RENDERED: February 14, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000115-MR

MARY KAY MCGURL and JOHN MCGURL,
by and through his NATURAL PARENT
AND NEXT FRIEND MARY KAY MCGURL — APPELLANTS

v. — APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 00-CI-003268

FRIENDS SCHOOL, INC.; LINDA BOWLES;
and PATTY GILDERBLOOM — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS and PAISLEY, Judges; and JOHN D. MILLER, Special Judge.[1]

COMBS, JUDGE: Dr. Mary Kay McGurl, both individually and on behalf of her son, John McGurl, appeals from an order of the Jefferson Circuit Court denying her motion to alter, amend, or vacate a summary judgment entered by that court in favor of appellees: Friends School, Inc.; Linda Bowles; and Patty Gilderbloom. The summary judgment resulted in a dismissal of Dr.

[1] Senior Status John D. Miller Sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

McGurl=s complaint, which had alleged: educational malpractice based in tort and contract, malicious prosecution, outrage, and defamation. Having examined the record and the applicable law, we affirm.

In 1997, Dr. McGurl enrolled her son, John, in Patty Gilderbloom=s first-grade class at Friends School, a private institution in Louisville. When John had difficulty with the first-grade curriculum, he was subsequently transferred to the school=s kindergarten program. While John apparently progressed reasonably well at Friends School through 1997 and 1998, Dr. McGurl became dissatisfied with his educational progress in 1999. Eventually, after attempting to modify the school=s goals and strategies with respect to John=s education, Gilderbloom suggested to Dr. McGurl that he be enrolled at another school, a school that Gilderbloom believed was better suited both to John and to Dr. McGurl. Gilderbloom also suggested that John might benefit from some contact with his estranged father, Kenny Doerhoerfer. Dr. McGurl communicated this advice to Doerhoerfer. However, Gilderbloom=s suggestions were not well received by either of John=s parents.

On September 7, 1999, Dr. McGurl spoke by telephone with Linda Bowles, a fellow parent and classroom volunteer. According to Bowles, Dr. McGurl became agitated during the course of the conversation and indicated that her husband was angry

about Gilderbloom=s recent suggestions. Dr. McGurl warned that Gilderbloom didn=t realize:

> how bad it could be for her if [Doerhoerfer] became involved in this. . .. he could hurt her; he could C Friends School better watch out; [Gilderbloom] better watch out. . . you better watch out; you all better watch out; Friends School better watch out.

Bowles became alarmed by the nature and content of the conversation and telephoned Gilderbloom. Gilderbloom also became frightened and consulted with her husband and the school=s attorney. Eventually, she contacted the police and filed a criminal complaint against Dr. McGurl alleging terroristic threatening. To insure the safety of its staff and students, the Louisville Police Department sent uniformed officers to Friends School on September 8, 1999. Gilderbloom advised Dr. McGurl not to return John to the school's premises.

On September 21, 1999, Dr. McGurl and Gilderbloom participated in a mediation of the criminal complaint. Dr. McGurl agreed to the mediation and did not contest the allegation that she had Athreaten[ed] and harrass[ed]@ Gilderbloom. Following the mediation, Dr. McGurl agreed to cease any unlawful contact with Gilderbloom and Friends School.

On May 19, 2000, Dr. McGurl filed this action alleging that: (1) Friends School had negligently educated John; (2) Friends School had breached John=s enrollment contract; (3) Friends School had fraudulently misrepresented the teaching ability of the school=s staff; (4) Bowles and Gilderbloom had

defamed her by filing a criminal complaint against her; and (5) Bowles and Gilderbloom had maliciously prosecuted her. The defendants answered and denied the allegations; each party engaged in discovery.

In April 2001, the appellees filed a motion for summary judgment. They argued that Dr. McGurl=s claims based on educational malpractice, contract, and fraud should be dismissed because no cause of action for these claims exists in this context under Kentucky law. Additionally, they asserted that the malicious prosecution claim should be dismissed as a matter of law on two grounds: (1) that Dr. McGurl did not emerge as the victor with respect to the criminal complaint filed against her and (2) that the criminal complaint had been filed by Gilderbloom only on the advice of counsel. With respect to the claim of outrage, the appellees contended that the school=s actions did not rise to the level necessary to support the claim as a matter of law. Finally, the appellees contended that Dr. McGurl=s defamation claims should be dismissed on the basis of a qualified privilege C indeed a duty C to report her criminal conduct.

Nearly three months later, Dr. McGurl responded to the appellees= motion for summary judgment. Dr. McGurl argued that any consideration of the motion was premature as discovery had not yet been completed. Oral arguments followed.

On October 29, 2001, the trial court entered a summary judgment in favor of the school, Gilderbloom, and Bowles. In an

extensive and thorough opinion supporting its judgment, the court held that the prevailing parties were entitled to judgment on each claim as a matter of law. The trial court denied Dr. McGurl=s subsequent motion to alter, amend, or vacate the judgment. This appeal followed.

CR[2] 56.03 provides in pertinent part as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Summary judgment should not be rendered if there exists any issue of material fact, and A[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.@ Steelvest, Inc. v. Scansteel Service Ctr., Inc., Ky., 807 S.W.2d 476, 480 (1991). The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Scifres v. Kraft, 916 S.W.2d 779 (1996). In Welch v. American Publishing Co., Ky., 3 S.W.3d 724, 729 (1999), the Kentucky Supreme Court emphasized that the:

> inquiry should be whether, from the evidence of record, facts exist which would make it

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[2]Kentucky Rules of Civil Procedure.

> possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial.

Before reaching the substantive issues before the court, we shall first address Dr. McGurl=s argument that the motion for summary judgment was entered Aprematurely.@ Dr. McGurl contends that the trial court A. . .failed to consider the record in its entirety@ and Aterminate[d] the factual record prematurely.@ Dr. McGurl points out that she even Ahad to obtain an extension of time to respond to the Motion in order have the deposition of Bowles and Gilderbloom of record.@

A party responding to a motion for summary judgment cannot complain of the lack of a complete factual record when it can be shown that the respondent has had an adequate opportunity to undertake discovery. Hartford Ins. Group v. Citizens Fidelity Bank & Trust, Ky. App., 579 S.W.2d 628 (1979); Hollins v. Edmonds, Ky. App., 616 S.W.2d 801 (1981). A review of the record compiled in this matter indicates that there was substantial pre-trial activity and that Dr. McGurl had more than ample opportunity to conduct discovery and to prepare her case for trial.

Dr. McGurl filed this action in mid-May of 2000, and the appellees promptly responded. In mid-October, the appellees propounded extensive written discovery, including interrogatories, a request for admissions, and a request for the production of documents. However, in contrast, Dr. McGurl never

served any written discovery in this matter. The appellees deposed Dr. McGurl in January 2001 and Doerhoerfer in March 2001. But it was only after the appellees filed their motion for summary judgment that Dr. McGurl scheduled the depositions of Gilderbloom and Bowles. No other depositions were ever scheduled. Dr. McGurl initiated this action more than seventeen months before the judgment was entered. She had a full and fair opportunity to develop the record, and her complaint about what might be missing is unfounded. The trial court did not err by entertaining the appellees=s motion for summary judgment.

Next, while conceding that the trial court=s decision to dismiss her educational malpractice claim was properly based on prevailing precedent, Dr. McGurl urges this Court to re-visit and to overrule our decision in Rich v. Kentucky Country Day, Inc., Ky. App., 793 S.W.2d 832 (1990). We are not persuaded to abandon that precedent.

In Kentucky Country Day, supra, we carefully considered and deliberately rejected any recognition of tort liability based on a theory of educational malpractice. In that case, plaintiff=s next friend sued the defendant private school for its negligence in educating the plaintiff=s son and its breach of the plaintiff=s enrollment contract. Specifically, the plaintiff alleged that his son=s failure to advance from grade ten to grade eleven was caused by the school=s failure to recognize the student=s medical condition (Attention Deficit Disorder) and to

craft a personal instructional program based upon that medical condition. Adopting the trial court=s conclusions, we held as follows:

> The practical problems raised by a cause of action sounding in educational malpractice are so formidable that . . . such a legal theory should not be cognizable in our courts. . . . Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. . . . The Ainjury@ claimed here is plaintiff=s inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupils subjectively, from outside the formal teaching process, and beyond the control of its ministers. . . . We find in this situation no conceivable Aworkability of a rule of care@ against which defendants= alleged conduct may be measured, no reasonable Adegree of certainty that plaintiff. . . suffered injury within the meaning of the law of negligence, and no such perceptible Aconnection between the defendants= conduct and the injury suffered,@ as alleged, which would establish a causal link between them with the same meaning.

Id. at 835-836 (citations omitted).

Based on the public policy considerations outlined above, the nation's courts have routinely refrained from entering the classroom to determine claims based upon so-called Aeducational malpractice.@ However, Dr. McGurl urges us to abandon this carefully crafted analysis because of the passage of the Kentucky Education Reform Act, KRS 158.645, et seq., by the General Assembly in 1990. Without citing a specific provision of the statute, Dr. McGurl argues that the passage of KERA signaled

a Afundamental public policy change adopting educational accountability.@ She contends that through KERA, Astandards of care [for educational negligence claims] are, in fact, ascertainable.@

KERA applies only to Kentucky=s public schools and not to private institutions. The Act was passed both to establish a broad set of educational objectives for students in the public schools and to facilitate more community involvement in the choice and content of public school curricula. See Board of Educ. v. Bushee, Ky., 889 S.W.2d 809 (1994). The provisions of the Act do not suggest that the General Assembly intended to create a new avenue for civil litigation against schools and teachers. The Act does not provide for citizen lawsuits. Instead, the penalties which may be imposed upon public schools for falling short of performance standards clearly emanate from various state boards and commissions and not from individual students or parents.

The enactment of KERA=s provisions does not impair the reasoning of Kentucky Country Day, supra. As we observed in that case, Athe fact that parents may pay tuition either privately or through taxes gives them no right to dictate to the educational system under threat of an action at law.@ Id. at 837. The trial court did not err by dismissing Dr. McGurl=s educational malpractice claim.

In conjunction with the educational malpractice claim, Dr. McGurl asserted claims for breach of contract and fraud. She alleged specifically that the Aacademic inadequacy@ of Friends School constituted a breach of the enrollment contract between the student and the school and that this alleged Ainadequacy@ also constituted a fraud perpetrated by the institution. Both claims essentially serve to reformulate or repackage the educational malpractice claim first asserted. They were properly resolved by way of summary judgment, and we find no error.

In our analysis of the plaintiff=s breach of contract claim in Kentucky Country Day, we considered the fact that multiple variables and intangibles involved in academic performance effectively limit any school=s contractual obligations to a particular student. We cited the fundamental rule that A[a] party to a contract cannot breach the contract by failing to do something that the contract does not require him to do.@ In this case, Dr. McGurl admitted in her deposition that the school had not guaranteed that her son would attain any precise level of academic proficiency by a date certain. Neither the school=s enrollment contract nor any statements made by school representatives created a contract with respect to John McGurl=s future academic performance. The enrollment contract provided simply for payment of tuition in exchange for admission into the school's offered program. It explicitly provided that there would be no refund of tuition even if a student were

subsequently dismissed. The trial court did not err by entering summary judgment with regard to these claims.

Next, Dr. McGurl contends that the trial court erred by concluding that the allegedly slanderous statements uttered by Gilderbloom and Bowles were protected by a conditional privilege to publish the information in question. We disagree.

It is well established that there can be no liability for defamatory statements if the defendant was privileged C either absolutely or conditionally C to make such statements. Louisville Times Co. v. Lyttle, 257 Ky. 132, 77 S.W.2d 432 (1935). A qualified privilege protects the defendant in a defamation action from liability unless the plaintiff can show that the allegedly defamatory statement or writing was published by the defendant with "actual malice." Id. In Ball v. E.W. Scripps Co., Ky., 801 S.W.2d 684, 689 (1990), the court defined "actual malice" as

> knowledge that [the statement] was false or with reckless disregard of whether [the statement] was false or not. . . .[R]eckless disregard is . . . a high degree of awareness of probable falsity, and . . . [w]here the publisher must have entertained serious doubts as to the truth of his publication. (Citations omitted).

In the event that a publication is qualifiedly privileged, the defamation plaintiff has the burden of proving actual malice. Weinstein v. Rhorer, 240 Ky. 679, 42 S.W.2d 892 (1931). Furthermore, where a qualified privilege exists, a party cannot be held liable for mistake or negligence in connection with the

communication. See McColllum v. Garrett, Ky., 880 S.W.2d 530 (1994).

A qualified privilege exists where there is a duty to publish the information in question. Stewart v. The Pantry, Inc., 715 F. Supp. 1361 (W.D. Ky 1988). Such a duty may be "public, personal or private, either legal, judicial, political, moral or social." Id. at 1366. A finding of privilege is an issue of law for the court. Caslin v. General Electric Co., Ky. App., 608 S.W.2d 69 (1980).

It is clear that Bowles and Gilderbloom were privileged to communicate the purported threats to the proper authorities in this case. Bowles as a parent and school volunteer had both a personal and a public duty to communicate the threats to school authorities. Similarly, Gilderbloom, in her administrative capacity, was privileged to communicate the threats to her counsel and to the police because of the obligation she bore to the students in her care. There is no evidence in the record of malice or abuse of the privilege that would warrant submitting this issue to a jury. The trial court did not err by entering summary judgment.

Finally, Dr. McGurl maintains that the appellees were not entitled to summary judgment with respect to her claim of malicious prosecution. Again, we disagree.

In Raine v. Drasin, Ky., 621 S.W.2d 895, 899 (1981), the Kentucky Supreme Court outlined the necessary elements to sustain a claim for malicious prosecution as follows:

> Generally speaking, there are six basic elements necessary to the maintenance of an action for malicious prosecution, in response to both criminal prosecutions and civil actions. They are: (1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance of the [defendant], (3) the termination of such proceedings in [plaintiff's] favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause of the proceeding, and (6) the suffering of damages as a result of the proceeding.

Because these actions are generally disfavored in the law, plaintiffs must comply meticulously with the prerequisites of maintaining an action for malicious prosecution. Id.

As the trial court correctly observed in its opinion, it is not clear that the criminal proceedings instituted against Dr. McGurl terminated in her favor. Instead, through a mediation process, Dr. McGurl agreed to have no unlawful contact with Gilderbloom or the school. This means of termination of the proceeding is analogous to a compromise of the criminal charge. We have held that termination of a criminal proceeding by compromise is not a favorable termination under the Raine standard. Broaddus v. Campbell, Ky. App., 911 S.W.2d 281 (1995). Additionally, we agree with the trial court's conclusion that any claim of malice in Gilderbloom's initiation of the criminal

action was nullified by her clear reliance upon the advice of the school's counsel. _See_ _Reid v. True_, Ky. App., 302 S.W.2d 846 (1957).

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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