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NO. COA10-1309
NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

DEBORAH HINTON-LYNCH,
Plaintiff,

v.

Johnston County
No.08 CVS 338

BRUCE FRIERSON, CAROLYN
FRIERSON, and CHESARE HORTON,
Defendants.

Appeal by plaintiff from order entered 12 April 2010 by
Judge Shannon R. Joseph in Johnston County Superior Court.
Heard in the Court of Appeals 23 March 2011.

*Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by
Alicia Journey Whitlock, for plaintiff.*

*Hewett & Wood, P.A., by Alan B. Hewett, for defendant
Horton.*

*Mast, Mast, Johnson, Wells & Trimyer, P.A., by George B.
Mast and Ephriam B. Wright, III, for defendants Bruce and
Carolyn Frierson.*

ELMORE, Judge.

Deborah Hinton-Lynch (plaintiff) appeals an order granting
a judgment notwithstanding the verdict (JNOV) in favor of the
movants, defendants Chesare Horton (defendant Horton) and Bruce

and Carolyn Frierson (the Friersons). After careful consideration, we affirm.

The basic facts are undisputed: Plaintiff and defendant Horton had a child together, whom we refer to as Sally. Plaintiff had legal custody of Sally pursuant to a Georgia court order, but she left Sally with her parents in North Carolina in early October 2004. After four months, Sally's grandparents (the Friersons) contacted defendant Horton, who did not know that Sally had been living with her grandparents. Defendant Horton retrieved the child and took her to his home in Georgia. The next day, a New Jersey court concluded that plaintiff had relinquished her custodial rights to Sally by leaving the child with her parents for four months. Several years later, plaintiff sued defendants for tortious interference with child custody, civil conspiracy, and intentional infliction of emotional distress. A jury found in favor of the mother, but the trial court granted the defendants' motion for JNOV, entering judgment in favor of defendants. The mother then appealed the JNOV to this Court.

The legal issue before us boils down to whether, at the time the father removed the child from her grandparents' home,

the mother had custody rights that were superior to the father's.

I. Background

Plaintiff and defendant Horton had Sally in 2000, but the couple never married, and, by 2002, they were no longer a couple. A 3 April 2002 consent order, entered in Cobb County, Georgia, stated that plaintiff was Sally's legal custodian. A 9 May 2002 order, also entered in Cobb County, declared that Sally was defendant's legitimate daughter. The order gave defendant Horton visitation rights. The next order in the record was signed on 4 August 2003 in Essex Vicinage, New Jersey, on a motion by plaintiff to limit defendant's visitation rights to supervised visitation rather than unsupervised visitation. The order acknowledged the May 2002 Georgia order, noting that it was in effect in New Jersey, and set out a schedule of supervised visitation. A second New Jersey order, signed 31 January 2005 in response to a petition by defendant Horton to enforce his visitation rights, denied those rights because plaintiff had "relinquished custody." The order also included the following note: "Def. says minor has been [with maternal grandparents] since 10/04. Pltf. Hinton relinquished custody to

[maternal grandparents] in Dec/04, she states. Child is now [with the father]."

On 3 March 2005, defendant Horton faxed a petition to the New Jersey trial court for a change in custody to him. After a hearing, the New Jersey court granted defendant Horton's petition on 17 March 2005. Plaintiff appealed, and a New Jersey appellate court reversed and vacated the 17 March 2005 custody order because New Jersey had no subject matter jurisdiction over Sally's custody case. Because Georgia had never relinquished jurisdiction, it had continuing jurisdiction over its original custody order, which precluded New Jersey from exercising jurisdiction over the custody case, pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). We note that the appellate court only vacated the 17 March 2005 custody order; it did not vacate any of the visitation orders, including the 31 January 2005 order that stated that plaintiff had relinquished custody of Sally. In the interim, plaintiff drafted a fake New Jersey custody order giving her sole custody of Sally, which she attempted to enforce in Georgia. She was charged and convicted criminally of this forgery.

On 18 February 2008, plaintiff initiated this suit.

II. Arguments

The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. A directed verdict and judgment notwithstanding the verdict are therefore not properly allowed unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish.

Scarborough v. Dillard's, Inc., 363 N.C. 715, 720, 693 S.E.2d 640, 643 (2009) (quotations and citations omitted). We address each cause of action in turn.

A. Tortious Interference with Child Custody

It appears that no North Carolina appellate court has addressed "tortious interference with child custody." Plaintiff sets out elements of this cause of action in her brief, but she relies on three cases that address the tort of abduction to do so. See *Howell v. Howell*, 162 N.C. 283, 78 S.E. 222 (1913); *Coleman v. Shirlen*, 53 N.C. App. 573, 281 S.E.2d 431 (1981); *La Grenade v. Gordon*, 46 N.C. App. 329, 264 S.E.2d 757 (1980). At common law, "[a] father has a right of action against every person who knowingly and wittingly interrupts the relation subsisting between himself and his child or abducting his child away from him or by harboring the child after he has left the

house." *Howell*, 162 N.C. at 287, 78 S.E. at 224 (quotations and citation omitted). Both *Coleman* and *La Granade* followed this rule, which relies in part on the common law rule that the father of a minor child has custody rights that are superior to the mother's, so that in the absence of a custody agreement to the contrary, a father has a cause of action against his child's mother if she abducts the minor child. *La Grenade*, 46 N.C. App. at 331-32, 264 S.E.2d at 758. We no longer follow the common law "presumption vesting custody of an illegitimate child in the child's mother" because N.C. Gen. Stat. § 50-13.2(a) "clearly abrogates" that common law presumption. *Rosero v. Blake*, 357 N.C. 193, 207, 581 S.E.2d 41, 49 (2003). By the same logic, § 50-13.2(a) also abrogates the common law presumption vesting superior custody rights to a legitimate child in the father. See N.C. Gen. Stat. § 50-13.2(a) (2009) ("Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child."). But even without those presumptions, the cause of action itself still lies, and because both parties and the trial court seem to have agreed that they were litigating defendant Horton's liability for abducting his minor child and the

Friersons' liability for helping him abduct his minor child, we evaluate the viability of that claim.

To prove the common law tort of abducting a minor child, the plaintiff must show that she had a superior right to custody of the minor child. *La Grenade*, 46 N.C. App. at 332, 264 S.E.2d at 759. The general rule is that legal custody, once established by a court, can only be modified by a court. *E.g.*, *West v. Marko*, 130 N.C. App. 751, 755, 504 S.E.2d 571, 574 (1998) (explaining that, so long as a custody order remains a valid court order, "it can only be modified on a showing of a substantial change in circumstances affecting the welfare of the child.") (citation omitted). In this case, legal custody was established by a Georgia court, and, pursuant to the UCCJEA, only a Georgia court can modify it. See N.C. Gen. Stat. § 50A-203 (2009) ("[A] court of this State may not modify a child-custody determination made by a court of another state" if the other state court has not determined that it no longer has exclusive continuing jurisdiction). But this is not a custody claim; this is a tort claim. As the trial court pointed out multiple times, the parties were not in district court and the custody action was entirely separate from the tort action. And, although from a custody perspective, the Georgia order giving

plaintiff legal custody of Sally was still in effect at the time of the alleged abduction, from a tort perspective, plaintiff had lost her superior custody rights by acting inconsistently with her parental rights. No North Carolina cases have yet addressed this particular issue of tortious interference with child custody, but there are a number of custody cases that discuss what it means for a parent to act inconsistently with her parental rights.

In *Price v. Howard*, the Supreme Court stated that parental conduct should be viewed on a case-by-case basis, but that "failure to maintain personal contact with the child or failure to resume custody when able" could be conduct inconsistent with parental rights. 346 N.C. 68, 83-84, 484 S.E.2d 528, 537 (1997). In *Adams v. Tessener*, the Supreme Court used the polestar of the child's best interests to grant custody to the child's grandparents over the natural parents. 354 N.C. 57, 66, 550 S.E.2d 499, 505 (2001) Although a natural parent has a "paramount constitutional right to custody and control over his or her children," that right is not absolute. *Id.* at 62, 550 S.E.2d at 503. The government can remove a child from her natural parents only (1) "upon a showing that the parent is unfit to have custody" or (2) "where the parent's conduct is

inconsistent with his or her constitutionally protected status.”

Id. Our Supreme Court first explained the second exception in

Price:

A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent would offend the Due Process Clause. However, conduct inconsistent with the parent's protected status which need not rise to the statutory level warranting termination of parental rights would result in application of the "best interest of the child" test without offending the Due Process Clause. Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy.

Price, 346 N.C. at 79, 484 S.E.2d at 534 (quotations and citations omitted). Even though this is a tort action and not a custody action, the principle that a parent whose conduct is

inconsistent with her constitutionally protected status may no longer enjoy that paramount status still applies.¹

Here, plaintiff acted inconsistently with her legal custody rights by failing "to shoulder the responsibilities that are attendant to rearing a child." *See id.* Specifically, she left the child with her parents for four months and provided support of only \$270.00 during that time. Although she turned over the debit card attached to the account into which defendant Horton was paying child support, this merely had the practical effect of Horton continuing to support his child while she lived with her grandparents; the trial court did not impute this support to plaintiff, and neither do we. As a result of her actions, plaintiff lost her paramount custody status, and she did not have custody rights superior to defendant Horton's at the time of the alleged abduction. Thus, as a matter of law, plaintiff could not prevail on her abduction of a minor (or interference with child custody) claim, and the trial court properly entered a judgment notwithstanding the verdict in favor of defendants.

¹ We emphasize that, because the matter of custody is not before us and the standard is higher in a custody action than a tort action, we make no determination as to the proper custodial arrangements for Sally and our opinion should not be read as such.

B. Civil Conspiracy

To prove civil conspiracy, a plaintiff must prove: (1) the existence of an agreement between the defendants, (2) that one or more of the conspirators committed an overt, tortious act in furtherance of the conspiracy, and (3) that the plaintiff suffered damages caused by the act committed pursuant to the conspiracy. *Coleman*, 53 N.C. App. at 577, 281 S.E.2d at 433.

Here, because plaintiff's abduction claim failed, she cannot show that defendants committed an overt, tortious act, and so she cannot establish the elements of a civil conspiracy.

C. Intentional Infliction of Emotional Distress

"The essential elements of a claim for intentional infliction of emotional distress are 1) extreme and outrageous conduct by the defendant 2) which is intended to and does in fact cause 3) severe emotional distress." *Holloway v. Wachovia Bank & Trust Co.*, 339 N.C. 338, 351, 452 S.E.2d 233, 240 (1994) (quotations and citation omitted). The extreme and outrageous conduct that plaintiff complains of is defendants' intentional interference with her custody rights. Given our analysis and holding in part II.A. of this opinion, we cannot conclude that

the trial court erred by entering a JNOV as to plaintiff's intentional infliction of emotional distress claim.

III. Conclusion

Accordingly, we affirm the order of the trial court.

Affirmed.

Judges BRYANT and STEPHENS concur.

Report per Rule 30(e).