IN THE COURT OF APPEALS

MARK LEEDOM and wife, SUSAN LEEDOM,	)	Knox Circuit
	)	C. A. NO. 03A01-9704-CV-00136
Plaintiffs-Appellants	)	
vs.	)	HON. DALE C. WORKMAN
	)	JUDGE
CORRINE BELL, SUZANNE MARLEY, and BARBARA CHALFONT,	)	AFFIRMED IN PART,
	)	REVERSED IN PART and
	)	REMANDED
Defendants-Appellees	)	

ALAN EVERETT, Knoxville, for Appellants.

EDWARD G. WHITE, II and WAYNE A. KLINE, Hodges, Doughty & Carson, Knoxville, for Appellee Corrine Bell.

JOHN KNOX WALKUP, Attorney General and Reporter, and DIANNE STAMEY DYCUS for Intervenor State of Tennessee, Attorney General's Office.

OPINION

McMurray, J.

Plaintiffs Mark and Susan Leedom brought this action against Dr. Corinne Bell, a psychologist, and Suzanne Marley, Mr. Leedom's ex-wife, for defamation, intentional infliction of emotional distress, outrageous conduct, and an alleged violation of, or interference with, plaintiff's constitutionally protected right to his familial relationship with his daughter.[1] Plaintiffs also sued Dr. Bell for malpractice. The essence of the complaint is an allegation that the defendants issued false accusations that Mr. Leedom had sexually abused his daughter. The defendants filed motions for summary judgment which were granted by the trial court. We affirm the court's ruling on all issues except the libel claim against defendant Bell.

I

The acts which precipitated this lawsuit began on October 16, 1992, when Marley, then divorced from Leedom, asked Dr. Bell for assistance regarding the behavior of her then seven year old daughter, Molly Leedom, and to conduct a psychological evaluation of her. Dr. Bell states in her affidavit that she interviewed Molly several times and expressed concern that she might have been sexually abused. On November 13, 1992, Marley filed a "petition for immediate suspension of visitation" in the Fourth Circuit Court

[1]Plaintiffs also sued Barbara Chalfont but they have not appealed the trial court's grant of summary judgment in her favor.

for Knox County. Along with the petition, Marley filed a handwritten letter from Dr. Bell, which stated in its entirety:

> 11-12-92
>
> To Whom it May Concern:
> Re: Molly Leedom, DOB 11-25-86
>
> In an appointment for a psychological evaluation on 11-9-92, information surfaced raising concern that Molly may be in danger of sexual abuse while in the care of her father.
>
> It is recommended that all contact between Molly and her father be temporarily suspended until a full evaluation and investigation can occur.
>
> Sincerely,
> Corinne Bell, Ph.D.

The same day the petition was filed, the trial court issued a temporary restraining order suspending Leedom's visitation and all contact with Molly. The court set a hearing date of November 20, 1992. There is no transcript of the hearing. Leedom's affidavit states that Dr. Bell "did not testify at the November 20, 1992 hearing on the temporary restraining order and this restraining order was dismissed." Marley filed a "Motion For a New Trial, or, in the Alternative, Motion to Alter or Amend Judgment" on December 3, 1992, which made reference to the court's "Order of Dismissal on November 24, 1992." This order is not in the record. Apparently the court set the date of December 11, 1992 to hear Marley's motion. That hearing did not take place. Instead, the parties apparently agreed to hear, and perhaps implement, Dr. Bell's recommendations. Her affidavit states:

> The parties' attorneys and the three parents then requested that instead of proceeding with the formal hearing, I provided them with my recommendations.
>
> Based upon my professional evaluation of Molly Jenkins Leedom, I recommended:
>
> A. That Molly Leedom engage in psychotherapy;
>
> B. That a custody style evaluation, sometimes referred to as an extended family evaluation, of the entire Leedom family occur by another psychologist;
>
> C. Visitation between Molly Leedom and her father, Mark Leedom, resume at the father's home, but be changed from full weekend visitation to 8-hour visitation on Saturdays and Sundays, with the step-mother present at all times, and no bath to be provided during visitation at the father's home.

As far as the record reveals, no further legal action was taken until February 17, 1993, when Marley filed a petition to suspend visitation in the Juvenile Court for Knox County. Attached as an exhibit was a four-page letter from Dr. Bell to Marti Kelly, a social counselor for the Knox County Department of Human Services, dated February 12, 1993. In it, Dr. Bell stated that the letter's purpose was "to inform you of my psychological findings" regarding Molly. After describing her interactions with and observations of Molly, and relating several statements about Leedom which she had heard from Marley and her family members, she concluded that "my interactions with Molly and test results raise concerns that she has been sexually victimized."

On February 18, 1993 the Juvenile Court issued a Temporary Order Suspending Visitation. The court set a preliminary hearing date of February 22, 1993. Neither a transcript nor the outcome of that hearing are included in the record. Leedom's affidavit states that Referee, Kay Kasserman, heard the case and ordered that Leedom should have no unsupervised visitation. From this point in time, it appears that Leedom's visitation with his daughter was quite limited and curtailed.

Plaintiffs' brief states that there was another hearing on the visitation issue after the Juvenile Court hearing:

> After a De Novo trial in front of Judge Garrett when the only proof came from Nan Butruff, LCSW the case was dismissed. . .The Circuit Judge refused to restrict the father's visitation[.]

There is nothing in the record regarding such a hearing before Judge Garrett, or the date on which it may have occurred.

Plaintiffs filed their initial complaint on February 15, 1994. They took a voluntary nonsuit on February 22, 1994, and filed a second complaint on February 21, 1995. The plaintiffs state that throughout the course of numerous investigations and evaluations, Molly Leedom has consistently denied being sexually abused by anyone. Also, they assert that the Tennessee Department of Human Services, having found the allegations unsupported, has refused to

open a file on the Leedoms or take other action in this regard. The defendants have not contradicted these assertions.

The plaintiffs argue that the real source of stress in Molly's life during the time at issue in this case was the strained relations between Molly's maternal grandparents. Leedom's affidavits contain allegations that Marley's mother was guilty of numerous misdeeds, including taking a convicted felon into their house and having a sexual affair with him, and plotting to kill her husband by lacing his orange juice with methadone. Some of these actions, Leedom contends, were done in Molly's presence, since she would stay with her grandparents from time to time. Leedom cited one occasion where Molly seemed upset and he asked her why, and she said that "they were being mean" to her grandfather. The plaintiffs complain that Dr. Bell apparently did not investigate any other possible source of Molly's stress, that she did not compile family histories as the standard of psychological care would require, and that she rushed to the judgment that Leedom had abused his daughter.

II

Reports of known or suspected child sexual abuse are governed by T.C.A. § 37-1-604 et seq. T.C.A. § 37-1-605 states in pertinent part:

> (a) Any person, including, but not limited to, any:
>
> * * * *
>
> (2) Health or mental health professional. . .
>
> * * * *
>
> (8). . .who knows or has reasonable cause to suspect that a child has been sexually abused; shall report such knowledge or suspicion to the department in the manner prescribed in subsection (b).
>
> (b)(1) Each report of known or suspected child sexual abuse pursuant to this section shall be made immediately to the local office of the department responsible for the investigation of reports made pursuant to this section or to the judge having juvenile jurisdiction or to the office of the sheriff or the chief law enforcement official of the municipality where the child resides.

This section thus required Dr. Bell to report her suspicions of child abuse to the Knox County Department of Human Services. The General Assembly has made it a Class A misdemeanor for a person required to report sexual abuse under the above section to "knowingly and willfully" fail to make such a report. T.C.A. § 37-1-615(a).

Dr. Bell contends, among other things, that she is immune from a lawsuit based on the allegations of her report of suspected sexual abuse by operation of T.C.A. § 37-1-613, which provides:

> **Immunity from civil or criminal liability.** Any person making a report of child sexual abuse shall be afforded the same immunity and shall have the same

> remedies as provided by § 37-1-410 for other persons reporting harm to a child.
>
> * * * *
>
> **37-1-410. Immunity from civil or criminal liability for reporting abuse. . .** (a) A person reporting harm shall be presumed to be acting in good faith and shall thereby be immune from any liability, civil or criminal, that might otherwise be incurred or imposed for such action.

By enacting the above sections and granting broad immunity "from any liability, civil or criminal," the General Assembly has evinced a strong public policy in favor of reporting suspected child abuse.

The statutory scheme does not provide any guidance for whether, and by what standard of proof, the presumption of good faith in § 37-1-410 could be rebutted. We are unwilling, however, to hold that more than a preponderance of the evidence is required to rebut the presumption.

The plaintiffs have alleged that Dr. Bell was motivated by bad faith and malicious intent. In support of this allegation, they filed an eleven-page affidavit of psychologist Dr. Eric Engum, in which he sets forth in substantial detail how Dr. Bell did not comply with the recognized standards of acceptable practice of psychology. Although the record, and particularly Dr. Engum's affidavit, presents evidence that Dr. Bell acted in an irresponsible and unprofessional way during the course of her investigation,

we do not think that the evidence in the record supports a finding that the presumption has been rebutted.

Consequently, the trial court was correct in granting summary judgment to Dr. Bell on the plaintiffs' claims of malpractice, outrageous conduct, intentional infliction of emotional distress, and interference with their constitutionally protected right to a familial relationship with Molly, based on the immunity granted by § 37-1-410.

Regarding the defendant Marley, we have meticulously searched the record for any evidence supporting the claims of outrageous conduct and intentional infliction of emotional distress and found none. The primary allegation against Marley in the record is the following paragraph from the complaint:

> The defendant, Suzanne Marley, made up numerous allegations about the plaintiff, Mark Leedom, and exaggerated and made up signs and symptoms purportedly exhibited by Molly Leedom and told these to numerous people, including the other two defendants. Additionally, the defendant, Suzanne Marley, actively covered up the background of, and the illicit relationship maintained by Clarence Madison and her mother, Patricia Marley.

The plaintiffs repeat their allegation that Marley refused to reveal what was going on between her mother and Madison (the alleged convict and lover) numerous times in their affidavits. Accepting these allegations as true, they do not establish anything

more than irresponsible conduct on Marley's part, and certainly do not rise to the level of intentional infliction of emotional distress nor outrageous conduct.

There is one specific allegation of slander by Marley in the amended complaint, which states:

> Excerpts from the testimony, under oath, in Juvenile Court by the Defendant Marley, indicate that the Defendant Marley discussed the abuse allegations with Roy and Sara Kersey in August of 1992. These occurred outside of Court and prior to any legal proceedings.

It is apparent on the face of the amended complaint that these alleged acts of slander occurred after the six-month limitations period for slander set out in T.C.A. § 28-3-103, and are time-barred. Therefore, the trial court's grant of summary judgment in favor of Marley is affirmed.

On appeal, the plaintiffs challenge the constitutionality of the entire statutory scheme governing the reporting of child abuse. The Attorney General has filed a brief in which he points out that plaintiffs did not raise such a challenge in the trial court, nor did they provide notice to his office as required by T.R.Civ.P. 24.04. The record reveals that plaintiffs did not challenge the constitutionality of any statute at the trial level. In Lawrence v. Stanford, 655 S.W.2d 927, 929 (Tenn. 1983), the Supreme Court stated:

> It has long been the general rule that questions not raised in the trial court will not be entertained on appeal and this rule applies to an attempt to make a constitutional attack upon the validity of a statute for the first time unless the statute involved is so obviously unconstitutional on its face as to obviate the necessity for any discussion.

We find plaintiffs' constitutional arguments dubious at best, however, we decline to address them under the authority of Lawrence.

The plaintiffs have also sued Dr. Bell for both libel and slander. In her brief, Dr. Bell contends that "[a]ppellants stipulated [in the trial court] that their entire cause of action against Dr. Bell is for medical malpractice only." We do not have a transcript of any hearing before the trial court, and the record contains nothing which bears out this assertion. Appellants deny that they made such a stipulation and insist they have continuously pursued their defamation claims.

Regarding the slander allegations, it is apparent from the record that all of the statements complained of were uttered more than six months before the complaint was filed, and the slander claims are time-barred.

The libel claim is based upon the letter sent to the Knox County Department of Human Services. Pursuant to the statutory

analysis above, Dr. Bell is immune from suit for the copy of the letter she sent to the KCDHS official. However, there is an annotation at the bottom of the letter, indicating that Dr. Bell sent a "carbon copy" or duplicate of the letter to two other parties:

> cc: Thomas F. Mabry, Atty.
>
> Sexual Assault Crisis Center
> Attn: Becky Garland

Thomas F. Mabry is Marley's attorney. The plaintiffs argue that there is no statutory immunity for copies of the confidential letter which were sent to parties other than the "local office of the department responsible for the investigation of [child sexual abuse] reports." We agree.

T.C.A. § 37-1-612 states the following in pertinent part:

> (a) In order to protect the rights of the child and the child's parents or other persons responsible for the child's welfare, all records concerning reports of child sexual abuse, including reports made to the abuse registry and to local offices of the department and all records generated as a result of such reports, shall be confidential and exempt from other provisions of law, and shall not be disclosed except as specifically authorized by the provisions of this part and part 4 of this chapter.
>
> (b) Except as otherwise provided in this part or part 4 of this chapter, it is unlawful for any person, except for purposes directly connected with the administration of this part, to disclose, receive, make use of, authorize or knowingly permit, participate in, or acquiesce in the use of any list or name, or any information concerning a report or investigation of a report of

> harm under this part, directly or indirectly derived from the records, papers, files, or communications of the department or divisions thereof acquired in the course of the performance of official duties. [emphasis added].

The above statutory language making records concerning reports of child sexual abuse "confidential" and proscribing them from disclosure strongly supports the conclusion that the actions of Dr. Bell in sending copies of a letter reporting suspected sexual abuse to individuals other than governmental officials authorized to investigate such matters are not protected by the immunity granted by T.C.A. § 37-1-613, and we so hold. Therefore, we must consider whether the court was correct in dismissing the libel claim against Dr. Bell.

The letter primarily concerns Mr. Leedom, there is nothing in it which is defamatory regarding Mrs. Leedom, and the trial court's summary judgment against her is affirmed. However, the letter contains statements which could fairly be considered libelous regarding Mr. Leedom. It contains descriptions or allegations of several unsavory aspects of his character.

Dr. Bell argues that since the letter was sent on February 12, 1993 and plaintiffs filed suit on February 15, 1994, their libel action is barred by the one-year statute of limitations found at T.C.A. § 28-3-104. Leedom counters by arguing that due to the confidential nature of the letter, there was no way he could have

discovered its existence or contents before February 22, 1993, the date of the juvenile court hearing. He alleges that this date, in fact, was the first time he became aware of the letter, and that it would be unfair to bar his action before he had grounds to know or suspect he had a cause of action. Leedom in effect argues for the application of the "discovery rule" first adopted by our Supreme Court in Teeters v. Currey, 518 S.W.2d 512 (Tenn. 1974) for malpractice actions, and later extended to all actions predicated on negligence, strict liability or misrepresentation. See McCroskey v. Bryant Air Cond. Co., 524 S.W.2d 487 (Tenn. 1975).

The precise issue of whether the discovery rule should be adopted in matters involving libelous documents which, unlike books or magazine articles, are not accessible to the general public, has not been addressed in Tennessee. In Quality Auto Parts Co., Inc. v. Bluff City Buick Co., Inc., 876 S.W.2d 818 (Tenn. 1994), the Supreme Court declined to apply the discovery rule in slander cases. The Quality Auto Parts court carefully limited its holding to slander actions, noting that "historically, ... a distinction has been drawn between the two types of defamation." Id. at 820. Additionally, the language of the libel limitations statute, which provides that an action must be brought "within one (1) year after [the] cause of action accrued," [T.C.A. §28-3-104], is significantly different from the more specific slander limitations

statute, which mandates the bringing of an action "within six (6) months after the words are uttered." T.C.A. § 28-3-103.

The Supreme Court has stated that "the public policy of our state is opposed to requiring that suit be filed when circumstances totally beyond the control of the injured party make it impossible for him to bring suit." Teeters, 518 S.W.2d at 517. This policy is grounded upon a recognition of the unfairness of "requiring that [a plaintiff] sue to vindicate a non-existent wrong, at a time when the injury is unknown and unknowable." Id. at 515. In deciding whether to apply the discovery rule to cases such as the one at bar, we must weigh these considerations against the policy reasons underlying the development of statutes of limitations, described by the Quality Auto Parts court as:

> To ensure fairness to the defendant by preventing undue delay in bringing suits on claims, and by preserving evidence so that facts are not obscured by the lapse of time or the defective memory or death of a witness.

Quality Auto Parts, 876 S.W.2d at 820.

There is a decided modern trend in American jurisprudence to apply the discovery rule in those limited situations where the allegedly libelous statement occurred in private or confidential publications which are not readily available to the plaintiff or the general public. Those state courts which have directly addressed this issue have generally adopted the discovery rule in

such cases. See Tom Olesker's Exciting World of Fashion, Inc., v. Dun & Bradstreet, Inc., 334 N.E.2d 160 (Ill. 1975); Kelley v. Rinkle, 532 S.W.2d 947 (Tex. 1976); Kittinger v. Boeing Co., 585 P.2d 812 (Wash.App. 1978); Manguso v. Oceanside Unified Sch. Dist., 88 Cal.App.3d 725, 152 Cal.Rptr. 27 (4th Dist. 1979); Sears, Roebuck & Co. v. Ulman, 412 A.2d 1240 (Md.App. 1980); White v. Gurnsey, 618 P.2d 975 (Or.App. 1980); Hoke v. Paul, 653 P.2d 1155 (Haw. 1982)(adopting discovery rule in all defamation cases); Clark v. AiResearch Mfg. Co. of Arizona, 673 P.2d 984 (Ariz.App. 1983); Jones v. Pinkerton's, Inc., 700 S.W.2d 456 (Mo.App. 1985); Burks v. Rushmore, 534 N.E.2d 1101 (Ind. 1989); Staheli v. Smith, 548 So.2d 1299 (Miss. 1989).

After careful consideration of the facts and equities of the present case, and the various policies underlying statutes of limitations and the discovery rule, we find ourselves in agreement with the following statement by the Mississippi Supreme Court on this issue:

> We are convinced that the general policies underlying this statute of limitations will not be thwarted by adoption of the discovery rule in that limited class of libel cases which, because of the secretive or inherently undiscoverable nature of the publication the plaintiff did not know, or with reasonable diligence could not have discovered, that he had been defamed. In such rare instances, we do not believe that a plaintiff can be accused of sleeping on his rights.

Staheli, 548 So.2d at 1303.

In the present case, Leedom could not have discovered the existence of the allegedly libelous letter until the juvenile court hearing on February 22, 1993. By the operation of the discovery rule, his cause of action for libel accrued on that date. Since Leedom filed his complaint less than one year after accrual, his claim is not time-barred.

We reverse the trial court's grant of summary judgment for plaintiff, Mark Leedom's libel claim resulting from Dr. Bell's publication of the letter sent to the parties other than the Knox County Department of Human Services. The trial court's judgment is in all other respects affirmed. Costs on appeal are assessed one-half each to appellants and one-half to the appellee, Dr. Bell.

_____
Don T. McMurray, Judge

_____
Herschel P. Franks, Judge

_____
William H. Inman, Senior Judge

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CORRINE BELL, SUZANNE MARLEY, and BARBARA CHALFONT,	)	
	)	AFFIRMED IN PART,
	)	REVERSED IN PART and
	)	REMANDED
Defendants-Appellees	)	

JUDGMENT

This appeal came on to be heard upon the record from the Circuit Court of Knox County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that there was some reversible error in the trial court.

We reverse the trial court's grant of summary judgment for the plaintiff, Mark Leedom's libel claim resulting from Dr. Bell's publication of the letter sent to the parties other than the Knox County Department of Human Services. The trial court's judgment is

in all other respects affirmed. Costs on appeal are assessed one-half each to appellants and one-half to the appellee, Dr. Bell.

PER CURIAM