

Circuit Court for Montgomery County
Case No. 454033-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 65

September Term, 2019

WILLIAM F. FELLER

v.

WILLIAM B. ZUCKERMAN

Kehoe,
Arthur,
Beachley,

JJ.

Opinion by Kehoe, J.

Filed: February 12, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. *See Md. Rule 1-104.*

— Unreported Opinion —

This is an appeal from a judgment of the Circuit Court for Montgomery County, the Honorable Gary E. Bair, presiding, which dismissed William F. Feller's multi-count civil action against William B. Zuckerman, Ph.D., a psychologist licensed in Virginia, and his professional alter ego, William B. Zuckerman Ph.D., P.C. Judge Bair dismissed the action because Feller's complaint failed to state a cause of action upon which relief could be granted. The dismissal was with prejudice. Feller appeals, raising one issue, which we have rephrased: did the circuit court err in granting Zuckerman's motion to dismiss?¹ We will affirm the court's judgment.

Background

William Feller is a party to a long-standing child custody dispute with his former spouse in the Circuit Court for Montgomery County. *See Robin J. Feller v. William F. Feller, III*, Circuit Court for Montgomery County Case No. 79745 FL. In July 2015, the circuit court entered a consent order in that action which, among other things, approved Zuckerman, as the custody evaluator pursuant to Maryland Rule 9-205.3. A "custody evaluator" is defined as "an individual appointed or approved by the court to perform a

¹ Feller phrased the issue as:

Under Md. Rule of Civil Procedure 2-322(b)(2) and applicable Maryland statutory and/or case law, did the trial court below abuse its discretion by finding as a matter of law that the Appellee's Virginia License at issue was equivalent to the license requirements in Maryland pursuant to Md. Rule 9-205.3(d)(1)(B) applicable Maryland statutory and/or law, and that the Appellee did not practice psychology in performing a Custody Evaluation, thereby dismissing the Complaint with prejudice?

custody evaluation.” Md. Rule 9-205.3(b)(4). An evaluator is “approved” by the court when the parties have consented to his or her appointment. Md. Rule 9-205.3(e)(2).² However, before it can approve the parties’ selection, the court “must find that the custody evaluator has the qualifications set forth in [Md. Rule 9-205.3](d).” The circuit court’s family services coordinator maintains a list of custody evaluators whose professional qualifications and experience satisfy the requirements set out in subsection (d) of the rule. When the court entered its order approving him as the custody evaluator in the *Feller v. Feller* litigation, Zuckerman was on the list maintained by the family services coordinator for the Circuit Court for Montgomery County.

² Rule 9-205.3 states in relevant part (emphasis added):

- (d) Qualifications of Custody Evaluator.
 - (1) Education and Licensing. A custody evaluator shall be:
 - • •
 - (B) a Maryland licensed psychologist or *a psychologist with an equivalent level of licensure in any other state;*
 - • •
 - (2) Training and Experience. In addition to complying with the continuing requirements of his or her field, a custody evaluator shall have training or experience in observing or performing custody evaluations and shall have current knowledge in the following areas:
 - (A) domestic violence;
 - (B) child neglect and abuse;
 - (C) family conflict and dynamics;
 - (D) child and adult development; and
 - (E) impact of divorce and separation on children and adults.

The court’s order tasked Zuckerman with evaluating Feller’s progression through a parental coaching program,³ making recommendations regarding Feller’s physical custody of his minor children, and preparing a report on his findings for the court.⁴

Dr. Zuckerman did all of these things and reported his findings to the circuit court. Based on Dr. Zuckerman’s reports and recommendations, the court issued a series of custody orders.

In 2018, Feller filed the current action against Zuckerman. Feller’s complaint set out claims of negligence, intentional infliction of emotional distress, intentional misrepresentation, and constructive fraud. The basis of liability for each count in the complaint was that Zuckerman owed a duty to Feller to be properly licensed to practice psychology in Maryland and that he either breached that duty by agreeing to serve as a custody evaluator (the negligence and intentional infliction of emotional distress counts) or fraudulently concealed his licensure status from Feller (the intentional misrepresentation and constructive fraud counts).

Zuckerman filed a motion to dismiss Feller’s complaint for failure to state a cause of action for which relief can be granted. In his motion, Zuckerman presented several

³ Mark Sweeny, Ph.D., was appointed to assist Feller with his parenting skills through the parenting coaching program. Feller was responsible for attending that program until both Dr. Zuckerman and Dr. Sweeny determined it was longer needed or achieved its goals.

⁴ The consent-custody order also appointed Dr. Ruth Zitner, Psy.D., to be the parties’ “parenting coordinator,” for the purpose of improving their communication and ability to co-parent their minor children.

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contentions, two of which are relevant for the purposes of this appeal. First, Zuckerman conceded that he was not licensed to practice psychology in Maryland but asserted—correctly as we will soon see—that licensure in Maryland is not required to act as a custody evaluator pursuant to Rule 9-205.3 because the rule expressly authorizes clinical psychologists licensed in other jurisdictions to act as custody evaluators. Second, Zuckerman asserted that he was entitled to quasi-judicial immunity for his actions as a court-appointed custody evaluator. Feller filed an opposition to Zuckerman’s motion.

The circuit court held a hearing on Zuckerman’s motion on February 5, 2019. In an opinion delivered from the bench at the close of the hearing, the court did not agree with Zuckerman’s contention that he was entitled to quasi-judicial immunity. However, the court noted that Rule 9-205.3 provided that a custody evaluator permitted psychologists who were licensed in states other than Maryland to serve as custody evaluators. Because all of the counts in the complaint were, in the court’s words “based on the lack of Maryland licensure,” the complaint failed to state a cause of action. The court stated that the claims were “premised on something that I don’t find to be meritorious as a matter of law.”

With that, the court dismissed Feller’s complaint, with prejudice, for failure to state a claim upon which relief can be granted.

Analysis

A defendant may seek dismissal of a complaint if the complaint fails “to state a claim upon which relief may be granted.” Maryland Rule 2-322(b)(2). “A motion to dismiss for failure to state a claim tests the sufficiency of the pleadings.” *Ricketts v. Ricketts*, 393 Md. 479, 491 (2006). This means that, in ruling on such motions, the circuit court assumes the truth of the relevant facts alleged in the complaint and reasonable inferences that can be drawn from those facts, and then decides whether the law permits a recovery. *Allied Inv. Corp. v. Jasen*, 345 Md. 547, 555 (1999). We review a circuit court’s decision to grant a motion to dismiss for failure to state a cause of action for legal correctness. *Norman v. Borison*, 192 Md. App. 405, 419 (2010), *aff’d*, 418 Md. 630 (2011). Whether a court was legally correct is subject to the *de novo* review of the reviewing court. *Allied Inv. Corp.*, 345 Md. at 555.

As we have mentioned, all of the counts of Feller’s complaint were premised on the notion that it was improper for Zuckerman to act as a custody evaluator because he was not licensed to practice psychology in Maryland. In arguing that the circuit court erred in concluding that Md. Rule 9-205.3 permitted Zuckerman to serve as a court-appointed custody evaluator even though he wasn’t licensed in this State, Feller points to the Maryland Psychologists Act (codified as Md. Code Health and Occupations Article § 18-101–502) and Code of Maryland Regulations 10.36.09.00-05 which, he asserts are inconsistent with the relevant parts of Md. Rule 9-205.3 This contention is not persuasive.

A difficulty with Feller’s argument is that, although his brief refers generally to COMAR 10.36.09.00-05 and Title 18 of the Health Occupations Article, his brief does not identify any specific provision of either the regulation or Title 18 that supports his contention. Md. Rule 8-504(a)(5) states that briefs must contain “[a]rgument in support of the party’s position on each issue.” A party’s failure to provide legal analysis to support an appellate contention constitutes a waiver of that argument. *See, e.g., HNS Dev., LLC v. People’s Counsel for Baltimore County*, 425 Md. 436, 459 (2012) (“The brief provides only sweeping accusations and conclusory statements [and] we are disinclined to search for and supply HNS with authority to support its bald and undeveloped allegation[.]”); *Honeycutt v. Honeycutt*, 150 Md. App. 604, 618 (2003) (“The Estate argues that the circuit court was legally incorrect when it granted the Bank’s Motion for Summary Judgment; however, the Estate failed to adequately brief this argument, and thus, we decline to address it on appeal.” (footnotes omitted)); *Wallace v. State*, 142 Md. App. 673, 684 n.5, *aff’d*, 372 Md. 137 (2002) (“Arguments not presented in a brief or not presented with particularity will not be considered on appeal.” (cleaned up)). This has long been the law of Maryland. *See Comptroller v. Aerial Products*, 210 Md. 627, 644–45 (1956) (collecting cases).

When the panel raised the issue of the inadequacy of his brief at oral argument, Feller’s counsel responded that his brief incorporated by reference all of the contentions made to the circuit court. But appellant’s brief merely refers the reader to pages 1 through 127 of the record extract. Even if incorporation by reference were permitted by Md. Rule 8-504—and it isn’t—such a generalized, unfocused reference would be inadequate. *See HNS Dev.*,

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425 Md. at 459 (Appellate courts will not “rummage in a dark cellar” to find support for a party’s appellate contentions.).

Although the observations in the previous paragraph are completely dispositive of this appeal, we note that we agree with Judge Bair’s analysis. Rule 9-205.3 provides, in pertinent part (emphasis added):

(b) Definitions. In this Rule, the following definitions apply:

• • •

(3) Custody Evaluation. “Custody evaluation” means a study and analysis of the needs and development of a child who is the subject of an action or proceeding under this Chapter and of the abilities of the parties to care for the child and meet the child’s needs.

(4) Custody Evaluator. “Custody evaluator” means an individual appointed or approved by the court to perform a custody evaluation.

• • •

(d) Qualifications of Custody Evaluator.

(1) Education and Licensing. A custody evaluator shall be:

• • •

(B) a Maryland licensed psychologist *or a psychologist with an equivalent level of licensure in any other state*;

• • •

(2) Training and Experience. In addition to complying with the continuing requirements of his or her field, a custody evaluator shall have training or experience in observing or performing custody evaluations and shall have current knowledge in the following areas:

- (A) domestic violence;
- (B) child neglect and abuse;
- (C) family conflict and dynamics;
- (D) child and adult development; and
- (E) impact of divorce and separation on children and adults.

By its plain language, Rule 9-205.3(d) authorizes a court to appoint a psychologist as a custody evaluator if the psychologist is licensed to practice in Maryland or has an

“equivalent level of licensure” in another state. If the Court of Appeals had the authority to promulgate Rule 9-205.3,⁵ then Zuckerman, a psychologist who Feller concedes was licensed in Virginia, was eligible for appointment as a custody evaluator as long as he satisfied the additional criteria set out in subsection (d)(2) of the rule. A trial court’s order or ruling is presumptively correct. *Davidson v. Seneca Crossing Section II Homeowner’s Ass’n*, 187 Md. App. 601, 628 (2009); *John O. v. Jane O.*, 90 Md. App. 406, 429 (1992). In the context of the present case, this means that there is a presumption that Zuckerman satisfied the subsection (d)(2) criteria and that Feller must rebut that presumption. But in his complaint, Feller did not allege that Zuckerman’s professional experience failed to satisfy the subsection (d)(2) criteria. Judge Bair’s conclusion that Feller’s complaint failed to state a cause of action upon which relief could be granted was entirely correct.⁶

**THE JUDGMENT OF THE CIRCUIT
COURT FOR MONTGOMERY COUNTY
IS AFFIRMED. APPELLANT TO PAY
COSTS.**

⁵ And the Court did. See Article IV § 8 of the Maryland Constitution.

⁶ To the circuit court and on appeal, Dr. Zuckerman argues that he is entitled to quasi-judicial immunity as a court-appointed custody evaluator, and that acting as a custody evaluator does not constitute “practicing psychology” as that term is defined in Health Occ. § 18-101(f). Because we affirm on other grounds, we will not address these interesting issues.