

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001052-MR

FLOYD ARNOLD IMBODEN

APPELLANT

APPEAL FROM HOPKINS CIRCUIT COURT
v. HONORABLE CHARLES W. BOTELER, JR., JUDGE
ACTION NO. 98-CI-00845

SUSAN PHELPS and
TROVER CLINIC

APPELLEES

OPINION

AFFIRMING

** ** *

BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND JOHNSON, JUDGES.

EMBERTON, CHIEF JUDGE. Floyd Arnold Imboden is the father of two minor children. He filed this action after Susan Phelps, a psychologist, concluded that Imboden sexually abused the children. Her signed affidavit containing her expert opinion regarding the abuse and her testimony were subsequently used in a custody proceeding between Imboden and his ex-wife. After the custody dispute was resolved, Imboden filed this action against Phelps alleging negligence, defamation, and slander. He also

named as a defendant Phelps' employer, Trover Clinic. The trial court ultimately held that the negligence action was barred by the one-year time period set out in KRS¹ 413.245 and that Phelps was entitled to absolute immunity on the libel and slander claims. This appeal followed.

Imboden and Karen Heady were divorced and Karen was awarded custody of their two sons, Jesse and John. Imboden was given visitation. In October 1995, Phelps began seeing Imboden's two sons. At that time, Phelps noted that although Jesse appeared to be functioning normally, John was showing signs of anger and difficulty sleeping. In April 1996, Jesse began to exhibit similar problems.

On April 23, 1997, Phelps had a session with Jesse and asked him to draw a picture of a person. The picture, in which there was a tree without leaves, a house, and a person with large hands, led Phelps and her supervisor to conclude that the drawing contained phallic symbols and indicated defensiveness. In early May 1997, Phelps contacted the Kentucky State Police and the Cabinet for Human Resources. On May 9, 1997, Phelps and Karen executed affidavits stating that Imboden had abused the children and Karen filed a motion requesting that visitation be denied. A hearing on the motion was held on March 10, 1998, at which Phelps testified concerning her opinion regarding

¹ Kentucky Revised Statutes.

Imboden's abuse of the children. However, based on a report by Dr. Linda Flynn, the court continued visitation.

Imboden filed the present action on December 23, 1998. On May 5, 2000, Phelps and Trover Clinic moved for summary judgment on the basis that Phelps had a duty to report the suspected abuse under KRS 620.030, that she has civil immunity under KRS 620.050, and had a common law privilege from civil suit for statements made in the custody proceeding. The court denied the motion holding that Phelps' immunity depended on her good faith, which was a jury question. On December 18, 2000, the appellees filed a second motion arguing that the action was not timely filed pursuant to KRS 413.140 and 413.245, and again that Phelps' testimony in a judicial proceeding is absolutely privilege. On May 18, 2001, the court held the libel and slander claim in abeyance pending the finality of this court's opinion in Reed v. Isaacs.² It granted summary judgment on the negligence claim finding that it was not filed within the one-year time period set out in KRS 413.245. After Reed became final, on February 18, 2002, Phelps and Trover Clinic renewed their motion for summary judgment on the libel and slander claims to which Imboden did not file a response. On April 18, 2002, the circuit court granted summary judgment finding that

² Ky. App., 62 S.W.3d 398 (2000).

the affidavit and the testimony at the hearing are privileged and not subject to a civil suit for libel or slander.

Imboden's notice of appeal identifies only the April 18, 2002, order as that appealed. The only issue addressed in that order is whether Phelps is entitled to immunity on the libel and slander claims. Imboden's negligence claims against Phelps and Trover Clinic were not addressed and were resolved in earlier orders of the court. CR³ 73.03 specifically requires that the notice of appeal designate the order appealed from and strict compliance with the rule is required.⁴ We will not, therefore, consider whether the trial court's ruling that the negligence claim is barred by the applicable statute of limitations is correct.

Following Reed, there is no dispute that testimony given in the course of a judicial proceeding is absolutely privileged against claims for libel and slander:

Where a witness willfully and maliciously gives false testimony, he is liable to prosecution for perjury or false swearing. [However] [n]o civil action will lie against him, because it is a well-settled rule in practically all jurisdictions that the testimony of a witness given in the course of a judicial proceeding is privileged and

³ Kentucky Rules of Civil Procedure.

⁴ Hopkins v. Hilliard, Ky., 444 S.W.2d 130 (1969).

will not support a cause of action against him.⁵

Phelps' testimony and her affidavit given during the course of the custody proceedings falls within the protection afforded.

Imboden argues that while Phelps' testimony and affidavit given during the custody proceeding are privileged, her statements to social services and the police are not shielded. Although Imboden raised this issue in his initial response to Phelps' and Trover Clinic's motion for summary judgment, there is no distinction made in the circuit court's order between Phelps' statements during the custody proceeding and those prior to the proceeding. However, even if this court were to find that in reporting the suspected abuse, under KRS 520.050 she is entitled to a privilege from civil suit only if her actions were in good faith, the action would have had to be commenced within one year from the date of the alleged libel or slander. The reports to the police and the Cabinet for Human Resources were made in May 1997 and the action was not commenced until December 1998, well beyond the one-year time period.

The order of the Hopkins Circuit Court is affirmed.

BAKER, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

⁵ Reed, supra, at 398 (quoting from McClarty v. Bickel, 155 Ky. 254, 159 S.W. 783, 784-85 (1913)).

JOHNSON, JUDGE, CONCURRING: I concur with the Majority Opinion on all issues except its misapplication of CR 73.03. The order entered on May 18, 2001, which granted a partial summary judgment on the issue of negligence was interlocutory and was not made final until the trial court entered its final order on April 18, 2002.⁶ However, I would still affirm the trial court's ruling on the merits. The tolling of the statute of limitations by the discovery rule does not save Imboden's negligence claim since he was aware of his claim prior to December 23, 1997.

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⁶ Tile House v. Cumberland Federal Savings Bank, Ky., 942 S.W.2d 904, 907 (1997); Patrick v. Hiner, Ky.App., 867 S.W.2d 211, 212 (1993).