COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2009-SC-159, 2009-SC-391

TIM DAVIS AND TIM DAVIS & ASSOCIATES, INC. — APPELLANTS/CROSS-APPELLEES

v.

KENTUCKY COURT OF APPEALS
2007-CA-2279, 2007-CA-2308

JOHN J. SCOTT AND WHITLOW & SCOTT — APPELLEES/CROSS-APPELLANTS

REPLY BRIEF FOR CROSS-APPELLANTS

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was sent by first-class mail March 9, 2010, to: Hans G. Poppe, The Poppe Law Firm, 6004 Brownsboro Park Blvd., Suite E, Louisville, KY 40207; Hardin Circuit Court Clerk, Hardin County Courthouse, 120 East Dixie Ave., Elizabethtown, KY 42701; Hon. Robert A. Miller, Meade County Courthouse, 516 Fairway Dr., Brandenburg, KY 40108; and to Hon. Sam Givens, Jr., Clerk Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

Counsel for Appellees/Cross-Appellants

I. TDA waived its claim for attorneys' fees for prosecuting this action.

TDA argues that the trial court erred by granting Scott's summary judgment on its claims for attorneys' fees for bringing this action. Because, however, TDA failed to raise this issue in its motion for discretionary review, it is not properly before this Court, and the trial court's ruling is the law of the case. *Ellison v. Ellison,* 32 S.W.3d 66, 72, n. 8; CR 76.20(3)(d).

Even if the issue were preserved, the trial court properly dismissed TDA's claim for attorneys' fees for bringing this action. In rejecting TDA's argument that KRS 411.165's provision regarding "all damages and costs" includes attorneys' fees for bringing this action, the trial court correctly held: "The legislature chose the express language employed in the statute. This court is convinced by the long line of cases which have held that in Kentucky unless attorney fees are expressly provided for in the enacting statute or the contract between the parties, they are **not** recoverable." The trial court continued: "In an action for a wrong . . . , **the plaintiff's attorney's fee is never regarded as part of his damage**, although it is obvious that any recovery is reduced by that and perhaps other expenses. **It is the policy of the law in this jurisdiction not allow an attorney's fee to be collected from an adverse party** in the absence of an express statute authorizing it." (TR 1526, p. 24, quoting *Bryan v. Security Trust Co.*, 176 S.W.2d 104, 112 (Ky. 1943)). Thus, "[a]bsent express allowance of attorney fees in KRS 411.165, they are not recoverable by the Plaintiffs." *Id.*

The trial court ruled correctly. The plain meaning of the statute controls, and the General Assembly is presumed to have meant exactly what it said and said it exactly what it meant. *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005). KRS 411.165 permits the recovery of "damages," not attorney's fees. "[T]he plaintiff's

attorney's fees is never regarded as part of his damage . . . ." *Bryan, supra.* Had the legislature intended recovery of attorney's fees it would have said so like it has in other statutes. *See, e.g.,* KRS 344.450, KRS 365.886, and KRS 383.655. It has not, however, done so in KRS 411.165. Accordingly, TDA's claim was properly dismissed.

II. TDA may not recover for emotional distress for Scott's alleged negligence.

Because there are no Kentucky opinions allowing emotional distress damages in negligence cases without "physical impact" causing the emotional distress, TDA resorts to trying to distinguish four of the many cases establishing and upholding the impact rule. First, it dismisses *Morgan v Hightower's Adm.*, 163 S.W.2d 21, 22 (Ky. 1942), and *Hetrick v. Willis*, 439 S.W.2d 942, 943 (Ky. 1969), as "involv[ing] claims for personal injuries." (TDA Response at 10.) But regardless of plaintiff's cause of action (which, in *Morgan*, was trespass), the holdings requiring physical impact for recovery of emotional distress damages were not limited simply to "personal injury" cases. Next TDA argues that *Sparks v. Craft*, 1994 U.S. Dist. LEXIS 21303, * 10 (E.D. Ky. 1994), a legal malpractice action that dismissed a claim for emotional distress due to lack of physical impact, is unreliable because the decision was overruled on appeal. (TDA Response at 10.) The *Sparks* decision, however, was overruled on other grounds. (Scott Brief at 32-33.) TDA also challenges the applicability of *Donna Yeager, Executrix of the Estate of Stacey Clise v. Taliferro, Shirooni, Carren & Keys, PLLC et. al*, No. 2008-CA-000126-MR (Ky. App. 2009) (unpublished), arguing that the court dismissed the cause of action of negligent infliction of emotional distress, but did not consider the issue of emotional distress as a component of damages under a cause of action for legal malpractice. (TDA Response at 10-11.) This argument likewise lacks merit. Regardless of the *Yeager*

opinion, the long line of cases requiring physical impact apply to emotional distress damages, not simply to causes of action for negligent infliction of emotional distress.

Moreover In *Yeager*, the court relied on this Court's recent reaffirmation of the impact rule in *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 929 (Ky. 2007), and held that the claim for negligent infliction of emotional distress failed because of lack of physical impact. *Id.* at p. 5. In *Yeager*, the plaintiffs brought suit for intentional infliction of emotional distress, breach of contract and fiduciary duty, and professional negligence. *Id.* at p. 3. The court denied the intentional infliction of emotional distress claim because there was no evidence of record beyond conclusory allegations to demonstrate any of the elements. *Id.* at 4. Citing *Congleton,* the court went on to hold, "[a]ny damages the Estate claims for negligent infliction of emotional distress are barred by the impact rule. . . . We decline the Estate's invitation to reevaluate the rulings of our Supreme Court of the validity of the impact rule." *Id.* at 5. Thus, the court in *Yeager* held that, according to *Congleton*, a claim for emotional distress based on negligent conduct must be based on physical contact or impact that caused the alleged distress. In other words, the inquiry in *Yeager* was not about a separate cause **of** action, but rather a separate cause (intentional or negligent conduct) **for** the action.

Such is the case here. TDA's claims against Scott are based in negligence, not intentional conduct. Thus, there must be physical contact or impact, and the alleged emotional distress must be the direct result of such contact. Accordingly, TDA's semantic argument fails as a matter of law and judgment should be entered in favor of Scott on this issue.

TDA also argues that the legislature created an exception (unknown and unrecognized by any Kentucky appellate court) to the physical impact rule in enacting

speculative to assist the trier of fact in deciding the issues. Thus, the disagreements between the experts warrant dismissal of the claim.

As set forth in Scott's opening brief, a dispute among expert witnesses in a legal malpractice case is proof that the legal principle involved is unsettled or debatable. *See* Scott Brief at 38-39, citing RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE, § 18.7 (2000); *Schmidt v. Pearson, Evans and Chadwick*, 931 S.W.2d 774 (Ark. 1996); *Myers v. Maxey*, 915 P.2d 940 (Okla. Ct. App. 1995)). "When an issue is left so in doubt by the proof in a case, so that a jury would be required to speculate, the party must lose upon whom the burden ultimately rests." *Welch v. L.R. Cooke Chevrolet Co.*, 236 S.W.2d 690, 692 (Ky. 1951).

As evidenced by its silence on this point, TDA agrees. *See* TDA Response at 17-19.[1] How can Mr. Scott or any other attorney in Kentucky know the standard of care to which he or she is to be held if it is not a sufficiently well-established "standard" that the plaintiff's experts (the party with the burden of proof) can agree as to what it is, how it should be met, and whether it was violated?

V. The Trial Court Erred in Denying Scott's Motion in Limine to Exclude Testimony of Alleged Violations of the Rules of Professional Conduct.

In its opinion dismissing TDA's case, the trial court discussed the arguments related to Scott's motion in limine to prohibit testimony of alleged violations of the ethics rules, requested "appellate assistance on this issue," and "reserved" ruling. In other

[1] Instead of attempting to demonstrate how experts' disagreement as to what constitutes the standard of care and its violation could fail to prove that the standard is unsettled or debatable, TDA cites to cases that have nothing to do with disagreements regarding the standard of care. *See* TDA Brief at 17-18, citing *Comm., Dept. of Hwys v. McQuown*, 395 S.W.2d 586 (Ky. 1965) (concerning the fact that witnesses in condemnation cases routinely and "logically differ in their opinions as to highest and best use"); *Howard v. Kingmont Oil Co.*, 729 S.W.2d 183 (Ky. App. 1987) (regarding the requirements for surveyor's testimony regarding boundary lines); and *Blankenship v. Lloyd Blankenship Coal Co.*, 463 S.W.2d 62 (Ky. 1970) (concerning medical experts in a workers' compensation case who "were consistent in all respects except as to the extent of disability to the man as a whole," an area where medical testimony is rarely "in complete agreement.")

KRS 411.165, which contains language that attorneys shall be liable to clients "for all damages and costs sustained" by reason of professional negligence. Unfortunately for TDA though, KRS 411.165 was enacted in 1976, after about fifty years of the rule requiring physical impact for recovery of emotional distress damages. KRS 411.165 provides no succor. *See* Scott Brief at 33-35.

Next TDA argues against the purported "inequity" of the physical impact rule (which it calls a "pure 'economic loss rule'"). (TDA Response at 11.) In *Congleton*, however, this Court recently discussed the hardship of allowing emotional distress damages not caused by physical impact, including the danger of fraud and the speculative nature of such claims as evidenced by claims for intentional infliction of emotional distress. *Id.* at 929-30.

TDA tries to salvage its claim by arguing that malicious prosecution/wrongful institution of civil proceedings cases show that the courts allow emotional distress damages against lawyers in cases which do not have any physical contact or impact. (TDA Response at 12-13.) This argument fails for the same reason TDA's argument regarding negligent infliction of emotional distress fails – the distinguishable difference between negligent and intentional conduct. As the very cases cited by TDA show, a claim for malicious prosecution or wrongful institution of civil proceedings requires a showing of malice or improper motive. *See Prewitt v. Sexton,* 777 S.W.2d 891, 894-95 (Ky. 1989); *Raine v. Drasin*, 621 S.W. 2d 895, 899 (Ky. 1981); *H.S. Leyman Co. v. Short*, 283 S.W. 96, 98 (Ky. 1926); and *Massey v. McKinley,* 690 S.W.2d 131, 133 (Ky. App. 1985). Here, there is no allegation or proof that Scott engaged in malicious conduct or had an improper motive. Accordingly, this argument fails as a matter of law.

Finally, TDA's reliance on jury verdicts from Jefferson Circuit Court is misplaced. (TDA Response at 11-12) Two of the three cases are currently on appeal, and the Court of Appeals, in a well-reasoned "To Be Published Opinion" (that is not yet final), recently vacated emotional distress damages in one of those legal malpractice cases due to lack of physical impact. *Keeney v. Osborne*, 2007-CA-2112 (March 5, 2010) at 19-21, 26-27 (App. A). Further, there is no evidence before this Court as to whether this issue was raised by the other defendants below. Finally, not one Kentucky case supports the proposition that jury instructions have any precedential value.

III. The Trial Court Erred in Allowing TDA to Recover Corrective Fees.

Because Kentucky prohibits attorney's fees to be recovered as damages, TDA cites to other states that allow recovery of some attorneys' fees under certain circumstances. (TDA Resp. at 13-16.) It has long been the law in Kentucky, however, that attorneys' fees are never considered part of damages:

> In an action for a wrong, *ex contractu* or *ex delicto*, **the plaintiff's attorney's fee is never regarded as part of his damage**, although it is obvious that any recovery is reduced by that and perhaps other expenses. It is the policy of the law in this jurisdiction not to allow an attorney's fee to be collected from an adverse party in the absence of an **express statute** authorizing it.

Bryan v. Security Trust Co., 176 S.W.2d 104, 112 (Ky. 1943). (Emphasis added.) There being no contract or Kentucky statute authorizing the recovery of attorneys' fees here, the trial court erred in holding that TDA could recover its "corrective" attorneys' fees.

IV. Scott was Entitled to Summary Judgment Due to the Disagreement of TDA's Expert Witnesses.

TDA tries to minimize the disagreements between its two experts, claiming that those disagreements are "minor" and that the witnesses agree that Scott was the cause for

its injury. (TDA Response at 19.) The conflict between TDA's experts is, however, more accurately classified as "major."

The only time anyone knows what was said – before the April 22nd cease and desist letter – TDA's experts disagree as to whether Scott violated any standard of care. Mr. McDonald opines that Scott violated the standard of care on two separate occasions before the April letter and that he was incompetent in violation of SCR 3.130(1.1). (McDonald Dep., pp. 117-18, 167-91, 168, 197, 211.) Mr. Murrell disagrees and opines that Scott did not violate the standard of care prior to receipt of the April 22nd letter, and was "very competent." (Murrell Dep., pp. 36-38, 44-46, 60.) It would be difficult to find a more fundamental disagreement in a legal malpractice case.

Despite the fact that neither Scott nor Davis can recall their conversations after receipt of the April 22nd letter, McDonald and Murrell agree that Scott somehow violated the standard of care after he received that letter. TDA's two witnesses disagree, however, as to what the standard of care required Scott to do. *See* Scott Brief at 37-38. TDA believes that this disagreement is irrelevant because Scott could be found to have violated the standard of care after April 22 based on either witness's theory. But TDA ignores the fact that no one knows how Scott advised TDA after receipt of the April 22nd letter. Both Davis and Scott acknowledge that they had a conversation about the letter after it was received, but both admit that do not remember anything about what was said during this conversation. (Davis Dep., pp. 115-16; Scott Dep., pp. 81-82.) Thus, at the only point at which the experts have any similarity in opinion, no one can testify as to what Scott said during the conversation that caused the alleged breach of the standard of care. Testimony about the standard of care being violated by Scott after April 22 is unreliable and too

speculative to assist the trier of fact in deciding the issues. Thus, the disagreements between the experts warrant dismissal of the claim.

As set forth in Scott's opening brief, a dispute among expert witnesses in a legal malpractice case is proof that the legal principle involved is unsettled or debatable. *See* Scott Brief at 38-39, citing RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE, § 18.7 (2000); *Schmidt v. Pearson, Evans and Chadwick*, 931 S.W.2d 774 (Ark. 1996); *Myers v. Maxey*, 915 P.2d 940 (Okla. Ct. App. 1995)). "When an issue is left so in doubt by the proof in a case, so that a jury would be required to speculate, the party must lose upon whom the burden ultimately rests." *Welch v. L.R. Cooke Chevrolet Co.*, 236 S.W.2d 690, 692 (Ky. 1951).

As evidenced by its silence on this point, TDA agrees. *See* TDA Response at 17-19.[1] How can Mr. Scott or any other attorney in Kentucky know the standard of care to which he or she is to be held if it is not a sufficiently well-established "standard" that the plaintiff's experts (the party with the burden of proof) can agree as to what it is, how it should be met, and whether it was violated?

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words, the trial court has not ruled in either Scott's or TDA's favor on this issue, which is immaterial if this Court upholds the Court of Appeal's and trial court's determination that this matter should be dismissed.

TDA argues that this reservation means that the issue has not been "preserved" for review or has been "waived." (TDA Response at 19-20.) TDA is mistaken. The issue was properly preserved because it was raised and briefed in the trial court, raised and briefed in the Court of Appeals, and raised in Scott's cross-motion for discretionary review and briefed to this Court. Civil Rule 52.04, upon which TDA relies, *id.*, applies to a failure to "make a finding of fact on an issue essential to the [final] judgment." Scott's motion in limine relating to expected testimony at a trial that did not take place is not essential to the trial court's final judgment dismissing the case; it will only be essential to the final judgment if the case is reversed and remanded and the trial court allows testimony regarding violations of the ethics rules. The cases relied upon by TDA for its waiver argument (TDA Response at 19-20) concern the failure to "make reasonable efforts" (of the kind made here) to obtain a ruling relating to the final judgment then on appeal – not relating to a possible future final judgment in the case.

This evidence should be excluded. First, although TDA claims that this Court should "follow existing Kentucky precedent" and allow the use of such testimony (TDA Response at 20), both Kentucky common law and the Kentucky Rules of Evidence preclude witnesses, lay or expert, from giving conclusions on the law. *See Gibson v. Crawford*, 83 S.W.2d 1, 7 (Ky. 1935) ("The courts never allow a witness to give his conclusion on questions of law . . . ."); KRE 702 (expert testimony may be offered if specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.) (emphasis added). The interpretation of law rests within the

province of the trial judge, the sole "legal expert" allowed in the courtroom. *See Rockwell Inter. Corp. v. Wilhite*, 143 S.W.3d 604, 623 (Ky. App. 2003). TDA would have Mr. McDonald testify that Mr. Scott violated SCR 3.130(1.1), based on his *interpretation* of Rule 1.1. (McDonald Dep., p. 196.) This opinion constitutes a legal conclusion by Mr. McDonald based on his interpretation of the rule and is prohibited. It is the duty of the trial court, not a witness, to instruct the jury on what the law is in this case. Accordingly, Mr. McDonald should not be allowed to testify regarding an alleged violation of Rule 1.1.

TDA claims that this Court has already approved of expert witnesses testifying to alleged violations of the Rules of Professional Conduct in *Raine, supra*. (TDA Response at 20-21.) A review of the block quotation cited by TDA, which is the entire discussion of Professor Leibson's testimony in *Raine*, states only that he opined that "the actions of both Raine and Highfield did not comply with the standard of care of ordinary prudent lawyers." *Raine,* 621 S.W.2d at 900-01. There is no reference to a violation of any rule of professional conduct in this cited testimony. The same could be accomplished here if trial were to proceed and if Mr. McDonald were permitted to testify at all.

More importantly, as TDA concedes (TDA Response at 21), the Rules of Professional Conduct were not intended to impose civil liability for legal negligence, and a violation of the Rules does not in and of itself constitute legal malpractice. *See Dean v. Bondurant*, No. 2004-CA-1345-MR, 2005 WL 2467768, * 6 (Ky. App. 2005) (Discr. Review den'd) (Scott Brief, App. 7.); *Hill v. Willmott*, 561 S.W.2d 331, 334 (Ky. App. 1978); TDA Response at 21. Because the Rules of Professional Conduct were not intended to impose civil liability, and violation of the rules does not constitute legal malpractice, they are irrelevant, and testimony regarding alleged violations of the Rules

should be excluded as unduly prejudicial. Mr. McDonald should be precluded from testifying regarding alleged violation of the Rules.

Without restrictions on reference to violations of the Rules of Professional Conduct, the jury may be confused and believe that the rules establish the standard of care, or the jury could be prejudiced against Mr. Scott for allegedly violating the standards of conduct of his profession, while such is not the standard of care. This is especially true when the testimony would be presented by a witness who is not only labeled as an "expert," but is also a former judge. The Court could and should mitigate against the potential prejudice this would have on Scott by allowing testimony that uses the language from the rules, but without specifically referencing them, alleviating any possibility that the jury could be misled or confused into believing that the rules establish the standard of care.

The Rules of Professional Conduct in Kentucky do not set the standard of care for legal negligence claims. Allowing an expert witnesses to testify that Mr. Scott violated the Rules of Professional Conduct would be unduly prejudicial, as the jury may be confused that such is the standard of care when it is clearly not.

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