson, for her part, cites no case where a psychologist or other treatment provider was found to have tortiously interfered with a parent's relationship with her child.[4] This case should not be the first.

C. It Would Be Poor Public Policy to Allow Claims Against Professionals Involved in Custody and Visitation Proceedings

Determining that this tort does not extend to adverse experts, the Supreme Court of Appeals of West Virginia explained its reasoning: "we are reluctant to recognize a party's right to bring a cause of action against an

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[4] Acknowledging the persuasive effect of *Bernet*, Ms. Wilson cites extensively to the concurrence to try and limit its holding. Opening Br. 19-20. But, the concurrence was the opinion of a single justice. 218 W. Va. at 638, 625 S.E.2d at 716 (Starcher, J. concurring). The Supreme Court of Appeals of West Virginia's holding was clear: this tort does not apply to adverse witnesses in custody and visitation proceedings. *Id.* at 635, 625 S.E.2d at 713. Whether defamation, perjury, negligence, or other tort claims could exist against an adverse witness is irrelevant to this case.

adverse expert witness because of the chilling effect that such a course would undoubtedly have upon the truth seeking process of the judicial system." *Bernet*, 218 W. Va. at 635, 625 S.E.2d at 713. Such concerns apply equally to professionals in Virginia.

In addition to being bad law, allowing upset litigants to sue professionals involved in custody and visitation proceedings would be poor public policy. As mentioned previously, the "lodestar" in custody proceedings is "the best interests of the child." *Bottoms*, 249 Va. at 413, 457 S.E.2d at 104 (citation and internal quotation marks omitted). When a professional is evaluating the child or her parents, the professional's primary motivation must be the child's best interest. Imputing a separate tort duty from the professionals to the child's parents would interfere with the professionals' duty to act in the child's best interests. This ultimately will harm, not help, the child whose custody or visitation is being decided. Furthermore, these professionals would be incentivized to be more guarded in their appraisal of the parents, for fear that a candid assessment might precipitate a future lawsuit. Finally, allowing disappointed parents to sue professionals who provide adverse testimony, recommendations, or reports in a custody or visitation proceeding would deter such professionals from providing such services and, ultimately, would make it more difficult and

more expensive for courts to obtain reports and testimony from capable, qualified experts. This Court should refuse the invitation to expand the tort to include claims against professionals like Dr. Wert and The Westwood Group.

IV. This Court Should Hold that Tortious Interference with Parental Rights Cannot Arise from Judicial Decisions in Court Proceedings

A. The Tort Does Not Apply Where the Change in Custody or Visitation Results from a Court Proceeding

Tortious interference with parental rights does not apply to situations where litigants are afforded due process and lose custody or visitation with a child; it is intended to apply to those situations in which the physical custody of a child was changed through extra-judicial self-help. *See, e.g.*, *Wyatt*, 283 Va. 685, 725 S.E.2d 555; *Kessel*, 204 W. Va. 95, 511 S.E.2d 720.

Ms. Wilson's tortious interference claim fails because all of the custody and visitation determinations were made by a court of law in accordance with due process of law. In *Wyatt*, this Court explained that the tort applied when a child was separated from her parent "for a substantial period of time *without due process of law*." 283 Va. at 693, 725 S.E.2d at 559 (emphasis added). But, where the actions taken that separated the child from its parent are taken pursuant to an order in a custody or visitation proceeding, the parent had due process.

In this case, there were multiple proceedings in the circuit court. *Padula-Wilson*, 2015 Va. App. LEXIS 123, at *2. There were no less than four hearings. *Id.* at *2-3. There were opportunities to question witnesses. There was a right of appeal of the circuit court's decision, which was exercised by Ms. Wilson. The case continued on for nearly two more years after remand from the Court of Appeals, at which time the final order was entered giving joint physical and legal custody to Mr. and Mrs. Wilson. App. 32 ¶ 121. The custody and visitation determinations were made by a court after giving Ms. Wilson due process of law, and therefore, she has no claim for tortious interference with parental rights.

B. Expanding the Tort Would Invite Inappropriate Collateral Attacks on Decisions Regarding Custody and Visitation

At its core, this suit is an attempt to collaterally attack a decision of a lower court. The circuit court awarded full custody to the father and appointed Dr. Nelson and Ms. Campanella to determine when Ms. Wilson could have visitation. App. 26 ¶ 98. Ms. Wilson disagreed with that decision, and appealed it to the Virginia Court of Appeals, as was her right. She prevailed. An appeal, not a collateral lawsuit against participants in the custody and visitation proceeding, is the appropriate remedy when one disagrees with a lower court's ruling.

"A collateral attack is an attempt to impeach a judgment in a proceeding not instituted for the purpose of annulling or reviewing that judgment." *Matthews v. Matthews*, 277 Va. 522, 527, 675 S.E.2d 157, 159 (2009). It is black-letter law in Virginia that "judgments and decrees of a court of general jurisdiction, acting within the scope of its authority, are presumed to be right, until the contrary appears" and are not subject to collateral attack. *Howard v. Landsberg's Committee*, 108 Va. 161, 165, 60 S.E. 769, 771 (1908). Custody and visitation decrees by courts of general jurisdiction should not be attacked collaterally, and this Court should not expand this tort to allow such collateral attacks by disappointed litigants.

If this Court were to allow the expansion of the tort of intentional interference with parental rights to include actions taken in connection with a custody or visitation proceeding, it would allow collateral attacks on those proceedings. Much like Ms. Wilson, future litigants will file their own suit and argue that the custody and visitation decisions would have turned out differently "but for" some action taken by the participants in those proceedings. Indeed, this type of "but for" causation is exactly what Ms. Wilson is arguing to this Court. Opening Br. 27. This unique conception of the tort runs directly contrary to this Court's long held skepticism towards collateral attacks on judgments.

Apparently aware of this collateral attack concern, Ms. Wilson attempts to argue the judge's decision in her case was procured by fraud. Opening Br. 28-31. Her brief, however, misstates the relevant law on extrinsic fraud and void *ab initio* judgments.

A judgment is only subject to collateral attack when there is *extrinsic* fraud—in other words, where some fraudulent act prevents the parties from appearing and having a decision on the merits. Indeed, Ms. Wilson's own brief cites to *Taylor v. Taylor*, 159 Va. 338, 344, 165 S.E. 414, 415 (1932) to explain that the fraud must be "extrinsic of the matter tried in the cause." Opening Br. 28.

A review of the cases cited by Ms. Wilson reveals what extrinsic fraud is and what it is not. Opening Br. 28. In *Taylor*, a divorce was procured without an appearance by the wife, where service of process was achieved only through publication when the wife's location was known, and when the husband knew she was legally insane. 159 Va. 338, 165 S.E. 414. Similarly, in *Gulfstream Bldg. Associates v. Britt*, 239 Va. 178, 387 S.E.2d 488 (1990) a party was absent from prior proceedings and therefore could not have been expected to defend the case and was not bound by the judgment that was procured. So too in *National Airlines v. Shea*, 223 Va. 578, 292 S.E.2d 308 (1982) when a default judgment was obtained without informing the court

that defense counsel had contacted plaintiff's counsel, requested an extension of time to answer, and had explained he had a meritorious defense.[5] In all these cases, fraudulent actions were taken that prevented a party from appearing, presenting evidence, and being a participant in the proceedings. No such activities occurred during the proceedings involving Ms. Wilson. She was a very active participant in the custody and visitation proceedings. Therefore, these cases do not provide any basis for reversal.

C. There is No Causal Link Between Out-of-Court Actions and the Custody and Visitation Decisions Made by a Circuit Court

A clear rule that the tort does not apply when custody or visitation is changed by a court order is also consistent with basic concepts of causation. Here, the change in custody was not made by any of the defendants to this lawsuit. Rather, that determination was made by the circuit court judge. App. 12 ¶ 30. To be sure, Ms. Wilson complains that Dr. Nelson and Ms. Campanella made their own visitation decisions, but their authority to make those decisions is exactly what was ordered by Judge Gill. App. 26 ¶ 98. By

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[5] Ms. Wilson's brief also cites to *Evans v. Smyth-Wythe Airport Comm'n*, 255 Va. 69, 495 S.E.2d 825 (1998). Opening Br. 28. This, however, is not an extrinsic fraud case. Instead the Court concluded that the circuit court "did not have the power to render a judgment which permitted a governmental entity to relinquish the power or right of eminent domain." 255 Va. at 74, 495 S.E.2d at 828.

its very nature, his decision could only have been made based upon information presented to him in court; he would not know of actions that occurred outside of court. Thus, a witness's out-of-court actions or statements cannot have a direct impact on the judge's order awarding custody or visitation to one parent or the other.

Perhaps recognizing this fact, Ms. Wilson attempts to characterize this as an issue of "superseding cause." Opening Br. 27. But, it is actually an issue of proximate cause. Out-of-court actions and statements that are not part of the court proceedings cannot directly enter into the decision-making process of a judge making custody and visitation determinations. By definition, they occur outside of the judge's presence. It is only the testimony and reports submitted to the court that can form the basis for a judge's order.

If in-court statements are subject to absolute immunity, and it is implausible that out-of-court statements and actions can directly cause the entry of a judge's custody or visitation order, then there is no reason the tort should be extended to cover situations like Ms. Wilson proposes. If a party is unhappy with a court order, the order can be appealed. If a court order is not being followed, contempt can be sought. There is no reason to extend this tort to cover orders in custody and visitation cases in the manner suggested by Ms. Wilson.

V. This Court Should Hold that Tortious Interference with Parental Rights Cannot Be Pursued for an Interference with Visitation, as Opposed to Custody

Although Dr. Wert and the Westwood Group encourage the Court to adopt a rule to prevent disappointed litigants from abusing this tort on the broader grounds set forth above, this Court could alternatively affirm the ruling of the circuit court on a narrow ground as to Dr. Wert and The Westwood Group. In *Wyatt*, this Court specifically identified *Kessel* as defining the scope of the tort of intentional interference with parental rights. 283 Va. at 699, 725 S.E.2d at 562. *Kessel* was explicit in stating that the tort did not apply to tortious interference with a parent's visitation rights, as distinguished from a parent's custodial rights. 204 W. Va. at 135 n.43, 511 S.E.2d at 760 n.43. In *Bernet*, the Supreme Court of Appeals of West Virginia confirmed this limitation on the tort explaining that "claims asserting tortious interference with a parent's visitation rights" are not included within the definition of the tort. 218 W. Va. at 636, 625 S.E.2d at 714 ("Not included within the scope of this cause of action, however, are claims asserting tortious interference with a parent's visitation rights.").

This limitation alone is fatal to Ms. Wilson's claim against Dr. Wert and The Westwood Group. By her own allegations, Ms. Wilson had already lost custody of her children before Dr. Wert or Ms. Campanella became involved

with the Wilson children. App. 16 ¶ 52, 20 ¶ 68, 25 ¶ 90. She did not regain custody until the final order was entered in the custody case in 2017. App. 32 ¶ 121. Thus, Dr. Wert and Ms. Campanella could not, as a matter of law, have interfered with Ms. Wilson's parental or custodial rights, the key to maintaining a claim under *Kessel* and *Wyatt.*

The only "interference" that has been pled regarding these two defendants was an interference with visitation rights. Opening Br. 24. Both only became involved after Ms. Wilson lost custody. The visitation rights that were at issue after they became involved are not within the scope of the tort of intentional interference with parental rights as defined in *Wyatt*, *Kessel*, and *Bernet*.

CONCLUSION

The trial court correctly ruled that the facts alleged by Ms. Wilson did not state a claim for tortious interference with parental rights as defined by this Court and the Restatement (Second) of Torts. There is no reason to expand that tort to cover Ms. Wilson's allegations; rather, whether such an expansion is appropriate is a question that should be left to the General Assembly. Therefore, Dr. Wert and The Westwood Group respectfully request that this Court affirm the judgment below granting their Demurrers.

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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