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LAUREE SUNDAY MIXON, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
	:	
v.	:	
	:	
MARGARET M. KORAL, ESQUIRE AND KORAL, KAHN & KORAL, P.C., Appellees	:	No. 1484 EDA 2001

Appeal from the Order entered May 4, 2001, in the
Court of Common Pleas of Philadelphia County, Civil,
at No. 1337 May Term, 1999.

BEFORE: HUDOCK, BOWES and CAVANAUGH, JJ.

MEMORANDUM:

FILED JUNE 20, 2002.

Lauree Sunday Mixon (Mixon) appeals from the order granting the motion for summary judgment of Margaret M. Koral, Esquire, and Koral, Kahn & Koral, P.C. (collectively "Koral"), in this legal malpractice action. We affirm.

Mixon had retained the Koral firm to represent her in connection with a personal injury claim arising from a slip and fall occurring on January 17, 1994. While leaving Burlington House, an apartment building in Philadelphia where she had been a tenant, Mixon slipped on the outside steps, which were covered with ice and snow. At the time, snow was still falling, as it had been for a period of time prior to her fall. Mixon contended that the steps had a layer of ice beneath the snow, from previous bad weather, which caused her to fall. As a result of the fall, Mixon allegedly sustained a rotator

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cuff tear. Following the surgical repairs to her right shoulder, Mixon began to experience reflex sympathetic dystrophy.

On January 17, 1996, a personal injury action was filed against Burlington House Apartments and other entities connected with the premises. On May 9, 1996, a case management order was issued establishing a discovery deadline of October 7, 1996. This deadline was later extended until May 5, 1997. Pre-trial memoranda were due in August 1997. On June 6, 1997, Koral provided opposing counsel and the court with a pre-trial memorandum listing as expert witnesses Barbara Frieman, M.D., orthopedic surgeon, Paul S. Shneidman, M.D., neurologist, David Andrews, M.D., and Richard Kaplan, M.D. Doctors Frieman, Shneidman and Andrews were affiliated with Thomas Jefferson University Hospital. The pre-trial memorandum contained a settlement demand of \$250,000.00. The case was thereafter listed for trial on February 24, 1998.

In January 1998, Dr. Shneidman left Thomas Jefferson University Hospital, and Mixon began to treat with Robert Knobler, M.D., another neurologist within the same department at the hospital. On February 5, 1998, Koral disclosed her intention to produce the testimony of Dr. Knobler at trial instead of Dr. Shneidman. This substitution was premised on Koral's representations that Dr. Shneidman's whereabouts were unknown and undiscoverable. Defense counsel objected to the untimely attempt to

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substitute Dr. Knobler and, on February 18, 1998, filed a motion *in limine* to preclude his testimony.

On February 24, 1998, Mixon's case was called for trial. At that time, defense counsel's motion *in limine* to preclude the testimony of Dr. Knobler was granted, after a lengthy discussion regarding the unavailability of Dr. Shneidman. Defense counsel advised the court that he had learned, while videotaping one of his medical experts, that Dr. Shneidman had been told to leave by the hospital, but that he was practicing in the area. Defense counsel then presented a phone number to the court for Dr. Shneidman, alleging that he had located this number by contacting Thomas Jefferson University Hospital, and independently through directory assistance. The court thus determined that Dr. Shneidman was available and, as such, precluded of testimony by Dr. Knobler, who had not been identified in Koral's pre-trial memorandum.

The court then instructed counsel to pick a jury and that opening arguments would then be heard and testimony would begin. When questioned regarding who Koral intended to offer as witnesses on Mixon's behalf, Koral stated that she intended to call Mixon, present a videotape deposition of Dr. Frieman, the surgeon who repaired the rotator cuff injury, and would "attempt to get Dr. Shneidman in either live or by videotape deposition." Exhibit "A" attached to Koral's Motion for Summary Judgment, N.T., 2/24/98, at 17.

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After a jury was selected, but prior to trial, the case was settled for \$40,000.00. On May 12, 1999, Mixon filed the within legal malpractice action against Koral. It contained various allegations of negligence stemming from Koral's failure to conduct an adequate and thorough investigation into the whereabouts of Dr. Paul Shneidman at the time of trial and for failing to secure his videotaped deposition prior to trial. The culminating effect of the negligence allegations was that "the underlying claim of [Mixon] was significantly weakened, compromised and diminished by the preclusion of any medical evidence pertaining to her condition of reflex sympathetic dystrophy, as a result of which, instead of receiving a fair and reasonable settlement predicated upon all of the injuries which [Mixon] sustained, [she] was placed in a position where she had to accept a compromised settlement offer based on only part of her injuries[.]" Mixon's Brief at 14; Third Amended Complaint, filed 10/29/99, at ¶ 34. Preliminary objections were filed and sustained in part on July 22, 1999. An amended complaint was filed August 13, 1999. Subsequently, a petition to amend the complaint was granted and a third amended complaint was filed on October 29, 1999. Koral filed an answer and new matter on November 19, 1999, and Mixon filed her reply to new matter on December 15, 1999.

On March 30, 2001, Koral filed a motion for summary judgment. The motion presented four grounds for the entry of summary judgment: (1) that Mixon had not pleaded fraudulent inducement and, therefore, could not

prevail under ***Muhammad v. Strassburger, McKenna, Messer, Shilobod and Gutnick***, 526 Pa. 541, 587 A.2d 1346 (1991); (2) that Mixon could not prove causation because Koral did not cause her to accept the settlement offer; (3) Mixon was precluded from recovery in the underlying cause under the “hills and ridges” doctrine and, therefore, could not prove legal malpractice; and, (4) the underlying cause of action had no merit because Burlington House’s duty to clear snow had not accrued under a provision of the Philadelphia Code. An answer to the motion was subsequently filed and, on May 2, 2001, the court, without hearing oral argument granted the motion for summary judgment and dismissed Mixon’s complaint with prejudice. The order contained no reasoning in support of the court’s decision. A petition for reconsideration was filed on May 17, 2001. A timely notice of appeal was filed with this Court on May 24, 2001. Following the appeal, an order was entered declaring the motion for reconsideration moot. On July 20, 2001, Mixon filed a concise statement of matters complained of on appeal. On December 10, 2001, the court filed its opinion reasoning that ***Mulhammad, supra***, barred Mixon from suing Koral for negligence.

On appeal, Mixon presents the following issue for our consideration:

Whether the trial court committed an error of law in dismissing a legal malpractice action as barred by ***Muhammad v. Strassburger, McKenna, Messer, Shilobod and Gutnick***, 526 Pa. 541, 587 A.2d 1346 (1991), where

- (a) [Mixon] had been forced to settle the underlying case because of her attorney’s negligence and

- [Mixon's] purported "agreement" to settle the underlying action on the day the case was called for trial was essentially the product of duress and the coercive environment created by the trial court's understandable frustration with [Koral's] negligent failure to locate and contact a key medical expert;
- (b) [Koral] did not negotiate the settlement or even participate or advise [Mixon] in the settlement negotiations but stood by impassively as [Mixon] responded to the trial court's ultimatum to "take the money" or "lose";
 - (c) [Mixon] was neither speculating or "second guessing" that her recovery may have been inadequate but knew for a fact at the time of settlement both that the settlement amount was inadequate and that [Koral's] negligence was the reason for that inadequacy; and
 - (d) [Mixon] not only knew of the inadequacy of the settlement amount and her counsel's negligence prior to entering into the settlement but in addition, before finalizing the settlement, had already retained an attorney to represent her in an action against her counsel in the underlying case and, on the advice of new counsel, insisted on executing a release that preserved her right of action against her former attorney.

Mixon's Brief at 4.

Preliminarily, we note that when reviewing the grant of summary judgment, we examine "the matter in the light most favorable to appellant, as the non-moving party." ***Piluso v. Cohen***, 764 A.2d 549, 550 (Pa. Super. 2000), *appeal denied*, ___ Pa. ___, 793 A.2d 909 (2002).

"We will only reverse the trial court's entry of summary judgment where the trial court committed an abuse of discretion or an error of law. Summary judgment is proper when the pleadings, depositions, answers to

interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. . . . In determining whether to grant summary judgment a trial court must resolve all doubts against the moving party and examine the record in a light most favorable to the non-moving party. Summary judgment may only be granted in cases where it is clear and free from doubt the moving party is entitled to judgment as a matter of law.”

Piluso, 764 A.2d at 550 (quoting **Bullman v. Giuntoli**, 761 A.2d 566, 571 (Pa. Super. 2000), *appeal denied*, 565 Pa. 661, 775 A.2d 800 (2001)).

In Pennsylvania, an individual who has taken part in an attorney-client relationship may sue his attorney for malpractice under either a trespass or assumpsit theory. Each requires the proof of different elements. **Guy v. Liederbach**, 501 Pa. 47, 55, 459 A.2d 744, 748 (1983); **Fiorentino v. Rapoport**, 693 A.2d 208, 212 (Pa. Super. 1997). In a trespass action alleging legal malpractice, a plaintiff must establish: (1) the employment of the attorney or other basis for duty; (2) the failure of the attorney to exercise ordinary skill and knowledge; and (3) that the attorney’s failure to exercise the requisite level of skill and knowledge was the proximate cause of damage to the plaintiff. **Fiorentino**, 693 A.2d at 212 (citing **Bailey v. Tucker**, 533 Pa. 237, 246, 621 A.2d 108, 112 (1993)). An assumpsit claim, in comparison, is a contract claim that is based on the breach of an attorney-client agreement. **Id.** Thus, the attorney’s liability must be evaluated under the terms of the existing contract. **Id.** at 213. “[A]n attorney who agrees for a fee to represent a client is by implication agreeing

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to provide that client with professional services consistent with those expected of the profession at large.” **Fiorentino**, 693 A.2d at 213 (quoting **Bailey**, 533 Pa. at 251-52, 621 A.2d at 115).

In this case, the parties do not dispute that the malpractice alleged is a tort action sounding in negligence. The parties, however, do dispute whether Mixon’s settlement of her personal injury action bars any of her claims against Koral for legal malpractice.

In **Muhammad, supra**, our Supreme Court modified the general standards stated above in holding that a dissatisfied client may not sue his or her attorney for malpractice, based upon retrospective unhappiness with the terms of settlement of litigation to which the client agreed, unless the client can show he or she was fraudulently induced to settle the original action. **Id.**, 526 Pa. at 546, 587 A.2d at 1348.

In **Muhammad**, the defendant-lawyers had represented parents who were asserting a claim for medical malpractice which, allegedly, had caused the death of their infant son. In that action, the parents, following negotiations, agreed to accept the sum of \$26,500.00 in full settlement of their claim. They subsequently became dissatisfied with the amount of their settlement and sought to avoid their agreement. However, the trial court held that they were bound by their agreement and enforced the settlement. Thereafter, the parents commenced a legal malpractice action against the lawyers who had represented them in the medical malpractice case. They

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contended that the lawyers had been negligent in recommending the settlement amount. The trial court sustained preliminary objections in the nature of a demurrer to the parents' complaint and dismissed the action. When the case subsequently reached the Supreme Court, that Court held that the trial court had correctly dismissed the complaint for failure to state a cause of action for which relief could be granted. Upon recognizing the longstanding public policy of encouraging settlements, the Court reasoned:

[i]t becomes obvious that by allowing suits such as this, which merely "second guess" the original attorney's strategy, we would permit a venture into the realm of the chthonic unknown. It is impossible to state whether a jury would have awarded more damages if a suit had been filed against another potential party or under another theory of liability. It is indeed possible that a smaller verdict would have been reached or a defense verdict ultimately would have been rendered. Thus sanctioning these "Monday-morning quarterback" suits would be to permit lawsuits based on speculative harm; something with which we cannot agree.

Muhammad, 526 Pa. at 553 n.13, 587 A.2d at 1352 n.13. Thus, the Court concluded "[a]n action should not lie against an attorney for malpractice based on negligence and/or contract principles when that client has agreed to a settlement. Rather, only cases of fraud should be actionable." **Id.**, 526 Pa. at 546, 587 A.2d at 1348. In determining when a plaintiff has been fraudulently induced, the Court stated:

It is not enough that the lawyer who negotiated the original settlement may have been negligent; rather, the party seeking to pursue a case against his lawyer after a settlement must plead, with specificity, fraud in the inducement. . . . If the lawyer *knowingly* commits

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malpractice, but does not disclose the error and convinces the client to settle so as to avoid the discovery of such error, then the client's agreement was fraudulently obtained.

Id., 526 Pa. at 552, 587 A.2d at 1351.

Subsequent cases following **Muhammad** have refined its application as follows:

In cases wherein a dissatisfied litigant merely wishes to second guess his or her decision to settle due to speculation that he or she may have been able to secure a larger amount of money, i.e. "get a better deal" the **Muhammad** rule applies so as to bar that litigant from suing his counsel for negligence. If, however, a settlement agreement is legally deficient or if an attorney fails to explain the effect of a legal document, the client may seek redress from counsel by filing a malpractice action sounding in negligence. **Compare Martos v. Concilio**, [629 A.2d 1037 (Pa. Super. 1993)] (client who was displeased with results of settlement agreement could not sue his attorney for malpractice absent allegations of fraudulent inducement) **with Collas v. Garnick**, [624 A.2d 117 (Pa. Super. 1993)] (counsel who negligently advised personal injury clients that signing a general release did not bar future lawsuits against other possible tortfeasors could be liable in negligence).

Banks v. Jerome Taylor & Associates, 700 A.2d 1329, 1332 (Pa. Super. 1332). **See also McMahon v. Shea**, 547 Pa. 124, 688 A.2d 1179 (1997) (holding that allegations by former husband that attorneys who had represented him in divorce had breached duty owed to him by failing to merge prior alimony agreement between husband and wife with final divorce decree stated claim for legal malpractice; action was not barred by rule prohibiting clients from suing attorney following settlement to which client

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agreed, as husband did not seek to obtain additional monies by attacking value placed on case but rather contended that attorneys failed to advise him as to possible consequences of entering into legal agreement).

Upon review of the record in the present case, we find no allegation of fraud or mistake. Instead, Mixon contends that she accepted the offer of settlement under duress because Dr. Knobler, the only expert offered to establish her development of reflex sympathetic dystrophy, was precluded from testifying and, as such, her proof of this injury would be significantly diminished before the jury. Moreover, she likens her case to that of **White v. Kreithen**, 644 A.2d 1262 (Pa. Super. 1994). In **White**, this Court found that settlement of the plaintiff's underlying medical malpractice action did not bar her legal malpractice action against her attorneys where she had discharged her attorneys prior to settlement due to their negligent handling of the case, and she was forced to settle the underlying claim because her trial was imminent and she had no other attorney to represent her. Mixon contends that she, similar to the plaintiff in **White**, was forced to accept the \$40,000.00 offer of settlement following the grant of the motion *in limine* precluding Dr. Knobler's testimony, as her counsel stood passively by. She alleges that counsel did not negotiate the settlement, participate or advise her in the settlement negotiations. We find that Mixon's argument is refuted by the record in all respects.

First, Mixon has failed to prove that testimony regarding her reflex sympathetic dystrophy would not have been presented. Although testimony from Dr. Knobler was precluded, testimony by Dr. Shneidman as to the disorder was permitted. Koral, in her exchange with the court, stated that it was her intention to then have Dr. Shneidman either testify live or have an expedited videotaped deposition. In preparation for the within suit, Dr. Shneidman's deposition was taken. During the course of the deposition, Dr. Shneidman advised that he would have been available on the dates needed to produce such testimony and, although inconvenient to him, could have testified on such short notice.

Secondly, and most importantly, the record clearly indicates that Koral actively participated in the settlement negotiations and that the settlement was not reached due to preclusion of Dr. Knobler's testimony but due to the court's continued admonition about the propensity of juries in recent slip-and-fall cases to award defense verdicts. Specifically, the court stated the following:

THE COURT: I don't know the facts of the case and I could care less what the facts are. All I can tell you is that all the judges I have spoken to, I know this year because I'm team leader of Day Forward '96, last week Judge DiBona had a slip-and-fall case, it was a serious injury, with a \$50,000 offer. He pleaded with the plaintiff to take it - - namely plaintiff's counsel - - to take it. Refused. Defense verdict.

I haven't seen a plaintiff's verdict yet this year in Day Forward '96 in a slip-and-fall case. Jurors are totally

turned off with slip-and-fall cases and I mean that sincerely.

* * *

THE COURT: My understanding from the defense is that they are willing to pay \$40,000 to settle the case today. After today, the money apparently will be off the table.

I strongly urge that your client reconsider. I have since learned what Dr. Frieman testified on video; that in her opinion, she had preexisting rotator - - a tear of the rotator cuff?

[KORAL]: What Dr. Frieman testified to, Your Honor, is - -

THE COURT: Then I am mistaken. In any event, with her injury six months before with her dogs, with a conflicting history given in this case, your client is going to lose.

What is today, February 24th? Write that date down. I said you are going to lose. . . .

THE COURT: When the defendant is wrong, you know I say so. When a plaintiff is wrong, you know I say so. In order for the system to work effectively, somebody has to win big or lose big and in this case, you are going to get nothing. You are going to take \$40,000 as if - - I think you have a better chance of going to Atlantic City with the money and putting it on a number.

[KORAL]: Your Honor, based upon what you have just said, I would like to talk to my client again.

THE COURT: Well, I can't waste any more time. It's either take it or don't take it. Let's try this case and get it over with. I am not here to play games. Yes, no, doesn't matter. No? Fine. Bring the Jury in.

[KORAL]: I don't know what she responded, Your Honor.

THE COURT: Well, let's hear a response.

(Discussion off the record)

THE COURT: Do you want to gamble 40,000? Fine. That's okay.

You know, it was snowing at the time, even. Where is the liability?

[KORAL]: Your Honor, there was - - I know that you have gotten some facts, but you haven't gotten all the facts correct. It was snowing at the time, but there was ice underneath that snow.

THE COURT: Okay. I'm just telling you what may be happening. Slip-and-fall cases are impossible to win, virtually impossible to win today, especially in the snow. This community has gone through - - I don't know what the year was - -

[DEFENSE COUNSEL]: '94 Your Honor.

THE COURT: Is that one of the bad ones? I know '96, we have a lot of '96 cases which are disasters as you know. These cases are all being lost. I don't remember what the snow was in '94.

[KORAL]: Your Honor, may I speak with my client, please?

THE COURT: What?

[KORAL]: May I speak with my client, please?

THE COURT: Make it very quick, though.

(Discussion off the record.)

[KORAL]: Your Honor, based on the things that have been indicated by the Court today, my client is going to accept \$40,000 from the defendant.

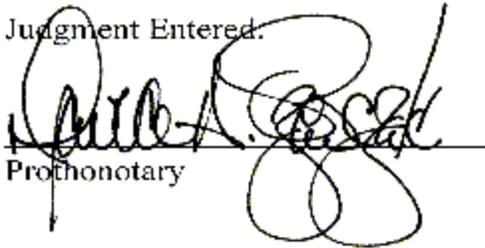
THE COURT: I sincerely believe she made a wise decision. I know she is not happy, but it is better than losing.

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Clearly, Mixon settled the suit as a result of the court's continued comments on her chances of success. Now Mixon is second guessing her decision to settle the case, speculating that she could have been able to secure a larger amount of money. A malpractice action against counsel in this regard, even if counsel were negligent, is barred by the dictates of **Muhammad**. Accordingly, as it is clear and free from doubt that Koral was entitled to judgment as a matter of law, we find summary judgment was appropriately granted.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to be "William A. B. [unclear]", written over a horizontal line. The signature is highly stylized and cursive.

Prothonotary

Date: _____