



Judge, Atty Spar Over Punitive Damages Bid In Blackmail Suit

By Nathan Hale

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A Florida state judge made a renewed push Monday to add punitive damages to her suit accusing a prominent South Florida attorney of attempting to blackmail her with a threat of releasing nude photos if she sought testimony from her ex-husband's girlfriend in a child custody battle.

The trial court in February granted Palm Beach County Judge Marni Bryson's request to step up her complaint against attorney William Scherer of Conrad Scherer, but the state's Fourth District quashed the order in August, saying it failed to specify the alleged misconduct and evidence supporting her bid for punitive damages. During Monday's Zoom hearing back before Martin County Circuit Judge William L. Roby, Judge Bryson's counsel argued that between her original October 2020 motion and a new proposed order, the judge has satisfied the appeals court's request.

Citing deposition testimony, declarations and affidavits from various interested parties, including Scherer's acknowledgement that the subpoena that was never served on the girlfriend would not have required productions of the intimate photos at issue anyway, "more than satisfies the plaintiff's burden that the conduct in this case is beyond egregious that was committed and perpetrated by the defendants," attorney Katie Phang of Phang Feldman argued.

Phang also contended that since the Fourth District's ruling, the defense has offered little more than citations to orders in two new cases.

"There was no new facts or evidence that was cited to by the defendants in the response," she said.

Scherer's counsel, Javier A. Lopez of Kozyak Tropin Throckmorton LLP, argued that it is not a matter of Judge Roby simply filling in some details he left out of his February order but instead an actual lack of evidence to support Judge Bryson's punitive damages bid.

"It is not because your honor failed to do anything that the Fourth sent this back, but because the other side gave you nothing other than Ms. Bryson's feelings," Lopez said.

He added that the court must act as a "gatekeeper" and weigh the evidence in these circumstances, not simply accept the plaintiff's allegations as true.

"They led your honor to error," he said.

In her suit, Judge Bryson claims that Scherer tried to blackmail her during a bitter custody dispute over her son with her ex-husband, James MacDiarmid. She said MacDiarmid stopped visiting their son and complying with the visitation agreement but refused to cooperate with her attempts to amend the custody arrangement.

Scherer began representing Stephanie Toothaker, MacDiarmid's girlfriend and a key witness in the custody proceedings.

Judge Bryson claims that on Nov. 16, 2015, she was interrupted during court proceedings to speak with another prominent Florida attorney, Jack Scarola of Searcy Denney Scarola Barnhart & Shipley PA, who told her he had been sent by Scherer to say that Scherer had acquired intimate photographs of Judge

Bryson that would be released publicly if she did not give in to her husband's demands in the custody dispute.

Lopez said Monday that Judge Bryson admitted during her deposition that she does not remember exactly what Scarola said during the surprise meeting and that her punitive damages request is based on how Scarola's words made her feel. Lopez also pointed to testimony in which Judge Bryson was shown Scarola's testimony that he did not state a threat and said she did not dispute that account.

"Your honor, this court makes decisions based on evidence, not on feelings," Lopez said. "This is a court of law, not a court of sentiment."

Lopez also argued that state law governing punitive damages claims requires Judge Bryson to show that Scherer acted with intention or recklessness to harm, but she has not provided such evidence and it is undisputed that the two never met or even spoke with each other.

Judge Roby cut Lopez off at that point to note that Scarola met with Judge Bryson at the request of Scherer.

"The only reason Scarola was in judge's chambers was to convey some sort of message," Judge Roby said. "And I'm not going to say it was to make her an offer she couldn't refuse, but some people might interpret him even being there saying basically that she might want to back off from her lawsuit because of the things that might come out. That's what I'm considering is being actionable."

Lopez asserted that regardless of the intent, Judge Bryson's claim is "dead on arrival" because it is barred by litigation privilege. He pointed to Florida Supreme Court case law that says "absolute immunity must be afforded to any act occurring during the course of a judicial proceeding ... so long as the act has some relation to the proceeding," and said any statements made by Scarola were related to the underlying custody case.

In rebuttal, Phang disputed that there was a connection to the custody proceedings, saying that Scarola never told Scherer that he was representing Judge Bryson and that there was no reason for Scherer not to reach out to Judge Bryson's counsel of record in the case if there was a legitimate connection.

"Because they wanted the extortion to remain secret, there was this meeting that took place between [Scherer] and Mr. Scarola, and Mr. Scarola went on behalf of Mr. Scherer to deliver the message that ultimately resulted in Ms. Toothaker not being deposed," Phang said, adding that the result allegedly sought by Scherer was obtained.

Judge Bryson is represented by Katie S. Phang and Jonathan S. Feldman of Phang Feldman, and Paul D. Turner and Oliver M. Birman of Perlman Bajandas Yevoli & Albright PL.

Scherer and his firm are represented by Harley S. Tropin, Javier A. Lopez and Gail A. McQuilkin of Kozyak Tropin & Throckmorton LLP, Irwin R. Gilbert of Conrad & Scherer LLP and Bruce Rogow and Tara A. Champion of Bruce S. Rogow PA.

The case is Bryson v. Scherer, case number 2019-CA-004756, in the Fifteenth Judicial Circuit Court of Florida.

--Additional reporting by Carolina Bolado. Editing by Alex Hubbard.