

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001092-MR

DOUGLAS H. RANK

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 00-CI-00799

KAY MONTGOMERY AND
GARY MONTGOMERY, HER HUSBAND

APPELLEES

OPINION
AFFIRMING

** **

BEFORE: BAKER, BARBER AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Douglas H. Rank has appealed from the order entered by the Fayette Circuit Court on April 24, 2002, which granted Kay Montgomery and her husband, Gary Montgomery's motion for summary judgment. Having concluded that the trial court properly determined that the Montgomerys' allegations in their complaint against Dr. Rank were entitled to judicial immunity

and that Dr. Rank has otherwise failed to demonstrate that there is a genuine issue as to any material fact, we affirm.

As part of Kay Montgomery's medical treatment for injuries she suffered in an automobile accident, she received treatment from Dr. Rank, a psychiatrist. Kay was Dr. Rank's patient from 1994 to 1998,¹ and during the course of treatment and while Kay and Gary Montgomery were married, Kay and Dr. Rank engaged in a sexual relationship. On March 3, 1999, the Montgomerys filed a complaint against Dr. Rank in Fayette Circuit Court alleging professional malpractice. The Montgomerys alleged, inter alia, that Rank failed to properly treat Kay and infected her with a sexually transmitted disease (STD), namely herpes, which Kay transmitted to Gary. In Dr. Rank's answer, filed on March 25, 1999, he denied the allegations and asserted certain affirmative defenses; however, he did not assert any counterclaims against the Montgomerys.

Prior to the professional negligence case going to a jury trial, the Montgomerys voluntarily dismissed their claims for relief based on the allegation that Dr. Rank had infected Kay with herpes.² The Montgomerys voluntarily dismissed this

¹ The Montgomerys allege that Dr. Rank treated Kay from 1994 to 1998. Dr. Rank, however, alleges that he treated Kay from 1993 to 1997.

² Although there is no filestamp on the Montgomerys "NOTICE OF WITHDRAWAL OF CLAIMS," the document indicates that it was served upon Dr. Rank's counsel on February 18, 2000. The Montgomerys withdrew from their complaint their claim that Dr. Rank "infected her with a sexually transmitted disease, which she thereafter transmitted to her husband, Gary Montgomery."

claim after they learned that neither Kay nor Dr. Rank was in fact afflicted with herpes. The jury trial in the Montgomerys' suit against Dr. Rank was held from March 6 to March 9, 2000, and resulted in a verdict in favor of the Montgomerys.³ Of course, the jury did not consider Kay's allegation that Dr. Rank infected her with herpes.

It is agreed that on March 10, 1999, the Lexington Herald-Leader published a newspaper article concerning the lawsuit. The article, entitled "Suit alleges woman's psychiatrist seduced her, gave her disease," included the Montgomerys' claim that Dr. Rank had allegedly infected Montgomery with a STD, which she had passed to her husband. Dr. Rank further alleged that prior to and subsequent to March 3, 1999, the date the Montgomerys filed their complaint, Kay told "numerous people" that he had infected her with herpes, which she thereafter transmitted to her husband. On March 2, 2000, Dr. Rank filed a separate action in Fayette Circuit Court and alleged in his complaint that the Montgomerys' accusations were both libelous and slanderous. Dr. Rank alleged that Kay knew her statements were false at the time of their publication because she knew her test results were negative.

³ In addition to a monetary judgment, Dr. Rank's medical license was suspended by the Kentucky Board of Medical Licensure for six months and certain restrictions were placed upon his practice once his suspension ended.

In the case sub judice, the Montgomerys filed their answer to Dr. Rank's complaint on March 24, 2000, and asserted, inter alia, that Dr. Rank's complaint should be dismissed because he had failed to present his allegations in a compulsory counterclaim as required by CR⁴ 13.01 and that the claim was barred by the doctrine of judicial immunity. On February 25, 2002, the Montgomerys moved for summary judgment; Dr. Rank filed his response on March 27, 2002; and the trial court granted the Montgomerys' motion for summary judgment on April 24, 2002. The trial court ruled that since the claims made by Dr. Rank in his complaint should have been asserted as a compulsory counterclaim pursuant to CR 13.01 in the original action the Montgomerys filed against him, the claims could not be brought as a separate action. Additionally, the trial court ruled that the Montgomerys were entitled to absolute immunity for any allegations they asserted in their complaint and concluded that there was "no factual proof in the record in this case indicating that Defendants made any actionable statements or took any actionable actions against Plaintiff outside the context of the pleadings in the underlying action." This appeal followed.

Summary judgment is only proper "where the movant shows that the adverse party could not prevail under any

⁴ Kentucky Rules of Civil Procedure.

circumstances.”⁵ The trial court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.”⁶ However, “a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial.”⁷ This Court has previously stated that “[t]he 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. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue” [citations omitted].⁸ Accordingly, our review of the record will be viewed in a light most favorable to Dr. Rank and any doubts will be resolved in his favor.

Dr. Rank argues that the Montgomerys were not entitled to judicial immunity for the allegations made in their underlying complaint against him. In particular, Dr. Rank

⁵ Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991) (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)).

⁶ Steelvest, 807 S.W.2d at 480 (citing Dossett v. New York Mining & Manufacturing Co., Ky., 451 S.W.2d 843 (1970)).

⁷ Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992)(citing Steelvest, supra, at 480).

⁸ Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

argues that the Montgomerys' claim that he infected Kay with herpes, which she then allegedly passed to Gary, was "impertinent and irrelevant" to their malpractice claim, and also "false and malicious." Thus, Dr. Rank argues that judicial immunity does not apply. We disagree.

In Schmitt v. Mann,⁹ the former Court of Appeals discussed the scope of judicial immunity as it relates to allegations made in a complaint:

The prevailing rule and the one recognized in this jurisdiction is that statements in pleadings filed in judicial proceedings are absolutely privileged when material, pertinent, and relevant to the subject under inquiry, though it is claimed that they are false and alleged with malice [citation omitted].

In the case at bar, the Montgomerys alleged in their underlying complaint against Dr. Rank that he committed professional malpractice during his treatment of Kay. The sexual relationship between Dr. Rank and Kay during this treatment was a key component of their malpractice claim.¹⁰ The Montgomerys also asserted that because of that alleged malpractice, Kay had suffered various damages, including severe emotional distress, and physical and mental injuries. We

⁹ 291 Ky. 80, 163 S.W.2d 281, 283 (1942).

¹⁰ The Montgomerys alleged that Dr. Rank's sexual relationship with Kay was an ethical violation and fell below "accepted medical standards." See The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry, Section 2, annotation 1 (2001), stating in part that "[s]exual activity with a current or former patient is unethical."

believe the Montgomerys' claim that Dr. Rank had allegedly infected Kay with herpes was "material, pertinent, and relevant" to their malpractice claim. This allegation, if accepted as true by a jury, would certainly be relevant when assessing the appropriate amount of damages to be awarded. As Schmitt makes clear, these claims are entitled to judicial immunity even though they may have been asserted falsely and/or maliciously. Therefore, the Montgomerys' allegations in their complaint that Dr. Rank infected Kay with herpes, which she then passed to Gary, was entitled to judicial immunity. Accordingly, the trial court did not err in granting the Montgomerys' motion for summary judgment on this issue.

Dr. Rank also argues that the Montgomerys were not entitled to judicial immunity for those alleged slanderous statements that Kay "made to persons outside the scope of their original lawsuit." Specifically, Dr. Rank argues:

The facts clearly indicate that the [Montgomerys'] actions went beyond the allegations set forth in their original malpractice [c]omplaint against [Dr. Rank]. Statements that [Dr. Rank] caused [] Kay Montgomery [] to be infected with a sexually transmitted disease (herpes), which she in turn gave to her husband, Gary Montgomery, were made to persons outside the scope of their original lawsuit.

However, aside from these bare allegations, Dr. Rank has failed to offer any evidence whatsoever in support of his assertion

that Kay and/or Gary made slanderous statements to persons outside the scope of their pleadings.

In Dr. Rank's deposition testimony, he admitted that he had no personal knowledge of either Kay or Gary telling anyone that he, Dr. Rank, had given Kay a sexually transmitted disease. In his answer to one of the Montgomerys' interrogatories, Dr. Rank named several individuals who Kay and/or Gary allegedly told that Dr. Rank had infected Kay with a STD. However, Dr. Rank has failed to offer any evidence, either in the form of an affidavit from these individuals or otherwise, to support these self-serving statements. Finally, Dr. Rank points to the deposition testimony of Kay, in which she admits discussing issues related to her alleged STD infection with two attorneys and three doctors. At best, Kay's testimony is vague with respect to her discussions with these individuals. It is not clear whether these conversations touched upon how Kay may have contracted the alleged STD or who may have given it to her. Moreover, assuming Dr. Rank had proven that Kay made slanderous statements to these individuals, which he has clearly failed to do, it is likely that most, if not all, of these statements would be absolutely privileged communications and not subject to a defamation claim.¹¹ Therefore, it is clear that Dr. Rank has

¹¹ See Restatement (Second) of Torts, § 587 (1977), stating in part that "[a] party to a private litigation . . . is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a

failed to present any "affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial."¹² Accordingly, the trial court did not err in granting the Montgomerys' motion for summary judgment on the issue of the Montgomerys' alleged slanderous statements made outside the scope of their complaint.

Dr. Rank next argues that he should be allowed to pursue a cause of action against the Montgomerys for malicious prosecution.¹³ However, the record shows that Dr. Rank failed to file a motion with the trial court seeking to amend his complaint to add a cause of action based on malicious prosecution. Where a party has established that he is entitled to summary judgment on the cause of action in the complaint at issue, and the party opposing summary judgment has failed to take the proper procedural steps to amend his complaint to add

proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding."

¹² Hubble, 841 S.W.2d at 171 (1992)(citing Steelvest, 807 S.W.2d at 480).

¹³ "Strictly speaking, this suit is improperly designated as a claim for 'malicious prosecution.' This is old terminology deriving from wrongful prosecution of criminal cases, a separate cause of action as described in Restatement (Second) of Torts, § 653-73 (1977). Properly designated, this tort is the 'wrongful sue of civil proceedings,' the elements of which are described in the Restatement (Second) of Torts, §§ 674-681B." Prewitt v. Sexton, Ky., 777 S.W.2d 891, 893 (1989).

an additional cause of action, summary judgment in favor of the moving party will be affirmed.¹⁴

Finally, since we have concluded that the Montgomerys' were entitled to summary judgment on the issue of judicial immunity and on the grounds that Dr. Rank has failed to proffer any evidence demonstrating that a genuine issue as to any material fact exists, it is unnecessary to discuss Dr. Rank's claim that the trial court erred in concluding that his slander claim against the Montgomerys was a compulsory counterclaim.

Based on the foregoing, the order of the Fayette Circuit Court is affirmed.

BARBER, JUDGE, CONCURS.

BAKER, JUDGE, CONCURS IN RESULT ONLY.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

David A. Weinberg
Lexington, Kentucky

BRIEF FOR APPELLEES:

Douglas L. Hoots
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Lexington, Kentucky

ORAL ARGUMENT FOR APPELLEES:

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¹⁴ See Townsend v. Gulf Interstate Gas Co., Ky., 308 S.W.2d 793, 794-95 (1958).