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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001745-MR

ILENE ORAM — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 16-CI-00591

VANESSA B. CANTLEY; DANIELLE BLANDFORD;
AND BAHE COOK CANTLEY & NEFZGER, PLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Ilene Oram appeals an order granting summary judgment in her legal malpractice case in favor of her former attorneys, Vanessa Cantley, Danielle Blandford and the firm of Bahe Cook Cantley & Nefzger, PLC

(collectively Appellees).[1] Finding no error in the trial court's conclusion that Oram's expert's testimony was insufficient, we affirm.

Cantley represented Oram on a contingency fee basis in a medical malpractice action in Fayette Circuit Court. Blandford assisted Cantley at trial. The evening before closing arguments, the doctor's counsel made a $200,000 settlement offer. Cantley relayed the offer to Oram via text. Cantley and Oram disagree about whether they also spoke on the phone. Oram contends she asked Cantley how much Oram would receive out of the $200,000, to which Cantley responded $80,000 to $85,000. Oram became upset because she thought she would receive less money than Cantley. According to Oram, Cantley did not respond to a text asking why Cantley would receive more money than Oram.[2] It is uncontested that Cantley complied with Oram's directive to decline the offer.

Before the trial resumed the next morning, Cantley and Blandford contend they discussed with Oram how any settlement funds would be dispersed (i.e., litigation costs and attorney fees, among other things, would be deducted from the total). Oram disputes that discussion occurred. It is undisputed, however, that immediately prior to Cantley's closing argument Oram informed Cantley she

[1] Blandford no longer works for the Bahe firm.

[2] Oram says she did not understand that litigation expenses also had to be deducted from any settlement amount.

would settle if she would net $150,000. Cantley states that she asked the adjuster for the doctor's malpractice carrier after the jury retired to deliberate if there were any additional settlement funds available, and the adjuster responded that settlement would only occur if Oram accepted the $200,000 offer. Oram testified at her deposition that she did not hear/see that conversation between Cantley and the adjuster. It is undisputed that Oram did not discuss further pursuing a settlement with her counsel while the jury deliberated. The jury found the doctor deviated from the standard of care, but the deviation did not proximately cause Oram's injuries.

Oram, via new counsel, later filed this legal malpractice claim against Appellees. Oram's complaint alleged: 1) Appellees violated the applicable standard of care by failing to explain adequately the $200,000 settlement offer; 2) Appellees violated the applicable standard of care by failing to communicate a counteroffer; 3) Appellees' malpractice was a breach of contract; and 4) Appellees' malpractice was a breach of their fiduciary duties.[3]

Though she argued expert testimony was not necessary, Oram retained attorney Michael Cox as an expert. Cox drafted a report in which he cited a thirty-plus year-old law review article from Louisiana for the proposition that an

[3] The breach of contract and breach of fiduciary duty claims functionally merged with the other malpractice claims as all four claims rely upon the same operative facts and arguments.

attorney should discuss thirteen general topics with a client when deciding whether to accept a settlement offer. However, Cox did not set forth a standard of care because Cox did not state which of the thirteen topics an attorney was required to discuss with a client, nor did he apply the thirteen general topics to Oram's case by opining as to whether/how Appellees had violated any standard of care. Instead, Cox wrote that Oram would win if the jury believed her and would lose if the jury believed Cantley and Blandford. Cox's report generically provides in relevant part:

> Thus, the issue posed in this matter is whether the attorneys sufficiently informed Ms. Oram of the information necessary for her to make an informed decision rejecting the $200,000 settlement offer as she did. Clearly there is a dispute in the testimony of the parties as to whether that occurred, and that is for the trier of fact to resolve. If the trier of fact believes Ms. Oram that all the necessary information was not provided to her such that her rejection of the settlement offer was not an informed decision, then the attorneys have breached the duty owed to her. The issue then is whether Ms. Oram would have accepted the offer if she had been properly instructed such that she could exercise informed consent. She has testified that if all the pertinent details and considerations as to the $200K settlement offer had been explained to her back during the trial, she would have then accepted the offer (even Ms. Cantley and Ms. Blandford both agree that the offer was a sufficiently valuable one for the case that should have been accepted to hedge against the risk of losing). On the other hand, if the trier of fact believes the attorneys that they did provide the necessary information to the client and she thus made an informed decision, there is not a breach of the duty and the attorneys are absolved.

Cox's report regarding the "failure to counteroffer" claim was similar:

> To the extent it appears that Ms. Oram directed a counter-offer to be made on the last day of the trial, the failure to convey the counter-offer to the defense is a breach of that duty. The lawyer's belief in [the] futility of making the counter-offer does not absolve the lawyer of the duty to convey it . . . . In other words, as to the issue of causation, it depends upon whether the finder of fact concludes that conveying the client's expressed counter-offer would have reasonably affected the defense positively . . . . This scenario (of failing to convey the counter-offer) implicates a lost opportunity or chance to know exactly how it would have affected the course of the negotiations, including as to both sides. This is because, but for the failure to convey the counter-offer, the defense here could not consider the counter-offer or act on it to change its settlement position, and Ms. Oram could not be affected by the course that ensued. Thus, given Ms. Oram's request for a counter-offer and the failure to convey it, the finder of fact can conclude that Ms. Oram has been damaged by the lost chance. If the finder of fact does not accept Ms. Oram's proof, the attorneys are absolved of liability.

Cox's deposition testimony failed to provide clarifying amplification, as the following illustrative colloquy shows:

> Q. But in terms of the specifics of any of these 13 points as they related to Ms. Oram's case against Dr. Karon, you're not here to talk about those?
>
> A. I'm not giving you an opinion on it; that's correct.
>
> Q. All right. So, as I understand it, basically what you are saying is, if a jury believes Ms. Cantley, she didn't violate the standard of care, but if the jury believes Ms. Oram, then Ms. Cantley did violate the standard of care. Is that what you're saying?

A. I think, as a generalization, yes. In other words, I think that –

Q. So how's that—how's that—

A. I think—I think—let me finish. I think what happens is that the jury is told by experts what they think the standard of care is in this particular situation. I've laid that out. They'll then hear Ms. Cantley's testimony about what she did, and they can decide for themselves if she, in fact, complied with the standard of practice duties. If they think she didn't, then they can find a breach with respect to Ms. Oram.

Q. So if these 13 points were discussed with Ms. Oram, case over?

A. Well, I don't think—I want to be clear. Each case doesn't necessarily implicate every single one of these 13 things. . . .

Q. Well, how many of these 13 did the standard of care require that Vanessa [Cantley] discuss or somebody discuss with Ms. Oram before trial began?

A. All of those that are relevant.

Q. And it's—as I understand it, you're saying that it's not up to you to decide which ones are relevant and you've not come up with specific circumstances or specific facts as to each of these 13 bullet points, right?

A. Well, I think—I think this is getting into the distinction between these are generally considerations that are discussed, but the details are specific, obviously, as to each case—

Q. Right. And you don't have an opinion—

A. –so there's no—

Q. –as to details?

A. That's right . . . .

The trial court granted summary judgment to appellees, chiefly because it agreed with their contention that Oram had not presented the requisite level of expert testimony. Oram then filed this appeal, primarily arguing the trial court erred by concluding: 1) she was required to present expert testimony, or, alternately, 2) Cox's expert testimony was insufficient.

Before addressing the merits of the summary judgment decision, we must resolve Oram's allegation that Judge Goodwine, who also presided over Oram's medical malpractice claim, should have recused *sua sponte*. Under Kentucky Revised Statutes 26A.015(2)(a) and (e), Judge Goodwine was required to recuse if she had "a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding" or had "knowledge of any other circumstances in which [her] impartiality might reasonably be questioned." *See also* Rules of the Supreme Court (SCR) 4.300, Canon 2, Rule 2.11. In other words, recusal is proper if "the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." *Taylor v. Carter*, 333 S.W.3d 437, 445 (Ky.App. 2010). Oram's burden to show

recusal was necessary is "an onerous one." *Stopher v. Commonwealth*, 57 S.W.3d 787, 794 (Ky. 2001).

A party is required to "move for recusal immediately after discovering the facts upon which the disqualification rests[,]" and a failure to timely seek recusal means "the issue will be considered waived and the issue will not be considered." *Johnson v. Commonwealth*, 231 S.W.3d 800, 809 (Ky.App. 2007). Oram did not timely seek Judge Goodwine's recusal. Thus, the issue is waived.

Oram's recusal argument would nonetheless fail on the merits. Oram contends Judge Goodwine "began yelling at" Oram's counsel during a hearing on appellees' motion for summary judgment. Our review of the cited portion of the record reveals no yelling by Judge Goodwine, and Oram's representation to the contrary is highly improper.

Oram also seizes on Judge Goodwine's comments at the summary judgment hearing regarding her recollections of the medical malpractice trial, but we find no grounds for recusal in those comments. "The United States Supreme Court has stated that 'opinions held by judges as a result of what they learned in earlier proceedings' are not considered examples of bias or prejudice likely to require a judge's recusal or threaten a party's due process rights." *Minks v. Commonwealth*, 427 S.W.3d 802, 808 (Ky. 2014) (quoting *Liteky v. United States*, 510 U.S. 540, 551 (1994)). In fact, our Supreme Court declined to hold that a

judge must automatically recuse from presiding over a suppression hearing involving determining the propriety of a search warrant issued by that judge. *Minks*, 427 S.W.3d at 807. The fact that Judge Goodwine presided over the medical malpractice trial is not grounds for recusal.

Oram also argues that Judge Goodwine's comments at the summary judgment hearing show she was biased. Simply put, a judge generally is not required to recuse merely due to comments made which counsel subjectively perceives as "critical, disapproving, or even hostile . . . ." *Marchese v. Aebersold*, 530 S.W.3d 441, 446 (Ky. 2017). Instead, recusal is only required if the judge's comments "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* (quoting *Liteky*, 510 U.S. at 555). Oram has not come close to meeting that demanding standard.

Judge Goodwine engaged in a searching, yet polite, colloquy with counsel for *both sides* during the lengthy summary judgment hearing, frequently asking each side to respond to points made by the other. Asking counsel tough questions is not improper. We thoroughly reject Oram's belated, baseless argument that Judge Goodwine was required to recuse.

Turning to the merits of the summary judgment, Oram argues that Cox provided sufficient expert testimony and/or that no expert testimony was necessary. A plaintiff in a legal malpractice case must show that the attorney

"violated the standard of care *and* that such violation was the proximate cause of injury to the client . . . ." *Osborne v. Keeney*, 399 S.W.3d 1, 12 (Ky. 2012). Generally, an expert witness is required to establish the appropriate standard of care, *Gleason v. Nighswander*, 480 S.W.3d 926, 929 (Ky.App. 2016), "since only an attorney can competently testify to whether the defendant met the prevailing legal standard. Without expert assistance, lay juries cannot understand most litigation issues, legal practices or the range of issues that influence how an attorney should act or advise." Ronald E. Mallen 4 *Legal Malpractice* §37.123 (2019) (footnotes omitted). However, no expert testimony is needed if "the negligence of the professional is so apparent that even a layperson could recognize it." *Gleason*, 480 S.W.3d at 929 (quotation marks and citation omitted). A trial court has discretion to determine whether an expert is required. *Id.*

Here, the trial court did not abuse its discretion when it concluded Oram had to present expert testimony. Oram relies upon *Stephens v. Denison*, 150 S.W.3d 80 (Ky.App. 2004), in which we held a legal malpractice plaintiff did not need to present expert testimony. However, *Stephens* is materially distinguishable because the attorney in that case completely failed to convey a plea offer to a criminal defendant. Here, Cantley timely conveyed the settlement offer to Oram—the question is whether she adequately explained the offer, which is not a matter readily understood by a layperson.

Having determined that Oram needed an expert, we now address whether Cox's report and deposition testimony were sufficient. As an expert, Cox was required to first establish the applicable standard of care (i.e., to "explain[] to a jury of laypersons what constitutes ordinary conduct among members of the bar,") and to then "apply the standard, opining whether the defendant's conduct conformed to that standard. The deviation from [the] standard of care must be specified." 4 *Legal Malpractice* § 37:131 (2019) (footnotes omitted). Similarly, Kentucky Rule of Evidence (KRE) 702(3) permits an expert to testify in the form of an opinion only if, *inter alia*, the expert "has applied the principles and methods reliably to the facts of the case."

Cox failed to establish a standard of care or a violation thereof, instead only listing thirteen general topics he believes an attorney should address with a client when contemplating settlement. Cox did not address whether an attorney must discuss all thirteen topics to meet the standard of care, nor did he discuss which topics appellees failed to address and the impact of that failure. Instead, Cox merely opined that Oram would win if the jury believed her and would lose if it did not. Cox, therefore, provided neither a standard of care nor an explanation of how appellees failed to meet that standard. Thus, appellees were entitled to summary judgment. *See, e.g.*, *Rogers v. Clay*, 2006-CA-000397-MR, 2006 WL 3691214 at 2 (Ky.App. 2006) (unpublished) (affirming a trial court's

grant of summary judgment in a legal malpractice case because the plaintiff's experts declined to opine on whether the attorney acted negligently—i.e., deviated from the standard of care).[4]

The result is the same as to Oram's "failure to counteroffer" claim. First, Oram did not unambiguously direct Cantley or Blandford to make a counteroffer. Instead, Oram merely said she would settle the case if she netted $150,000. Second, Cox again failed to set forth a specific standard of care, nor did he apply that standard to the facts at hand. Instead, Cox again merely blandly opined that an attorney should convey a counteroffer if directed to do so by the client and it thereafter is up to the finder of fact to determine if conveying the counteroffer would have impacted the doctor's settlement position.

Oram also has offered no evidence she was prejudiced by appellees' failure to make a counteroffer. To show prejudice, Oram must show that a counteroffer would likely have been accepted because Oram cannot have been harmed by a failure to make an inherently doomed counteroffer. It is undisputed that for Oram to net $150,000 the total settlement would need to exceed $300,000, given the 40% contingent attorney fee and extensive litigation costs. Cantley testified she asked the doctor's adjuster after the jury retired to deliberate if the case could be settled and the adjuster said settlement would only occur if Oram

[4] We cite *Rogers* for illustration purposes only, not as binding precedent.

accepted the $200,000 offer. Similarly, the doctor's attorney testified at his deposition that a counteroffer of $275,000 or $300,000—still below the level necessary to allow Oram to net $150,000—would have been rejected. Oram offers nothing concrete to the contrary as Cox admitted in his deposition that he did not—indeed could not—know what would have happened if Cantley had counteroffered at a level which would have netted Oram $150,000. Speculation and supposition are insufficient to defeat summary judgment, *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006), and "expert opinion based on speculation rather than reasoned analysis and judgment is of no assistance to triers of fact[.]" *Mondie v. Commonwealth*, 158 S.W.3d 203, 213 (Ky. 2005) (quotation marks and citation omitted).

In closing, we recognize that there are some factual disputes between the parties. However, those disputes do not prevent granting summary judgment to appellees because Oram has shown only that she regrets not accepting the $200,000 offer without showing how appellees violated the standard of care or how that violation proximately caused her to be injured.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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