

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001770-MR

TIMOTHY M. SMITH

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
ACTION NO. 06-CI-02372

KIM WOLFE

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: TAYLOR, CHIEF JUDGE; CAPERTON AND CLAYTON, JUDGES.

TAYLOR, CHIEF JUDGE: Timothy M. Smith brings this appeal from an August 25, 2010, summary judgment of the Kenton Circuit Court dismissing Smith's claims against Kim Wolfe for intentional infliction of emotional distress, negligent infliction of emotional distress, the tort of outrage, and violation of Kentucky Revised Statutes (KRS) KRS 367.826. We affirm.

In late 2000 and early 2001, Smith was indicted by a Kenton County Grand Jury upon the offenses of sodomy in the first degree and use of a minor in a sexual performance. Both charges stemmed from incidents involving Smith's daughter, K.S. After Smith's indictment but before trial, the prosecution retained Kim Wolfe to act on its behalf as an expert witness at Smith's criminal trial. Wolfe held herself out to be a counselor with a "Ph.D. degree" who was an alleged expert on sexual crimes against minors. Wolfe met with K.S. on five occasions. Thereafter, Wolfe outlined her expected trial testimony in a written letter to the prosecutor. Wolfe opined that K.S.'s behavior "appears to be consistent with that of an individual who has both suppressed and repressed memories." Wolfe further stated that K.S. was "reasonably credible and that her presentation of traumatic symptoms is consistent with her reported memories."

At trial, Wolfe testified that K.S. suffered from repressed memory syndrome as to the acts of sexual abuse perpetrated by her father. Wolfe was addressed as Dr. Wolfe during her trial testimony. Following a three-day jury trial, Smith was convicted of first-degree sodomy and sentenced to twenty years' imprisonment. Smith's conviction was eventually affirmed on direct appeal by the Kentucky Supreme Court.

In February 2005, Smith's daughter, K.S. died.¹ Later in July, Smith filed a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate, set

¹ K.S. was apparently killed during her attempt to murder a pregnant woman and take her unborn child.

aside, or correct the judgment of conviction alleging that he received ineffective assistance of trial counsel. Ultimately, the circuit court granted Smith RCr 11.42 relief and vacated his judgment of conviction based upon ineffective assistance of trial counsel. By Opinion rendered September 28, 2007, this Court affirmed the trial court's vacation of Smith's conviction pursuant to RCr 11.42. The Commonwealth decided not to reindict Smith as their key witness, Smith's daughter, K.S., was deceased.

On September 1, 2006, Smith filed this civil action against Wolfe in the Kenton Circuit Court. Therein, Smith alleged that Wolfe misrepresented her academic credentials in an attempt to bolster her credibility as a witness, thus resulting in his wrongful conviction and incarceration.² Smith maintained that Wolfe did not obtain a Ph.D. in psychology from an accredited university and could not hold herself out as having earned such degree per KRS 367.826. By separate orders, the circuit court dismissed Smith's claims against Wolfe. This appeal follows.

Smith contends the circuit court erred by granting summary judgment and dismissing his claims against Wolfe. Smith claims summary judgment was improper because material issues of fact existed that precluded summary judgment. Moreover, Smith claims that Wolfe failed to demonstrate entitlement to summary judgment as a matter of law.

² The record indicates that Kim Wolfe obtained a Ph.D. in psychology from Kennedy Western University, which is an unaccredited university originally based in California. The business was alleged to be a "diploma mill" and ceased operations in 2009.

Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). For the reasons hereinafter elucidated, we hold that the circuit court properly entered summary judgment dismissing Smith's claims against Wolfe, although we reach such decision upon different grounds from the circuit court. *See Vega v. Kosair Charities Comm., Inc.*, 832 S.W.2d 895 (Ky. App. 1992).

In his complaint, Smith set forth the following claims of relief against Wolfe: (1) intentional infliction of emotional distress, (2) negligent infliction of emotions distress, (3) the tort of outrage, and (4) violation of KRS 367.826. All of these claims were predicated upon either Wolfe's trial testimony or upon her pretrial misrepresentations as to her academic credentials.

It is clear that any statements made by Wolfe during her testimony at the criminal trial are shielded by absolute testimonial immunity and may not form the basis for Smith's claims of relief against Wolfe. *See McClarty v. Bickel*, 155 Ky. 254, 159 S.W. 783 (1913); *Stone v. Glass*, 35 S.W.3d 827 (Ky. App. 2000)(citing *Lawson v. Hensley*, 712 S.W.2d 369 (Ky. App. 1986)). Thus, Wolfe is absolutely immune from civil liability for her testimony during Smith's criminal trial.

The more troublesome issue presented is whether Wolfe's pretrial communications made directly in anticipation of her trial testimony is afforded the

same absolute testimonial immunity. In preparation for her trial testimony, the record reveals that Wolfe, in both written and oral communications, repeatedly held herself out as possessing a Ph.D. in psychology. As summarized by the circuit court, Smith claimed that in Wolfe's pretrial communications she misrepresented her academic credentials which "improperly influenced the direction of the criminal case against him" and ultimately led to his criminal conviction and imprisonment.

We are convinced that if the absolute testimonial immunity afforded to a witness at trial is to have any true effect, it must, likewise, extend to pretrial communications or statements made by a witness in preparation for trial.³ *See Schmitt v. Mann*, 291 Ky. 80, 163 S.W.2d 281 (1942). Thus, a witness should be afforded absolute immunity from civil liability for communications or statements made directly in preparation for and preliminary to a judicial proceeding. *Id.* This rule is consistent with the position taken in the *Restatement (Second) of Torts* § 588 (1977), which recognizes absolute testimonial immunity as encompassing a witness's pretrial statements made in preparation of trial.⁴

We, thus, conclude that Wolfe is clothed with absolute testimonial immunity for any communications made directly in anticipation of and prior to her

³ In *General Electric Company v. Sargent & Lundy*, 916 F.2d 1119 (6th Cir. 1990), the Sixth Circuit Court of Appeals opined that this Commonwealth would recognize that absolute testimonial immunity extends to pretrial communication made in preparation for trial.

⁴ We also observe that other jurisdictions are in agreement. *See Gallo v. Barile*, 935 A.2d 103 (Conn. 2007); *Mahoney & Hagberg v. Newgard*, 729 N.W.2d 302 (Minn. 2007); *Oparaugo v. Watts*, 884 A.2d 63 (D.C. 2005); *Krouse v. Bower*, 20 P.3d 895 (Utah 2001); *Hawkins v. Harris*, 661 A.2d 284 (N.J. 1995); *Radue v. Dill*, 246 N.W.2d 507 (Wis. 1976).

testimony at trial. This would, of course, include Wolfe's oral and written misrepresentations as to her credentials. As such misrepresentations form the basis for Smith's remaining claims of relief against Wolfe, we are of the opinion that the circuit court properly rendered summary judgment dismissing Smith's complaint in its entirety.

We view Smith's remaining allegations of error as either moot or without merit.

For the foregoing reasons, the order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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