

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002506-MR

JOHN I. MASON,
MICHELLE FAETH, AND
DEBORAH TOPP

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOPF, JUDGE
ACTION NO. 98-CI-006963

KENNETH BALL, AND
JOHN TARRANT, D.M.D.

APPELLEES

TO BE HEARD WITH: NO. 2001-CA-000111-MR

KENNETH BALL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOPF, JUDGE
ACTION NO. 98-CI-006963

MICHELLE FAITH
(N/K/A MICHELLE FAETH MASON)

APPELLEE

OPINION
AFFIRMING APPEAL NO. 2000-CA-002506-MR
AND
DISMISSING APPEAL NO. 2001-CA-000111-MR
** ** ** ** **

BEFORE: BARBER, DYCHE AND MILLER, JUDGES.

MILLER, JUDGE: These appeals spring from an Opinion and Order entered in the Jefferson Circuit Court on May 17, 1999, and a subsequent Order entered in the same proceeding on December 14, 2000. We affirm in Appeal No. 2000-CA-002506-MR, and dismiss as moot Appeal No. 2001-CA-000111-MR.

The facts of the case are these: Sometime prior to January, 1997, the office of Attorney General initiated an investigation of John I. Mason, D.M.D., and the Mason Dental Clinic¹ owned by him in Jefferson County, Kentucky. The object of the investigation was to determine whether the clinic had been improperly billing the Kentucky Medical Assistance Program (KMAP) in violation of Kentucky Revised Statutes (KRS) 194.505 (now 194B.505). The investigation was conducted in part by Kenneth Ball, a Medicaid investigator for the office of the Attorney General. In furtherance of the investigation, the office of Attorney General retained the services of one John Tarrant, D.M.D., as a consultant for the purpose of reviewing dental records of patients as well as the billing records of Mason Clinic. Dr. Tarrant examined certain former patients of the clinic to determine what services had in fact been rendered.

¹J. Mason, D.M.D. & Associates, P.S.C.

As an outgrowth of the investigation, indictments were returned against Dr. John Mason, and Michelle Faeth² in December, 1997. In April, 1998, an indictment was returned against Deborah Topp, D.M.D., a professional employee of the clinic. These indictments were subsequently disposed of by agreement.

On December 11, 1998, Dr. John Mason, Michelle Faeth, and Deborah Topp, brought the instant proceedings in the Jefferson Circuit Court naming as defendants the appellees, Kenneth Ball, and Dr. John Tarrant. The action sounded in malicious prosecution, defamation, negligence, and interference with prospective economic advantage. Various orders were entered in the action culminating in the two appeals before us.

Preserved for appeal are the claims of Mason, Faeth and Topp against Dr. Tarrant for negligence, and the claim of Faeth for malicious prosecution against Ball. We shall discuss the appeals separately.

APPEAL NO. 2000-CA-002506-MR

Faeth argues that summary judgment was improperly granted in favor of Ball upon her malicious prosecution claim. Summary judgment is proper where there exists no material issue of fact, and movant is entitled to judgment as a matter of law. CR 56; Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

Faeth was indicted by the grand jury of complicity to commit Medicaid fraud. The indictment was dismissed with

²Faeth was the clinic's office administrator in charge of billing. She later married Dr. Mason.

prejudice pursuant to her agreement to testify truthfully in trials of various clinic dentists.

To prevail upon a claim of malicious prosecution, it must be demonstrated that the action was terminated in favor of the accused. Raine v. Drasin, Ky., 621 S.W.2d 895 (1981). The circuit court concluded that "a dismissal by compromise of the accused is not a termination favorable to the accused," and, thus, Faeth's malicious prosecution claim must fail. Broaddus v. Campbell, Ky. App., 911 S.W.2d 281, 284 (1995). We are compelled to agree. Restatement (Second) of Torts § 660(a) (1977).

We believe, as the circuit court, that Faeth's agreement to testify was a "compromise," as it amounted to waiver of her Fifth Amendment right against self-incrimination. Thus, we think the action was not terminated in favor of Faeth and that summary judgment was properly entered in favor of Ball as a matter of law. Id.

Mason, Faeth and Topp also contend that the circuit court erred by entering summary judgment dismissing their claims of medical negligence against Dr. Tarrant. Dr. Tarrant reviewed dental records and examined patients pursuant to a contractual duty with the Office of the Attorney General, Medicaid Fraud Division. Mason, Faeth and Topp allege that Dr. Tarrant was negligent in his duties, thereby causing indictments to be returned by the grand jury against them. The circuit court held that Dr. Tarrant owed no duty of care to Mason, Faeth or Topp, thus dismissing their claims of medical negligence as a matter of law. We agree.

We know of no legal duty that could be imposed upon Dr. Tarrant for the benefit of Mason, Faeth or Topp. Mason, Faeth and Topp were not in privity with Dr. Tarrant, were not third party beneficiaries³ to the contract with the Attorney General, and were not patients of Dr. Tarrant. As Mason, Faeth and Topp did not use or rely upon Dr. Tarrant's medical opinions, we reject the notion that Restatement (Second) of Torts § 552 (1977) imposes such a duty upon Dr. Tarrant. We also observe that any statements made by Dr. Tarrant while testifying before the grand jury were absolutely privileged. See Hayes v. Rodgers, Ky., 447 S.W.2d 597 (1969); McClarty v. Bickel, 155 Ky. 254, 159 S.W. 783 (1913). Hence, we hold that summary judgment was properly entered in favor of Dr. Tarrant as a matter of law.

APPEAL NO. 2001-CA-000111-MR

Ball brings this appeal from a discovery order entered by the circuit court after Appeal No. 2000-CA-002506-MR was taken. In view of our decision in the former appeal, it seems to us that Appeal No. 2001-CA-000111-MR is now MOOT.

For the foregoing reasons, the Opinion and Order of the Jefferson Circuit Court in Appeal No. 2000-CA-002506-MR is affirmed. Appeal No. 2000-CA-000111-MR is DISMISSED.

ALL CONCUR.

³ It is well-established that "no stranger to a contract may sue for its breach unless the contract was made for his benefit." Sexton v. Taylor County, Ky. App., 692 S.W.2d 808, 810 (1985).

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