No. 130931

IN THE SUPREME COURT OF ILLINOIS

VIERA HULSH Plaintiff-Petitioner, v. MAYA HULSH and OREN HULSH Defendants-Respondents.	)))))))))	Petition for Leave to Appeal from the Appellate Court of Illinois, First Judicial District No. 1-22-1521 There heard on appeal from the Circuit Court of Cook County, County Department, Law Division No. 2021 CH 00831 Judge Patrick Sherlock, Presiding

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BRIEF OF APPELLEE OREN HULSH

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POINTS AND AUTHORITIES

I. INTRODUCTION

Appellant, Viera Hulsh ("Viera" or "Appellant"), asks this Court to depart from *stare decisis* and to abandon nearly 40 years of precedent. Viera wants this Court to recognize a new tort of tortious interference with custodial rights. This Court has made it clear that it does not recognize any such tort. This Court has deferred to the state legislature to create (or not) the claimed new tort. The legislature has not created the tort. It does not exist. This Court should not go behind its own *stare decisis* and create it now.

Despite the non-existence of the claimed tort, Viera brought an action in the Circuit Court for Cook County ("Circuit Court" or the "trial court") against Appellees, Maya Hulsh ("Maya") and Oren Hulsh ("Oren,") (collectively "Appellees"), based on three alleged causes of action: tortious interference with custodial rights, civil conspiracy to aid and abet tortious interference with custodial rights, and intentional infliction of emotional distress. The Circuit Court granted the Respondents' Motions to Dismiss as to the tortious interference with custodial rights and civil conspiracy to aid and abet tortious interference with custodial rights. On September 8, 2022, the Circuit Court entered an order granting Viera's motion for voluntary dismissal of the intentional infliction of emotion distress count, which terminated the action. Viera appealed to the Appellate Court of Illinois, First Judicial District (the "intermediate appellate court"). The intermediate appellate court affirmed the trial court. This Court should affirm the intermediate appellate court.

II. STATEMENT OF FACTS

A. Background

Viera's allegations stem from litigation in the Slovak Republic and United States District Court for the Northern District of Illinois between herself and her former husband, Jeremy Hulsh ("Jeremy"). Jeremy is not a party in the Circuit Court litigation. (C-19–32). Oren is the brother of

Jeremy and the former brother-in-law of Viera. (*Id.*). Oren is not a party in the Slovak Republic litigation nor the Northern District of Illinois litigation. (C-131).

Viera and Jeremy have two children (the "Children"). (C-20, ¶ 7). Viera and Jeremy obtained a divorce in Slovakia in 2019. (*Id.*). In October 2019, Jeremy removed the Children from the Slovak Republic and brought them to Chicago. (C-21, ¶¶ 9–12). On July 21, 2020, the United States District Court for the Northern District of Illinois entered a return order, requiring that the Children be returned to the Slovak Republic. (C-23, ¶ 27). The Children returned to the Slovak Republic. Currently, and at all relevant times during the Circuit Court litigation, the Children have been in the Slovak Republic with Viera. (C-23, ¶ 24).

B. The Allegations

Viera filed her Complaint in the Circuit Court on February 22, 2021. (C-19-32). Viera's Complaint asserted some 10 allegations against Oren, which she largely based upon information and belief:

- Jeremy booked a rental car in Oren's name. (C-21, ¶ 11).
- Oren paid for the rental car after Jeremy and the Children arrived in Canada from the Slovak Republic and drove into the United States. (*Id.*).
- Oren was sometimes present at a home in Illinois and while there, he helped care for the Children. (*Id.*, ¶ 15).
- Oren did not contact Viera. (*Id.*, ¶ 16).
- Jeremy and the Children stayed in a condominium unit owned by Oren. (*Id.*, ¶ 17).
- Oren assisted Jeremy with living expenses, including use of a car. (*Id.*, ¶ 18).
- Oren paid for Jeremy's expenses related to traveling with the Children from the Slovak Republic to Illinois. (*Id.*, ¶ 20).

- Oren assisted Jeremy with legal expenses. (*Id.*).
- Oren was a witness, by affidavit, in the Slovak Republic litigation. (*Id.*, ¶ 21).
- Oren was aware of the content of custody orders entered in the Slovak Republic litigation. (*Id.*, ¶ 22).

C. The Causes of Action

Viera brought three counts against Oren and Maya. (C-19-32). The first count was for tortious interference with custodial rights. (C-28–29). The second count was for civil conspiracy to aid and abet tortious interference with custodial rights. (C-29-30). The third count was for intentional infliction of emotional distress. (C-30–31).

Only the Circuit Court's decisions relating to the first and second counts are on appeal. (A-1-32). As to these counts, Viera requested judgment against Oren through a declaration that he "must pay Viera an amount equal to all future lost income and attorney fees and expenses reasonably incurred in litigating the Bankruptcy Case pending in the United States Bankruptcy Court for [the] Northern District of Illinois, cause 20-16482, and all future lost income, transportation and living expenses, and attorney fees and expenses reasonably incurred obtaining payment of the fee and expense award entered by the United States District Court for the Northern District of Illinois in cause 119-CV-7290." (C-28-29). Viera also requested judgment against Oren for "reasonable punitive damages commensurate with [his] outrageous misconduct." (C-29-30).

D. Motion to Dismiss

On April 2, 2021, Oren moved to dismiss the Complaint pursuant to 735 ILCS 5/2-615. (C-130-139). Oren explained that tortious interference with custodial rights and civil conspiracy to aid and abet tortious interference with custodial rights are not causes of action under Illinois law. (C-132). On December 17, 2021, Viera filed her Response to the motion. (C-188-206) (the

exhibits thereto are excluded from citation). Viera's response relied on other states' laws in her attempt to argue that the Illinois Supreme Court would, but has not, recognized a cause of action for tortious interference with custodial rights and with it civil conspiracy to aid and abet tortious interference with custodial rights. (C-194-198). On January 24, 2022, Oren filed his reply to the Response in which he argued the flaws and circular reasoning advanced in Viera's Response. (C-282-288).

On February 24, 2022, the trial court (Hon. Patrick J. Sherlock) entered an Order granting Oren's Motion to Dismiss as to Count I and Count II of Viera's Complaint. (C-296-300). The trial court held that there is no cause of action recognized in Illinois for tortious interference with custodial rights. (C-298). The trial court further held that the civil conspiracy claim fails because there is no cause of action for tortious interference. (C-299). Viera's appeal to the intermediate appellate court on these issues followed.

E. The Intermediate Appellate Court's Opinion

The intermediate appellate court affirmed the trial court's decision. It recognized that for Viera to prevail, the appellate court would have to ". . . recognize a new tort for interference with custodial rights in the context of international child abduction . . ." (A-1). It further explained that " . . . it is the prerogative of our supreme court or the legislature to create new causes of action, not [the intermediate appellate] court." *Id.* It also found that public policy does not support a new cause of action. *Id.*

III. ARGUMENT

A. This Court Should Not Depart From *Stare Decisis* to Create a New Tort.

1. General principles of *stare decisis*.

Viera asks this Court to depart from its long-standing precedent. This Court has declined

to recognize a new tort for interference with custodial rights. But s*tare decisis*—the doctrine fundamental to the rule of law and a well-functioning judicial system—is fatal to Viera's position. *See Welch v. Texas Dept. of Highway and Public Transp.*, 483 U.S. 468, 494 (1987). This Court has repeatedly declined to recognize the claimed tort. This Court has concluded that it is the legislature that must decide whether a new cause of action should be created. *See Vitro v. Mihelcic,* 209 Ill. 2d 76, 81-88 (2004). The legislature has not created any such new cause of action. This Court should not reverse course now and abandon its long-standing precedent. The point has been settled by this Court.

"The doctrine of *stare decisis* expresses the policy of the courts to stand by precedents and not to disturb settled points." *Vitro,* 209 Ill. 2d at 81 (citations omitted); *see also Clark v. Children's Memorial Hosp.,* 2011 IL 108656, ¶ 102 (2011) (citing *People v. Colon,* 225 Ill. 2d 125, 145 (2007)); *Wakulich v. Mraz,* 203 Ill. 2d 223, 230 (2003). It is "the means by which courts ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vitro,* 209 Ill. 2d at 81-82. "*Stare decisis* enables both the people and the bar of this state to rely upon this court's decisions with assurance that they will not be lightly overruled." *Id.* (internal quotations omitted) (citing *Moehle v. Chrysler Motors Corp.,* 93 Ill. 2d 299, 304 (1982)).

This Court has long and consistently held that "any departure from *stare decisis* must be specially justified and that prior decisions should not be overruled absent good cause or compelling reasons." (cleaned up). This Court has further acknowledged that "it will not depart from precedent merely because the court is of the opinion that it might decide otherwise were the question a new one." *Id.* (citations omitted). The Court has summarized the concept as follows: "when a rule of law has once been settled, contravening no statute or constitutional principle, such rule ought to

be followed unless it can be shown that serious detriment is thereby likely to arise prejudicial to public interests." *Id.* (citing *Maki v. Frelk,* 40 Ill. 2d 193, 196-97 (1968); *Heidenreich v. Bremner*, 260 Ill. 439, 450-51 (1913)). Viera has not made any such showing below. Viera cannot make any such showing here. *See infra*.

2. *Stare decisis* on custodial interference tort.

For nearly four decades, Illinois jurisprudence has been consistent. Illinois jurisprudence has declined to recognize tortious interference with custodial rights as an action in tort. This Court should not abandon its precedent now.

The line of cases began with an intermediate appellate court case. It led to nearly 40 years of this Court having declined to recognize the tort. In *Whitehorse v. Critchfield*, the plaintiff father sued two teachers who had induced his daughter to leave her home in a Native American community in Utah, and to change her religion. *Whitehorse*, 144 Ill. App. 3d 192 (1986). The teachers put the daughter on a plane to Illinois, concealed her location from her father, and attempted to arrange for the child to be adopted by another couple. *Id.* The plaintiff father sued the prospective adoptive parents for tortious interference with parental rights, conspiracy to deprive the plaintiff of custody of his child, aiding and abetting the teachers in their conduct, and intentional infliction of emotional distress. *Id.* The trial court in *Whitehorse* dismissed the plaintiff's claims, and the appellate court affirmed, expressly declining to recognize a cause of action for tortious interference with custodial rights. *Id.* The appellate court explained as follows:

> Plaintiff argues that defendants' actions tortiously interfered with his parental rights and such interference also constituted intentional infliction of emotional distress. Plaintiff urges this court to recognize a new cause of action based upon a tortious interference with a custodial parent's right to custody, care, and companionship of his child. We decline to do so, feeling this area, because of its multiple ramifications and potential for abuse, is more properly a

> subject for the legislature's consideration.

Whitehorse, 144 Ill. App. 3d at 194.

In the nearly four decades following *Whitehorse*, this Court has taken the same approach and has declined to recognize the tort. This Court first analyzed the issue in *Dralle v. Ruder*, 124 Ill. 2d 61 (1988). In *Dralle*, plaintiff parents sued a drug manufacturer for the loss of their child's society and companionship, alleging that a drug produced by the company had caused birth defects in their child. *Id.* The parents' claim was dismissed in the lower court. *Id.* When the appeal came before this Court, the Illinois Supreme Court held that no tort exists that would allow parents to recover for the loss of a child's society and companionship in a nonfatal case. *Id*.

Next, this Court revisited its *Dralle* holding on the issue of custodial interference claims in *Doe v. McKay* approximately 10 years later. 183 Ill. 272 (1998). In *Doe*, the plaintiff father sued a defendant therapist for intentional interference with the parent-child relationship, loss of the child's society, and intentional infliction of emotional distress. *Id*. The plaintiff father alleged that the defendant therapist had suggested to the child that the father had abused her. *Id*. The *Doe* Court affirmed the trial court's dismissal of the father's complaint, relying on the Court's earlier holding in *Dralle*. *Id.* The *Doe* Court further explained that although the *Dralle* case involved allegations of "indirect interference" with the parent-child relationship, the same analysis applies to "direct interference" with the parent-child relationship. *Id*. The *Doe* Court reiterated that there is no cause of action based on custodial interference with parental rights in Illinois, regardless of whether the allegations relate to direct or indirect interference. *Id*.

Most recently, this Court again revisited its *Dralle* holding in *Vitro v. Mihelcic* in 2004. The Court reaffirmed again its *Dralle* holding, namely that parents cannot recover for the loss of a child's society and companionship in a nonfatal case. *Vitro*, 209 Ill 2d 76. In *Vitro*, the plaintiffs'

complaint sought damages for loss of filial consortium resulting from their daughter's nonfatal injuries. The same claim had been rejected in *Dralle*. The trial court and appellate court both held that the plaintiffs' complaint failed to state a claim. *Id.*

In the appeal to this Court, the *Vitro* plaintiffs argued that *Dralle* had been incorrectly decided, and they urged this Court to overrule its *Dralle* decision. This Court applied the principle of *stare decisis* to reaffirm its *Dralle* holding and to again decline to recognize tortious interference with custodial rights as an action in tort. *Id.* at 81-88. This Court was clear that although it found some portions of the *Dralle* rationale to be flawed, the Court continued to "nevertheless agree with an important basis" for the *Dralle* holding—namely, that this Court "has evinced a preference for a statutory rather than nonstatutory, or judicially created, basis for the new claim." *Id.* at 88. This Court in *Vitro* further explained that "[i]mplicit in the [*Dralle*] court's reasoning is the conclusion that it is the legislature which should decide whether this new cause of action should be created." *Id.* This Court held in *Vitro* that it continued to agree with the conclusion that a new tort of tortious interference with custodial rights is for the legislature, not the judiciary, to decide. *Id.*

The *Vitro* Court reaffirmed that "[w]e believe that, notwithstanding the flaws in other portions of *Dralle*'s rationale, this legislative deference is in itself a valid basis for reaffirming *Dralle*." *Id.* at 90. The Court further reasoned that there had been no post-*Dralle* decisions by this or any other court that criticized or called into doubt the *Dralle* holding. *Id.* Rather, the Court emphasized that in its *Doe* decision 10 years after *Dralle*, the Court relied on *Dralle*'s reasoning to reject the existence of a tort based on "direct interference" with the parent-child relationship. *Id.* The *Vitro* Court concluded that its reliance on *Dralle* in *Doe* "negates any claim that *Dralle* has become unworkable. On the contrary, it would appear that the rule in *Dralle* is now ***firmly settled***." *Id.* (emphasis added).

Here, as in *Vitro*, Viera has failed to demonstrate good cause or compelling reasons to depart from *stare decisis* in the application of this Court's firmly settled rule in *Dralle*. She has not articulated a single reason why this case presents good cause or compelling reasons for the Court to abandon its decades long precedent and its even longer-standing policy of deference to the legislature on the creation of new torts. And unlike the plaintiffs in *Dralle, Vitro, and Doe*, Viera has in fact already obtained monetary relief relating to the underlying abduction she alleged of the children. She obtained that relief in the federal court against Jeremy. She could have included Oren and Maya as defendants in that case and sought monetary relief against them there. Viera's position here therefore presents zero compelling reason for the Court's reconsideration of its holdings in *Dralle, Vitro, and Doe*.

Applying the principles of *stare decisis*, this Court should not recognize a new tort of tortious interference with custodial rights. This Court should continue to uphold the rule of law and its long-standing deference to the legislature to create (or not) new torts.

3. In the alternative, prospective application of the new tort, if recognized, is the only way to protect Oren's due process rights.

Even if this Court were to abandon its *Dralle, Doe,* and *Vitro* holdings and to recognize in this case a new tort of tortious interference with custodial rights—which it should not—any such new recognition should only be applied prospectively to future cases, not retroactively to this case.

This Court, as the highest court of the State, has the inherent power to make its rulings prospective. *Elg v. Whittington,* 119 Ill. 2d 433, 356-57 (1987); *see also Molitor v. Kaneland Community Unit Dist. No. 302,* 18 Ill. 2d 11, 29 (1959) (superseded by statute on other grounds) (citing *Great Northern Railway Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358) (1932). A new rule or decision should be given prospective operation "whenever injustice or hardship due to justifiable reliance on the overruled decisions would thereby be averted." *Id.* So here.

Whether a rule will be applied prospectively depends upon whether the decision to be applied establishes a new principle of law, "either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Id*. If the criteria is met, then the Court must consider "(1) whether, given the purpose and prior history of the rule, its operation will be retarded or promoted by prospective or retroactive application; and (2) whether prospective application is mandated by the balance of equities." *Id.* (citations omitted). Again, so here.

Application of these principles supports the prospective application of the Court's decision here, if the Court abandons its precedent and recognizes a new tort of tortious interference with custodial rights. Here, at the initiation of this case, and as determined by both the trial court and the intermediate appellate court, tortious interference with custodial rights was not a tort that existed in Illinois. Prospective application here would neither retard nor promote any purpose for the creation of the new tort. Balancing the equities, Oren would be deprived of his due process rights if he were to be required to defend against a new tort that did not exist in Illinois at the time of the alleged tortious behavior and at the time of all of the pending litigation between the parties to this action for the last nearly four years.

Applying the principles of *stare decisis*, this Court should not recognize a new tort of tortious interference with custodial rights. But if it does, this Court's opinion must be applied prospectively only, excluding Oren and Maya, in order to protect the right to due process.

4. Jurisprudence of sister states does not support departing from *stare decisis*.

In a misjudged attempt to argue that sister states' courts have created a tort of tortious interference with custodial rights, Viera cites cases from Maryland, New Hampshire, Missouri, and Texas. None of the cases she relies upon supports her position.

Firstly, Maryland's *Khalifa v. Shannon* case is inapposite. 404 Md. 107 (2008). In *Khalifa*, the plaintiff/father sued the child's mother and maternal grandmother for tortious interference with custodial rights. The mother and grandmother had abducted the child from Maryland to Egypt, in violation of a Maryland custody order, thereby depriving the father of his court ordered custody and access rights to the child. The defendants in *Khalifa* moved to dismiss the plaintiff's complaint, arguing that the tort of tortious interference with custodial rights did not exist in Maryland. The trial court denied the motion and the case proceeded to trial. The plaintiff prevailed and obtained a jury verdict and a judgment against the defendants. On appeal to Maryland's highest court (then called the Court of Appeals, now called the Supreme Court), the Maryland Supreme Court held that the tort of tortious interference with custodial rights had in fact long existed under Maryland law. It affirmed the lower court. There were no prior Maryland Supreme Court cases holding to the contrary, and no prior Maryland Supreme Court cases deferring to the legislature relating to the tort. *Khalifa* is therefore inapplicable because the Maryland Supreme Court simply recognized an already-existing tort; it was not called upon to abandon *stare decisis*.

Viera also attempts to rely on *Khalifa* for the proposition that custodial interference tort cases involving international abductions "often do not discuss the Hague Convention" in the context of other remedies that had been available to the tort plaintiff. But *Khalifa* would have had no reason to discuss the Hague Convention because the United States and Egypt are not treaty partners[1] under the Hague Convention, and the plaintiff in *Khalifa* therefore did not have the ability to seek relief under the Hague Convention. *Khalifa* is inapposite here in all respects.

The cases Viera attempts to rely upon from New Hampshire, Missouri, and Texas likewise

[1] *See* Hague Abduction Convention Country List, text available at: https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/hague-abduction-country-list.html (last accessed November 13, 2024).

have no bearing here. None of the cases from these sister states were called upon to abandon *stare decisis* and to create a new tort of tortious interference with custodial rights. *See Siciliano v. Capitol City Shows, Inc*., 124 N.H. 719 (1984) (issue before the court related to liability of a negligent tortfeasor for harm to a plaintiff that resulted from one child's death and the other's injury on an amusement park ride); *Plante v. Engel,* 124 N.H. 213 (1983) (distinguishing actions for loss of a child's services from actions for loss of custody); *Powell v. A. Motors Corp.,* 834 S.W. 2d 184 (Mo. 1982) (declining to recognize common law action in children or parents of injured party); *Kramer v. Leineweber,* 642 S.W.2d 364 (Mos. Ct. App. 1982) (action was based on already-existing torts of loss of services and companionship under state law); *Silcott v. Oglesby,* 721 S.W.2d 290 (Tex. 1986) (damages awarded to plaintiff in statutory child abduction tort previously enacted by state legislature); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967) (food manufacturer can be liable in negligence for contaminated food related injuries to plaintiff).

Applying the principles of *stare decisis*, this Court should not recognize a new tort of tortious interference with custodial rights. Jurisprudence of sister states does not support abandoning this Court's precedent declining to recognize the new tort.

VI. CONCLUSION

Tortious interference with custodial rights is not a cause of action in Illinois. There is no rational, factual or jurisprudential basis for this Court to depart from *stare decisis* and abandon its four decades of precedent holding that the tort does not exist. The Court has deferred to the state legislature for nearly 40 years to enact (or not) legislation to create a new tort of tortious interference with custodial rights. The legislature has not done so. The tort does not exist. This Court should not create it. The intermediate appellate court's decision should be affirmed.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, Rule 341(h)(1) table of contents and statement of points and authorities, Rule 341(c) certificate of compliance, certificate of service, is 4,077 words.

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CERTIFICATE OF SERVICE

On November 13, 2024 at 7:00 p.m., I served this Brief by email on Thomas Kanyock at tkanyock@pattersonlawfirm.com, and Peter Ordower at PO@ChicagoLawsuits.com.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil procedure, the undersigned certifies that the statements in this instrument are true and correct.

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