

Sanctions upheld in two cases with false abuse claims

By PAUL THARP, Staff Writer

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The Court of Appeals tackled the issue of unsubstantiated claims of sexual abuse in the context of child-custody cases in two March 1 opinions - and upheld sanctions in both disputes.

In one case, *Lamm v. Lamm* (Lawyers Weekly No. 11-07-0213, 17 pp.), the court sanctioned Pamela R. Lamm after she filed an emergency motion alleging that her son would be "exposed to a substantial risk of bodily injury or sexual abuse" if an immediate order curtailing Kenneth R. Lamm's visitation was not issued.

Mrs. Lamm filed the motion the day before Mr. Lamm's summer visitation with their son was due to begin.

The trial court granted an emergency custody order, but after the Pasquotank County Department of Social Services concluded that the allegations were unsubstantiated, the court dismissed the emergency order and awarded primary custody of the son to Mr. Lamm.

In its order, the trial court found that Mrs. Lamm's emergency custody motion lacked basis in law or fact and was made for the improper purpose of blocking Mr. Lamm's scheduled summer visitation. The court ordered Mrs. Lamm to pay Mr. Lamm \$3,500 for the attorney's fees he incurred defending the motion for an emergency custody order.

The court upheld the Pasquotank County trial court's decision to impose sanctions against Mrs. Lamm under G.S. § 1A-1, Rule 11(a), and upheld the attorney's fee award.



Spence

Manteo attorney W. Mark Spence, who represented Mr. Lamm, said the timing of the motion contributed to the court's finding that it had been brought for an improper purpose. By the time underlying motions were heard, he said, Mr. Lamm's summer visitation with his son had been eliminated. That, Spence said, had been Mrs. Lamm's intent all along.

"You see the allegation of physical or sexual abuse made a lot without evidence," he said. "It doesn't most of the time get into pleadings in the midst of a pending custody case like it was in this case."

Spence said he hopes the *Lamm* case sends a message to attorneys and litigants that courts will enforce Rule 11 to preclude unsubstantiated abuse claims. "I've seen so many claims that are made to obtain improper leverage in child custody and domestic cases," he said.

In the second Court of Appeals opinion, *Peters v. Pennington* (Lawyers Weekly No. 11-07-0215, 42 pp.), the court addressed a panoply of issues arising from a three-week domestic trial in Mecklenburg County that featured as many as 24 witnesses who testified as to whether Marco Peters abused his sons, as alleged by his ex-wife, Lisa Pennington.

Witnesses also testified as to whether Pennington's "actions in connection with her allegations of abuse were abusive and caused damage to the children." The court found that they were. It also concluded that Peters had never abused the children.

Instead, it found that "Dr. Pennington had abused her children by 'manipulat[ing], whether intentionally or not, the minor children's recollections and memories, instilling in them false images of being sexually abused by their father.'"



Odom

Charlotte attorney Preston Odom III, who represented Peters, said the case represented one in which a party “used the allegation of abuse as a tactic in a divorce case.” Citing the *Lamm* decision, Odom warned that when “blatantly unsubstantiated allegations are made in that context, sanctions are proper.”

Pennington challenged numerous portions of the trial court’s order on appeal, including the court’s conclusion that she was “not a fit [or] proper person to exercise custody or unsupervised visitation with the minor children” and that she should “pay all uninsured therapy costs incurred on behalf of the children due to her ‘role in creating this crisis.’”

The Court of Appeals upheld the trial court’s custody determination. It also upheld an order requiring Pennington to pay Peters’ lawyers \$224,196.

The court vacated and remanded for hearing to the trial court an award of \$42,462 derived from “expert consultation, testimony, and travel and other litigation-related expenses” because the trial court’s order pertaining to those costs “lack[ed] findings as to how these costs were incurred.”

The court also vacated an order requiring Pennington to acknowledge that Peters did not sexually abuse the children and accept as true the trial court’s conclusion that she harmed her children.

The Court of Appeals ruled that it “was an abuse of discretion to require Dr. Pennington to change her beliefs and prove to a counselor that such a change has in fact occurred.”

The court upheld sanctions imposed against Pennington’s counsel, a Pennsylvania attorney named Erica Burns who was admitted pro hac vice. The trial court had “concluded that several factual allegations made by Ms. Burns in post-trial motions had no factual support.” The Court of Appeals upheld that conclusion as well as the sanctions.

“Either [Burns] failed to make an adequate inquiry in these factual allegations or did not reasonably believe the allegations were well-grounded in fact,” Judge Robert N. Hunter Jr. wrote for the court.

Odom said in *Peters* “the sanctions against the pro hac lawyer focused not on the underlying substantive allegations but instead on unsubstantiated procedural allegations during trial. “Cautious litigators,” he added, “must properly represent what happened in court proceedings to the court.”

Spence agreed. “Lawyers are bound by rules and ethical standards to make reasonable investigation into the factual basis of allegations in a motion.” When such an investigation is not conducted, parties and lawyers both may be sanctioned.

The *Peters* case, Odom said, confirms that “Rule 11 is alive and well and as officers of court, we must abide by its dictates.”

Opinion Briefs

Case name: *Lamm v. Lamm*

Court: N.C. Court of Appeals

Date: March 1, 2011

Judges: Judge Rick Elmore; Judges Robert C. Hunter and Ann Marie Calabria, concurring

Plaintiff-appellee’s attorney: W. Mark Spence of Aldridge, Seawell & Spence (Manteo)

Defendant-appellant’s attorneys: K. Edward Greene, Tobias S. Hampson of Wyrick Robbins Yates & Ponton (Raleigh); Edward Eldred (Carrboro)

Issue: Did the trial court's findings of fact and conclusions of law support its decision to impose sanctions against the defendant, and did the trial court abuse its discretion in awarding the plaintiff attorney's fees as a sanction?

Holding: The trial court's findings of fact supported its conclusion of law, and the trial court did not abuse its discretion in awarding the plaintiff \$3,500 in attorney's fees.

Case name: *Peters v. Pennington*

Court: N.C. Court of Appeals

Date: March 1, 2011

Judges: Judge Robert N. Hunter Jr.; Judges Robert C. Hunter and Ralph A. Walker, concurring.

Plaintiff-appellee's attorneys: Preston O. Odom III, Jonathan D. Feit and Sarah M. Brady, all of James McElroy & Diehl (Charlotte)

Defendant-appellant's attorneys: K. Edward Greene and Tobias S. Hampson of Wyrick Robbins Yates & Ponton LLP (Raleigh)

Appellant's attorney: Erica N. Burns, pro se appellant

Issues: (1) Did the trial court's findings of fact support its conclusions of law? (2) Did the trial court err in drawing its conclusions regarding child custody? (3) Did the trial court abuse its discretion when it sanctioned counsel for the defendant?

Holdings: (1) There were ample adequately supported factual findings that support the trial court's conclusions. The findings of fact in the court's order support its award of permanent legal custody. (2) It was an abuse of discretion to require the defendant to change her beliefs and prove to a counselor that such a change has in fact occurred. (3) The trial court correctly decided to sanction an out-of-state attorney admitted pro hac vice, and that the specific sanction imposed did not constitute an abuse of discretion.