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In the Supreme of Virginia

RECORD NO. 190107

AMANDA PADULA-WILSON,

Appellant,

v.

SCOTT DAVID LANDRY, ET AL.

Appellees.

REPLY BRIEF OF APPELLANT

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Amanda Padula-Wilson ("Mother") states as follows:

I. STATEMENT OF FACTS

Appellees go outside of the complaint[1] and add facts not considered for the purposes of demurrer, and in some cases, are misrepresentations of the facts as they occurred. The standard for considering a demurrer is that all facts taken in the Complaint are true and interpreted in the light most favorable to plaintiff. *Coward v. Wellmont Health Sys*., 295 Va. 351, 358 (2018). The trial court did not take evidence, and so this Court should disregard the additional proffers by the Appellees for the purposes of demurrer as they are not properly before this Court.

For example, some of Gasper's allegations in her brief are incorrect and outside of the Complaint[2] and some of the citations are incorrect.[3] Contrary to Gasper's assertions, the Complaint actually states regarding Gasper that Mother had custody of the children and Father had supervised visitation and the court declined to change custody on April 24, 2014 after Gasper testified Mother was an alienator and a flight risk even though Gasper had never observed Mother with the children because she was angry that her name was placed on a website. (App. 13 ¶

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[1] Only some of the facts outside of the Complaint are iterated here.
[2] Gasper's statements that she, reviewed material, says Mother's website was called a certain name and that Mother placed material on the website, discussed children reacting, says she's against expanding Mom's visitation on April 24, 2013, says Mother is delusional regarding Father, and her actions were consistent with an August 12, 2013 order were outside the complaint. (Gasper brief 1-4).
[3] *See e.g*., Gasper's citation to ¶ 43 on p. 2 of her brief. *But see*, the actual ¶ 43 of the Complaint on p. 14 of the Appendix of what it actually states.

38, 18 ¶ 58- 59, 71). Gasper, angry at having her name placed on a website by Mother, conspired with Landry just before August 20, 2013 to make false accusations about Mother that she was delusional, psychotic, and a flight risk, and conspired to break a court order in order to intentionally and maliciously interfere with Mother's parental rights. (App. 4-5, 18 – 19, ¶¶ 58-64, 21 ¶ 72). Mother had custody of the children until August 20, 2013. (App. 12 ¶¶ 28-30).

Some of Landry's allegations in his brief are incorrect and outside of the Complaint[4]. Contrary to Landry's assertions[5], the Complaint states the custody

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[4] Landry states in his brief (pp. 5-8) outside the complaint that the Juvenile & Domestic Relations Court appointed Nelson, that Landry became aware that Mother posted information about the child that could be harmful to the Wilson children, that Mother's behavior worsened and so the court cut off contact, and the court restored Mother's visitation in an incremental basis until March 2017.

[5] It is noteworthy that Gasper states (Gasper brief 4) outside of the Complaint that on August 12, 2013 there was an order when this Court's record in *Padula-Wilson v. Wilson*, Record No. 150719 shows that there was no such order, and Landry states (Landry brief 7) outside of the Complaint that on August 12, 2013, the Circuit Court adopted his recommendations for Mother to have supervised visitation when this Court's record of the custody case shows no such thing occurred. Similar to Gasper and Landry's coordinated misrepresentations to the custody court on August 20, 2013 that Mother was delusional, psychotic, and a flight risk, their coordinated misrepresentations of the custody record to this Court almost match which might cause this Court to believe their representations if this Court did not have the benefit of the custody court record from when the custody case was appealed to this Court. On August 20, 2013, when two separate people are making up completely false but coordinated misrepresentations that Mother is delusional, psychotic and a flight risk to a custody court, how else could we expect the custody court to react other than to remove all contact from Mother with her children. Thus, Gasper and Landry's out of court conspiracy to make misrepresentations to the court which evidentially continues with their briefs to this Court is the cause of Mother's loss of her children.

case was in Circuit Court (App. 13 ¶ 39). After Landry discovered his name on a website, Landry acted outside the scope of engagement and with malicious intent with no new information except his name had been placed on a website to tortiously interfere with Mother's parental rights. (App. 14 ¶¶ 44-45). Landry entered Mother's house without permission while she was on vacation with her children in Hilton Head and then conspired with Gasper to make false allegations about Mother that she was delusional, psychotic and a flight risk in order to remove the children from Mother and as result, Mother's children were removed from her on August 20, 2013. (App. 16 ¶¶ 48-52). Mother had no authorized contact with A.W. until March 2017 (App. 34 ¶ 132). Mother had custody of the children until August 20, 2013. (App. 12 ¶¶ 28-30).

Outside of the Complaint based on a wrongful death lawsuit where Nelson was alleged to have caused the death of a child, Nelson states Mother has a personal animus against Nelson, is vexatious, and has a personal dislike of Nelson while purporting to quote several documents. Nelson brief 14. Nelson filed a motion for sanctions against Mother in the underlying trial court which was denied in the Dec. 14, 2018 final order. (App. 107). Attached to Nelson's Motion to sanctions were numerous documents, none of which were heard or admitted at the trial court. (App. 567-633). As Nelson admits on p. 1 of her brief, no evidence was taken on Nelson's Motion for Sanctions. Despite the fact that the dismissal of

Nelson's Motion for Sanctions was not appealed and so not relevant here, Nelson included her 66 page sanctions motion with her attached non-admitted documents in the designation and appendix and now uses those non-admitted documents for a Motion for sanctions not under appeal to add irrelevant, non-admitted material to her brief which is inappropriate for demurrer. (App. 567-633). It is these non-admitted documents outside of the Complaint that Nelson purports to quote on p. 14 of her brief. As such Mother, asks that this Court disregard Nelson's argument and quotes on p. 14 which is not appropriate for demurrer and award Mother her costs for the unnecessary designation.

II. Conspiring to falsely call Mother delusional, psychotic and a flight risk and breaking the final custody court order to withhold the children from Mother for years is the egregious conduct contemplated in a tortious interference of parental rights action.

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

The defendants all engaged in egregious conduct that barely fell short of abduction. The egregious conduct was extensive involving multiple acts over a period of years as detailed in the 104 pages of the Complaint and exhibits. For the purposes of brevity, only the most salient facts are listed here. On or about August 18, 2013, Landry entered Mother's house while she was on vacation with the children at Hilton Head without Mother's permission. (App. 16 ¶ 48). While

Mother was in Hilton Head with the children, Landry conspired out-of-court on a phone call with Gasper to falsely call Mother delusional, psychotic and a flight risk when they knew it was false and that the children should be removed from their Mother with no contact with their Mother to deprogram them because they were mad they were put on a website even though neither had seen Mother out of court since April 2013 when both recommended custody to Mother. (App. 16 ¶¶ 48-51, 19 ¶¶ 61-62, 20 ¶ 67). As a result of Gasper's perjury and Landry's out-of-court conspiracy with Gasper to call Mother delusional, psychotic, and a flight risk, the custody court removed Mother's children with no contact with all three children for almost 8 months. (App. 19 ¶ 62-64). Landry and Gasper then outside-of-court told Campanella, Wert and Nelson that Mother was totally delusional, psychotic and a flight risk even though they knew it was false. (App. 17 ¶ 53, 20 ¶ 65). After almost eight months, Mother had limited supervised contact with all three children for one month, then limited supervised contact with only two children thereafter until the court entered the final order on June 20, 2014 as a result of defendant's actions. (App. 25 ¶ 89 & 94-95). The June 20, 2014 final order entitled Mother to at least supervised visitation to all three children. (App. 26 ¶ 98). Nelson, Campanella and Wert then all broke the final June 20, 2014 order and refused to allow Mother any contact with A.W. which did result in Mother having no authorized contact with A.W. until March 2017. (App. 25 ¶ 95, 26 ¶ 99, 27 ¶

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

Gasper argues that even if ¶ 62 of the Complaint is true (App. 19) that Gasper did conspire with Landry to falsely call Mother delusional, psychotic and a flight risk and that the children should be removed from their Mother with no contact with their Mother to deprogram them, that these facts do not rise to the level of egregiousness required. (Gasper brief p. 13). Further, Gasper argues that even if she did tell Wert and Nelson that Mother was delusional and psychotic even though she knew it was false (as alleged on App. 20 ¶ 65) that does not rise to the level of egregiousness. (Gasper brief p. 13, 16-17).

As stated in the third paragraph of the Court of Appeals opinion in the custody case *Padula-Wilson v. Wilson*

> At a hearing on August 20, 2013, the father presented evidence that the mother was "psychotic" and had experienced a "break from reality." … It also directed the mother to seek mental health treatment and barred her from visitation with the children.

2015 WL 1640934 * 1 (April 14, 2015).

The evidence cited to in the Court of Appeals opinion was Gasper as a result of Gasper and Landry's out of court conspiracy to falsely call Mother, delusional, psychotic, and a flight risk even though neither had seen Mother. As the Complaint notes, as a result of Gasper's conspiracy with Landry to make up with knowledge that it was false that Mother was delusional, psychotic and a flight risk, the children were removed from Mother on August 20, 2013 with no contact for nearly eight months. (App. 12 ¶30, 19-20, ¶¶ 62-64). As noted in the Complaint, because a google search of Mother's name reveals the Court of Appeals custody case where the third paragraph calls Mother "psychotic" and states Mother was barred from her children, Mother, who is an attorney, has difficulty getting paying clients. (App. 33 ¶¶ 124-125). Because the Court of Appeals custody case was necessary to turn the custody case around to return the children to Mother after Appellees intentionally and maliciously interfered with Mother's parental rights, the long-term effects of Gasper and Landry's conspiracy to make up that Mother was "psychotic" which are now prominent on the searchable internet are damages of trying to retrieve the children that Mother still deals with.

The only discussion by Defense at the trial court regarding whether Mother consented to losing her children was by counsel for Wert who stated:

> In the *Coward* case, they were looking at a different portion of the Restatement and specifically looking at the portion of the Restatement that talks about whether or not

> the parent consents. That's not an issue here. We are not alleging and not suggesting that Ms. Wilson at any time consented to giving up custody or visitation of her child.

App. 143:19-144:02.

Gasper is now arguing for the first time on appeal that Mother didn't plead that she didn't consent[6] to being falsely called delusional, psychotic and a flight risk and having her children removed based on those false accusations. This should be disregarded by this Court because it is as logical as calling Mother delusional and psychotic without having seen or communicated with her in August 20, 2013 when she knew it was totally false. However, it was pled that there was no consent in ¶ 129 of the Complaint. (App. 34 ¶ 129).

Landry argues that the facts in this case do not present the type of egregious circumstances that this Court hoped to deter in *Wyatt* because Mother's rights were not permanently severed. (Landry brief 12, 18).

Termination of parental rights is not a necessary element to prove for a tortious interference of parental rights claim, just like it is not necessary to prove a plaintiff died in a car accident for the defendant who t-boned the plaintiff to be liable for the plaintiff's injuries. In *Wyatt v. McDermott*, Wyatt's rights were not

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[6] Campanella is also arguing for the first time on appeal that Mother didn't plead that she didn't consent to Campanella breaking the court order and withholding A.W. for three years. (Campanella brief at p. 11). This is also illogical and mistaken. Did not consent was pled in ¶ 129 of the Complaint (App. 34).

permanently severed or terminated at the time *Wyatt* was decided. 283 Va. 685 (2012). Indeed, Wyatt was awarded sole custody of the child by Virginia courts; Wyatt simply did not have any visitation of his child at the time this case was decided since the adoption had not yet taken place. *Id*. at 690-691. Like *Wyatt*, in this case, Mother had no contact or visitation of all three of her children which totaled no contact for a year with two of the children and over three years for the third child. Indeed, if a child is kidnapped off a street corner by a hypothetical kidnapper and returned a few days later, the parents have never lost their parental rights, but the kidnapper would still be liable for tortious interference of parental rights and charged with kidnapping.

Wert argues that her acts are not egregious because in order to be liable for tortious interference of parental rights[7] they would have had to kidnap the children, hide the children, and remove them from the state. (Wert brief pp. 11-15). If a hypothetical kidnapper kidnaps a child from a street corner and keeps the child in his house a few blocks away for a few days, then that child has not been removed from the state or the neighborhood, but that kidnapper would still be liable for tortious interference of parental rights and charged with kidnapping. Nor is it

[7] Wert cites a number of cases she claims have been filed throughout the Commonwealth that are tortious interference cases (Wert brief p. 19-20), however two of those cases are not tortious interference of parental rights cases – *Wilson v. Wert*, CL 17-2596 and *Corbin v. Wert*, CL16-2861 are malpractice cases.

necessary for the kidnapper to hide the child. If the hypothetical kidnapper stood in front the child's parents while holding the child at knifepoint, even if only for a few minutes, then the kidnapper would still be liable for tortious interference of parental rights and charged with kidnapping.

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

Thus, based on the foregoing, as required by *Coward*, egregious conduct that barely falls short of outright kidnaping by the Appellees has been pled because they used deception to falsely call Mother delusional, psychotic and a flight risk and used deception to break court orders to prevent Mother from exercising her parental and custodial rights which did keep Mother from her children.

Wert argues that this Court can only hold her liable if she physically removes or detains the child, and that this Court should ignore the express language in *Wyatt* were she can be held liable by "or by otherwise preventing the complaining parent from exercising his/her parental or custodial rights." (Wert brief p. 11-15). The case Wert cites to this end discusses *ejusdem generis* canon of

construction in a deed construction; it does not discuss trying to change an element of tort as set forth in one of this Court's opinions as Wert is trying to do here. Nonetheless, Wert's argument does not apply because by the use of the word "or," this Court expressly states that liability from tortious interference of parental rights may result if either of the below conditions are true.

> a party outside of the relationship between the complaining parent and his/her child intentionally interfered with the complaining parent's parental or custodial relationship with his/her child by removing or detaining the child from returning to the complaining parent, without that parent's consent, **or** by otherwise preventing the complaining parent from exercising his/her parental or custodial rights;

Wyatt v. McDermott, 283 Va. 685, 699 (2012)(emphasis added).

In this case it has clearly been alleged that Appellees prevented Mother from exercising her parental or custodial rights and so they are liable.

III. Appellees do not have judicial privilege because their acts were outside of a judicial proceeding with no judicial protections.

There are two primary[8] time periods where defendants tortiously interfered with Mother's parental rights. The first occurred just before August 20, 2013 when Landry entered Mother's house without her permission while Mother was on vacation in Hilton Head with her children, and then conspired with Gasper outside

[8] There were other time periods but for the sake of argument, the most salient time periods are reflected here.

of court to falsely call Mother delusional, psychotic and a flight risk in order to interfere with Mother's parental rights. (App. 4-5, 14 ¶¶ 44-49, 18 – 19 ¶¶ 58-64, 21 ¶ 72). Gasper and Landry then told Nelson, Wert and Campanella that Mother was totally delusional and psychotic when they knew it was false in order to intentionally and maliciously interfere with Mother's parental rights. (App. 17 ¶ 53, 20 ¶ 65-66). These events occurred while there was a custody case occurring in the background – but are not subject to absolute judicial privilege because they occurred outside of court and outside of the judicial proceedings.

The second time period occurred after June 20, 2014 when Wert, Campanella[9] and Nelson broke the June 20, 2014 final order entitling Mother to visitation and refused to allow Mother contact with one of her children (A.W.) for three years and refused Mother contact with the other two children for months at a time – all contrary to the order which entitled Mother to at least supervised visitation. (App. 6-7, 26-27 ¶¶ 98-101, 33-35). As the complaint alleges, the final custody order was entered June 20, 2014 (App. 26 ¶ 98), and the Court of Appeals overturned the custody case on April 14, 2015 (App. 28 ¶ 103). As this Court's

[9] Campanella argues that she should not be held accountable for breaking the court order because another remedy exists – holding her in contempt of court. Under her argument, you could not sue someone for killing your loved one because another remedy exists. This is not the law. As stated in *Wyatt*, even if a criminal remedy exists, there is no right to civil recovery from third parties and so tortious interference of parental rights may be brought. 283 Va. 685, 693-694 (2012).

records reflect, thereafter the custody case (*Padula-Wilson v. Wilson*, Record No. 150719) was in this Court until this Court denied the petition on August 12, 2015. As such, the relevant time period when Wert, Nelson and Campanella were breaking the June 20, 2014 court order and wrongfully withholding the children from Mother occurred when the trial court did not have jurisdiction and was therefore outside the course of any judicial proceedings.

A. The origins of judicial privilege doctrine in Virginia limit judicial privilege to defamation cases for words spoken in a judicial or quasi- judicial proceeding with judicial protections

The origins of judicial privilege derive from English Common Law. *Cutler v. Dixon*, 4 Co. Rep. 14b, 76 Eng. Rep. 886 (Q. B. 1585).

Cutler[10] held that "in articles of the peace exhibited to justices" are not actionable because they are a "proceeding in the course of justice." 76 Eng. at 887.

Later English case law clarified that *Cutler* applied only to defamation cases. *Anfield v. Feverhill*, 2 Bulst. 269, 80 Eng.Rep. 1113 (K.B.1614). Subsequently,

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[10] It is noteworthy that England has recently overturned *Cutler* – the basis for our English common law for Judicial privilege. In *Jones v. Kaney*, [2011] UKSC 13, the Supreme Court of the United Kingdom allowed a forensic psychologist involved in judicial proceeding to be sued citing that "The general rule that where there is a wrong there should be a remedy is a cornerstone of any system of justice. To deny a remedy to the victim of a wrong should always be regarded as exceptional." *Id*. "The practical reality is that, if the removal of immunity would have any effect at all on the process of preparation and presentation of expert evidence (which is not in any event likely), it would tend to ensure a greater degree of care in the preparation of the initial report or the joint report." *Id*.

courts in America began adopting judicial privilege based on English common law. By 1913, Virginia's courts recognized in *dicta* that words spoken in a judicial proceeding were privileged and not subject to defamation actions. *Williams Printing Company Saunders*, 113 Va. 156 (1913). In 1925, this Court recognized limits on judicial privilege when it held that a defamation/insulting words action could lie where the words uttered during the testimony in a court case were not privileged because they were not material or relevant to the court proceeding. *Lightner v. Osborn*, 142 Va. 19 (1925)(Lightner sued to enjoin publication of a newspaper and during the trial testimony called Osborn a thief which was wholly unrelated to the injunction and so insulting words action not subject to privilege because words were not material or relevant to the judicial proceeding).

By 1927, Virginia had the opportunity to define a judicial proceeding after a petition was filed with the courts to contest a political election. *Penick v. Ratcliffe*, 149 Va. 618 (1927). Penick subsequently sued those who filed the petition for defamatory words contained in the petition to the Court which essentially alleged that they conducted the election dishonestly. *Id*. at 626-627. This Court, analyzing English common law and a collection of what other states had done with the English common law, found that words in a petition to the court were subject to absolute privilege for actions of defamation because they were both in a judicial proceeding and material and pertinent to the judicial proceeding. *Id*. at 626-634.

Explaining why a statement had to be BOTH in a judicial proceeding and material and pertinent to qualify for the privilege, this Court stated:

> Still this privilege must be restrained by some limit, and we consider that limit to be this: That a party or counsel shall not avail himself of his situation to gratify his private malice by uttering slanderous expressions either against a party, witness, or third person which has no relation to the cause or subject-matter of the inquiry.

Id. at 632.

Defining judicial proceedings the *Penick* Court wrote:

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

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

In *Lockheed Info Mgmt. Sys*, Maximus was awarded a bid to privatize the child support enforcement of two northern Virginia offices. *Id*. at 97. Lockheed filed affidavits and a protest under Va. Code § 11-66(A) "which provides the

procedure for an unsuccessful bidder to file a protest to the action of a public body in the procurement process." *Id*. at 101. That statute requires the public body to respond within ten days and that the entire process may be appealed to a court. *Id*. Lockheed was subsequently sued for defamation. *Id*. at 97. Lockheed appealed to the Va. S. Ct. after a substantial jury award against it and claimed that its statements made in the protest were immune both because the protest was a judicial proceeding and that an affidavit was a judicial proceeding. 259 Va. 92 (2000). This Court disagreed and stated,

> We have 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. *Penick v. Ratcliffe*, 149 Va. 618, 636-37, 140 S.E. 664, 670 (1927). This absolute privilege has been extended to communications made in administrative hearings so long as the "safeguards that surround" judicial proceedings are present. *Elder v. Holland*, 208 Va. 15, 22, 155 S.E.2d 369, 374 (1967). Those safeguards include such things as the power to issue subpoenas, liability for perjury, and the applicability of the rules of evidence. *Id*. The bid protest proceeding in which the statements complained of in this case were made, however, did not have the safeguards inherent in a judicial proceeding.

Id. at 101.

Only in very recent times (2012) has this Court extended the privilege beyond a judicial proceeding or quasi-judicial proceeding – and this Court has done that only once in a very narrow exception. In *Mansfield v. Bernbei*, this

Court allowed the privilege to extend to a defamatory action that was based on a demand letter that was circulated with a draft of complaint before that action was filed. *Mansfield v. Bernabei*, 284 Va. 116 (2012). This Court, citing the importance of settlement negotiations to avoid a lawsuit and relying on Restatement provisions which limited the expansion to defamation actions only, applied the privilege to the pre-filing circulation of the draft complaint to bar a defamation suit. *Id*. at 125. Importantly, the Complaint was soon filed. *Id*.

In all of the other cases deciding judicial privilege, this Court has limited the privilege to defamation actions in judicial or quasi-judicial proceedings subject to judicial safeguards. *Massey v. Jones*, 182 Va. 200 (1944)(defamation action barred based on judicial privilege when suit based on trial testimony in court and words spoken were pertinent and relevant), *Darnell v. Davis*, 190 Va. 701 (1950)(defamation action barred based on judicial privilege after defendant swore out false criminal warrant and then issued sworn statement to magistrate to have criminal charge dismissed), *Elder v. Holland*, 208 Va. 15 (Va. 1967)(no privilege and defamation suit allowed where a police disciplinary hearing was conducted without judicial safeguards), *Watt v. McKelvie*, 219 Va. 645 (1978)(defamation suit barred under judicial privilege where words were republished in a deposition and initial statute of limitation of when the words were actually spoken had expired because a deposition is sworn testimony in a judicial proceeding),

Donohoe Constr. Co. v. Mount Vernon Assocs., 235 Va. 531 (1988)(defamation suit for a mechanics lien barred under judicial privilege where lien was filed with the court under oath, and required to be filed for his suit to enforce), *Lockheed Info. Mgmt. Sys. v. Maximus, Inc*., 259 Va. 92 (2000)(no judicial privilege and defamation suit allowed where administrative hearing regarding bid for services conducted pursuant to statute that did not have judicial safeguards even though affidavits were involved), *Lindeman v. Lesnick*, 268 Va. 532 (2004)(no judicial privilege and defamation suit allowed for words spoken to an attorney that defamed a doctor for the purpose of potential litigation after finished workman's compensation hearing).

<u>This Court has never applied judicial privilege outside of a defamation or insulting words suit</u>. The common law does not apply judicial privilege outside of a defamation suit. This Court has no reason to extend the reach of judicial privilege outside of a defamation suit to apply to tortious interference of parental rights suit since it would be contrary to both English common law and Virginia's well-developed judicial privilege law. Nor does this Court have to reach that decision, since the actions sued for are not barred by judicial privilege since all occurred outside of court and outside of any judicial proceedings.

B. This Court should not extend judicial privilege to out of court actions that are outside of judicial or quasi-judicial proceedings

When Nelson, Wert and Campanella were breaking the June 20, 2014 final custody order and wrongfully withholding the three Wilson children from Mother with no contact (A.W. for three years and A.G.W. and C.W. for months at a time), the custody court no longer had jurisdiction and their actions were outside any judicial proceedings. As the complaint alleges, the final custody order was entered June 20, 2014 (App. 26 ¶ 98), and the Court of Appeals overturned the custody case on April 14, 2015 (App. 28 ¶ 103). As this Court's records reflect, thereafter the custody case (*Padula-Wilson v. Wilson*, Record No. 150719) was in this Court until this Court denied the petition on August 12, 2015. As such, the relevant time period when Wert, Nelson and Campanella were breaking the June 20, 2014 court order and withholding the children from Mother occurred when the trial court did not have jurisdiction and was outside the course of any judicial proceedings.

Just before August 20, 2013, Landry entered Mother's house without her permission, while she was on vacation in Hilton Head with her children, and then conspired with Gasper outside of court to falsely call Mother delusional, psychotic and a flight risk in order to tortiously interfere with Mother's parental rights. Gasper and Landry then outside of court told Nelson, Wert and Campanella that Mother was totally delusional, psychotic, and a flight risk when they knew it was false in order to intentionally and maliciously interfere with Mother's parental

rights. These events occurred while there was a custody case occurring in the background, but these events are not subject to absolute judicial privilege because they occurred outside of court and outside of the judicial proceedings.

Appellees argue that despite the fact that this Court has never applied judicial privilege outside of a defamation or insulting words case that this Court should not only apply judicial privilege to a tortious interference of parental rights case but this Court should apply it to all acts done or said outside of court and even long after the trial court no longer had jurisdiction. Given that the only time this Court has ever allowed judicial privilege outside of a sworn affidavit, procuring a criminal charge, sworn testimony, or a court pleading filed with the court was in the one exception where this Court allowed judicial privilege in a demand letter accompanied by a proposed complaint in a soon to be filed lawsuit (*Mansfield v. Bernbei*), it seems Defendants asking for all of their out of court actions and words to be granted privilege in a non-defamation claim merely because there was at some point a custody case in the background is contrary to well-established law.

This Court should not extend judicial privilege to cover out of court actions outside of a judicial or quasi-judicial proceeding with no judicial protections as appellees are requesting. The implications of doing so would be wide ranging. Anyone who ever was a witness in any pending suit could now claim privilege for any other occurrence in the outside world if they could somehow draw a line that

the other occurrence was relevant in the suit at hand. For example, in child custody cases under Va. Code § 20-124.3, Factor 9, domestic violence is a relevant factor to determine child custody. According to Appellees, if a hypothetical dad beat a hypothetical mom outside of court but while a custody case was pending which did cause her to incur medical bills, now mom can not bring charges or sue for battery because it is material and relevant in the pending custody case and so dad has judicial privilege. Of course, that is not the law because it is outside of the judicial proceedings and not defamation. Further, even if hypothetical dad beat hypothetical mom inside the courtroom while the custody case was occurring and dad was testifying, dad still would not have judicial privilege because it was not a suit for defamation, even though domestic violence would be relevant and material to a child custody case pursuant to Va. Code § 20-124.3, Factor 9, and even though dad would be subject to contempt proceedings. Nor would it make a difference if just words spoken caused the harm. If while the hypothetical custody case was pending, hypothetical dad called a hit man and told him to rough up hypothetical mom, and that hit man did, then that would be relevant to the custody case as domestic violence. Nonetheless, dad still would not have judicial privilege for his conspiracy to commit battery merely because his words spoken is what caused the battery upon mom and the battery was relevant to the pending custody case because the battery would have been outside of the judicial proceedings and it is

not a defamation suit. Likewise, the Appellees do not have judicial privilege for their tortious interference of parental rights against Mother that occurred outside of court and outside of a judicial proceeding with no judicial protections.

None of the acts that Appellees are sued for were subject to any judicial protections. There was no built-in mechanism to expose the falsity of Appellees' accusations. Mother had no ability to know that Landry was entering her house without her permission while she was on vacation in Hilton Head with the children or that he was calling Gasper on the phone and conspiring with her to falsely call Mother delusional, psychotic, and a flight risk - much less combat those false accusations with any judicial safeguards. Nor did Mother receive any notice or have any ability to impeach Landry and Gasper's statements to Nelson, Campanella and Wert that Mother was totally delusional and psychotic and an alienator because all of those actions occurred outside of court and without any type of notice. Likewise, Mother had no notice of the discussions on the phone between Nelson, Wert and Campanella and could not impeach their statements to each other. Additionally, when they broke the June 20, 2014 court order to withhold the children from Mother contrary to the order at a time when the trial court did not even have jurisdiction because the case was on appeal, then that was the very antithesis of a judicial safeguard.

Thus, this Court should hold that the appellees do not have judicial privilege because their acts had no judicial protections, were outside of a judicial proceeding, and outside of a defamation case.

C. Appellees do not have judicial privilege or any type of immunity merely because they were court appointed

For the first time on appeal, several appellees raise that they have judicial privilege because they were court appointed. This was not a deciding factor by the trial court in awarding judicial privilege, but because this Court does affirm trial courts under the "right result, wrong reason doctrine[11]," Mother addresses it.

1. Gasper

An exhibit to the Complaint shows that a court ruled that the children were to see Gasper two times for reunification therapy but nothing in the complaint states she was court ordered. (App. 71). Gasper alleges in her brief she was court appointed for two reunification therapy[12] sessions before May 31, 2013. Gasper brief at 3, 14. She was not court appointed by her own statements during her

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[11] Mother's briefs respond to allegations by Appellees that were outside of the trial Court's decision-making process to address any questions this Court may have to ensure that the "right result, wrong reason doctrine" is not applied in this case.

[12] Contrary to Gasper's outside the complaint assertions on p. 19-20 of her brief, reunification therapy does not require any type of investigation, analyzing evidence, providing opinions to the court or anything other than trying to reunite a child with a parent in a therapy session.

August 2013 conspiracy with Landry to falsely call Mother delusional, psychotic and a flight risk which are the acts sued for.

2. Campanella, Nelson and Wert

Campanella (brief p. 19) and Nelson (brief p. 12) argue that because they were court appointed, that their tortious acts were in the course of judicial proceedings. Campanella and Nelson argue this even though their court appointments were made on June 20, 2014 in the custody court's final order, after which the trial court no longer had jurisdiction (and thus there were no ongoing court proceedings)– and that order was overturned by the Court of Appeals as an improper abdication of the trial court's duty to determine custody and visitation.

First and foremost, since the trial court no longer had jurisdiction, and by definition could not provide oversight or judicial protections, any actions by Nelson and Campanella were outside of a judicial proceeding.

Campanella and Wert argue that because they are experts, they should receive some expanded protected under judicial privilege. First off, Campanella and Wert were retained by Mr. Wilson to provide child therapy to three Wilson children, though as alleged in the Complaint, they are well known hired gun psychologists who will say whatever they are paid to say regardless of the truth or facts. (App. 9 ¶¶ 10 & 13, 20-21 ¶¶ 68-70, App. 25 ¶ 90). In summary, they are saying all of their sessions in their offices with the children where they collected

health insurance payments over the years should be immune because they are actually hired gun experts and so they should be granted judicial privilege for whatever they have done regardless of where it took place, even if it was after the final order when the trial court did not have jurisdiction. In other words, they are asking for a special privilege to cover them in perpetuity over what is given to any other child therapist merely because they may have testified in a court at some point over the years. This seems counter intuitive, especially in light of the fact that in Virginia, even court appointed attorneys are subject to negligence claims for their in-court actions. *See, e.g.*, *Taylor v. Davis*, 265 Va. 187 (2003)(malpractice claim against attorney allowed to proceed when he didn't properly research the law and present it to the court which resulted in a wrongful conviction).

Additionally, this Court has already squarely decided that you can sue court ordered therapists who interfere with visitation of the children in a custody suit even though that therapist raised that she was entitled to privilege because she was participating in judicial proceedings.

In *Tomlin v. McKenzie*, Tomlin sued a court-ordered therapist for malpractice and defamation after he was ordered to see therapist McKenzie by the Chesapeake J&DR court in the context of a custody case between him and his ex-wife. 251 Va. 478, 479-480 (1996). Tomlin alleged that the therapist conspired with his ex-wife to deny him visitation of his daughter, exactly as is alleged in the

case at bar against all of the defendants. *Id*. at 481. McKenzie alleged that she was entitled to absolute immunity because all of the acts were in the context of court proceedings by a court agent exactly as is alleged in the case at bar. *Id*. at 480-481 (emphasis added). This Court reversed the trial court stating,

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

Id. at 481-482 (emphasis added).

Nelson argues, "While Dr. Nelson's statements and decisions regarding visitation were probably made while she was standing outside the courtroom, they were made under the direction and authority of the Custody Court and are part of the Custody Proceeding and require protection." Nelson brief at 12.

Nelson's representation to this Court is contrary to the what was squarely decided by the Court of Appeals in the custody case. *Padula-Wilson v. Wilson*, 2015 WL 1640934 (April 14, 2015). The Court of Appeals analyzed Nelson and

Campanella's court appointment to make visitation determinations in the June 20, 2014 final order and held:

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

Id. at * 14.

In other words, contrary to Nelson's statement (brief p. 12), Nelson's decisions were NOT made under the direction and authority of the custody court and that was the basis for reversal in the custody case. Indeed, trial courts do not have the authority to abdicate their duty to determine custody and visitation.

As this Court said,

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

Raiford v. Raiford, 193 Va. 221, 230 (1952).

Additionally, Nelson, Wert and Campanella never had a right to break the June 20, 2014 court order. When they wrongfully withheld the Wilson children

contrary to the order that allowed Mother at least supervised visitation and instead refused Mother all contact with her children, then they were outside any direction of the custody court and outside of any judicial proceedings.

3. Landry

For the first time on appeal, Landry argues as a guardian *ad litem*, he should be afforded an extension of the judicial privilege. This was not a basis for the trial court's decision and was not argued below, and so it should not be decided here, but for purposes of the right result, wrong reason doctrine, Mother responds.

While there is no doubt, that in theory, a guardian *ad litem* is supposed to play a vital role in representing the best interests of the children, as Landry spends pages of brief detailing (Landry brief at 23-25), unfortunately this is not always the case as has clearly been laid out in the Complaint and exhibits with regard to Landry. Landry was the driving force for falsely calling Mother delusional and psychotic after he entered Mother's house (which she had been the sole occupant other than the children for the year prior) while she was on vacation with the children in Hilton Head. Landry called Gasper to conspire with her to falsely call Mother delusional, psychotic, and a flight risk. Landry was the driving force for blocking evidence of child abuse and a convicted pedophile so he could continue blocking Mother from her children. Landry ensured that Mother continued to have no contact with her children even after he heard the 911 call where father is

threatening to break the child's hand and read the CPS report detailing abuse allegations by the child was written at a time when Mother had not had any contact with her children in six months.

Nonetheless, this Court does not need to consider whether Landry engaged appropriately as a guardian *ad litem* here as this is a straight legal argument since all of the facts alleged in the Complaint are taken as true.

The Court need only consider that there is no basis in English or Virginia common law to grant a guardian *ad litem* or otherwise court appointed person judicial privilege beyond the scope of what is given to any other witness in a judicial or quasi-judicial proceeding. The only exceptions our Supreme Court and this Court has ever made to that rule are based on English common law that a judge, a prosecutor and a grand juror member are granted an expanded judicial privilege when engaged in decision-making roles[13]. *Andrews v. Ring*, 266 Va. 311, 321 (2003). A guardian *ad litem* did not exist in English common law and so there is no basis for expanding common law judicial privilege to guardian *ad litems* who act outside the scope of their duties, outside of court and in bad faith. That should be preserved for the General Assembly.

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[13] This Court has not decided that a prosecutor has judicial privilege when engaged in an investigative or administrative role.

Instead, if a guardian *ad litem* seeks immunity, then it should request it under qualified[14] immunity – which both Landry and Nelson did in their plea in bars[15] which the trial court did not hear. As such it should not be a basis for determination in this venue since the trial court never decided the issue.

Landry also argues he was not a party outside of the relationship between the parent and the child. (Landry brief at p. 17-18). Given that Landry was not a parent of the child and not the child, then he was a party outside of the relationship between the parent and child. Attorneys are not in privity with their clients. *Lane v. Bayview Loan Servicing*, 831 S.E.2d 709, 715 (Va. S. Ct., 8/22/2019).

IV. The Appellees were the cause of the tortious interference of Mother's parental and custodial rights

Appellees were the proximate cause of the tortious interference of Mother's parental and custodial rights. Nelson, Campanella, and Wert attempt to all state that they did not cause the tortious interference of parental rights when they broke the June 20, 2014 court order that entitled to Mother to see her children, and

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[14] In *St. Martin v. McCracken*, the Circuit court ruled the Guardian *ad litem* had qualified immunity but he could be sued for tortious interference of parental rights where it was alleged that the guardian *ad litem* broke custody court orders which did cause the Father to not have any in person contact with his children over eighteen months except for three supervised visitation sessions because qualified immunity does not protect against intentional acts outside the scope of a guardian *ad litems* duties. 101 Va. Cir. 257, 2019 WL 4259759 (March 7, 2019).

[15] The trial court did not hear Landry and Nelson's plea and bars since they wanted to present evidence, and Mother demanded a jury trial for any evidentiary hearing.

instead withheld the children from Mother with one child being withheld from Mother for three years and the other two children being withheld from Mother for months at a time. Even though the custody court did not have jurisdiction when they were breaking the June 20, 2014 court order because the case was on appeal, they all argue that the custody court was the cause and not them. It is contrary to reason that the custody court could be the cause of Nelson, Wert and Campanella refusing to take the direction of the custody court in the June 20, 2014 order and allow Mother to see her children. While the court may have, outside of its authority, asked Nelson and Wert to set a schedule for Mother to see her children, it never allowed Nelson, Wert and Campanella to refuse to allow Mother to see her children.

As expressly stated in the Complaint, the final [June 20, 2014] custody order did not allow a termination of Mother's contact with her children and did not allow reinstatement of supervised visitation after supervised visitation was removed, but Nelson, Wert, and Campanella conspired and did remove all contact with A.W., C.W., and A.G.W. contrary to the order. (App. 6-7, 26-27 ¶¶ 99-101, 34-35 ¶¶ 131-133, 46 ¶¶ 169-170). By January 2015, Mother had limited unsupervised visitation of C.W. and A.G.W. (App. 12 ¶ 34). From April 2014 to March 2017, Mother was allowed no contact with A.W. and two of the children were wrongfully withheld during the summer of 2015 (App. 12 ¶ 33, 35, 34-35 ¶¶ 131-133).

Thus, when Nelson[16], Wert and Campanella broke the June 20, 2014 court order and wrongfully withheld the children from Mother, they were the cause of Mother's tortious interference of parental rights. The breaking of the court order was an independent and separate wrongful cause of Mother losing her children because BUT FOR Nelson, Wert and Campanella's actions of breaking the June 20, 2014 court order, Mother would have had her children after June 20, 2014.

Likewise Landry and Gasper were the direct cause of the tortious interference of parental rights because BUT FOR Landry and Gaspers' out of court conspiracy of intentionally calling Mother delusional, psychotic and a flight risk when they knew it was false, Mother would not have lost her children on August 20, 2013. As discussed in Appellant's brief, Defendants actions may be the cause in fact of a tortious interference of parental rights claim even when a court order decides custody or visitation. *See*, *Wyatt v. McDermott*, 283 Va. 685 (2012)(actual loss of custody caused by Utah custody court, but defendants liable for their out of court actions which enabled Utah courts to take away Wyatt's daughter). *See also*,

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[16] Nelson, Wert and Campanella attempt to state they couldn't be the cause because they were involved after Mother lost her children. This is incorrect and App. p. 5 details Nelson's tortious acts prior to Mother losing her children. Additionally, all orders prior to the June 20, 2014 order were *pendente lite* orders and pursuant to Va. Code § 20-103 E "An order entered pursuant to this section shall have no presumptive effect and shall not be determinative when adjudicating the underlying cause." Since they were all involved prior to June 20, 2014, Mother had not lost custody of the children before their involvement.

Kessel v. Leavitt, 511 S.E.2d 720 (W. Virginia, 1998) (actual loss of parental rights caused by Canada court order, but defendants liable for their out of court actions which enabled Canadian courts to take away Kessel's child).

When Landry[17] committed extrinsic fraud upon the custody court by fabricating and conspiring with Gasper that Mother was delusional, psychotic and a flight risk, then the extrinsic fraud made the August 20, 2013 order void *ab initio* and thus that court order could not have been the superseding cause of Mother's loss of her children.

Further, in *Nelson v. Green*[18], the court stated, "that when Plaintiff alleges "the defendant misled or coerced the intervening decision-maker such that the decision-maker's conduct [i.e. a court order] was tainted" then proximate cause has been alleged despite any intervening court cases or court orders. 965 F. Supp. 2d

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[17] As explained in appellant's brief, Landry's fraud was extrinsic because fraud on the court committed by an attorney is extrinsic fraud because there is no right to "cross-examination and impeachment to ferret out and expose false information presented to the trier of fact" of that attorney when they are making fraudulent representations to the court. *Peet v. Peet*, 16 Va. App. 323, 327 (1993). "A collateral challenge to a judgment obtained by extrinsic fraud is allowed because such fraud perverts the judicial processes and prevents the court or non-defrauding party from discovering the fraud through the regular adversarial process." *Id*.

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

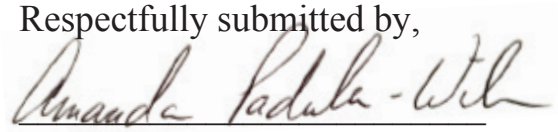
732, 748 (W.D. Va. 2013). Thus, Landry and Gasper's actions caused Mother's tortious interference of parental rights.

V. CONCLUSION

Allowing tortious interference of parental rights cases to proceed after Defendants engage in acts as egregious as they have done here would discourage this type of behavior. As the Supreme court of the United Kingdom stated when they overturned the case that was the basis of our English common law for judicial privilege and allowed a suit against a forensic psychologist to go forward, "The practical reality is that, if the removal of immunity would have any effect at all on the process of preparation and presentation of expert evidence (which is not in any event likely), it would tend to ensure a greater degree of care in the preparation of the initial report or the joint report." *Jones v. Kaney*, [2011] UKSC 13. The fact that Appellees need eleven attorneys (many of them partners) to go against one *pro se* litigant who six years ago they were calling delusional and psychotic seems to suggest that they know that Mother was never delusional and psychotic and that it was all completely fabricated because they were mad they were put on a website. If this tort is not allowed to proceed, then there will be nothing to dissuade this type of behavior as there will be no accountability. Appellees argument that no one will do this work if they can be sued is without merit – since there are still plenty of doctors and lawyers even though they can be sued. As such, Mother

respectfully requests that this Court overrule the demurrers, overrule the trial court, rule that Mother has stated a claim for both tortious interference of parental rights against all of the Appellees and defamation against Nelson, allow Mother's tortious interference of parental rights and defamation claims to proceed to trial, and grant whatever additional relief that this Court deems proper. Additionally, Mother requests her costs for this Appeal.

Respectfully submitted by,



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CERTIFICATE

I hereby certify that on this 3rd day of December, 2019, pursuant to Rule 5:26, three paper copies of the Reply Brief of Appellant have been 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 Reply Brief of Appellant was served, via email, upon:

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