

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002536-MR

ANGIE MONAHAN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 99-CI-03826

L. DOUGLAS KENNEDY AND
L. DOUGLAS KENNEDY, M.D., P.S.C.

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, GUIDUGLI, AND McANULTY, JUDGES.

DYCHE, JUDGE. Angie Monahan appeals from an October 14, 2002, judgment of the Fayette Circuit Court in which, after trial, a jury found her former employer, L. Douglas Kennedy, M.D., not liable to her for breach of an alleged oral agreement.

According to Monahan, Kennedy agreed to pay her an ongoing bonus based on her efforts to increase the amount of collections in his medical practice.

Prior to trial, the Fayette Circuit Court excluded certain cell phone billing records and, during trial, excluded the testimony of two of Kennedy's former employees regarding bonus agreements they had with Kennedy. Monahan argues that the circuit court erred when it excluded the phone records and the former employees' testimony. Finding that the circuit court did not abuse its discretion, we affirm.

While briefly working in Denver, Colorado, for Dr. Gary Jay, Kennedy met Monahan, who worked as Dr. Jay's office manager. Monahan managed the collections for Jay's medical practice. Kennedy soon returned to his own practice in Lexington, Kentucky. According to Monahan, Kennedy was experiencing problems with the outside collections agency that managed his billing and his collections were lower than he had anticipated. Kennedy decided to handle his collections in-house and, knowing Monahan was an expert in medical collections, contacted her in late 1996 and asked her to work for him. According to Monahan, Kennedy was desperate for her help and he persistently called her via his cell phone until she agreed. Since Kennedy could not afford to pay Monahan more than \$30,000.00 per annum, he agreed, according to Monahan, to pay her a yearly bonus of ten percent of the amount she collected in excess of his 1995 collections, which were approximately \$586,422.00. Kennedy allegedly agreed to pay her this bonus in

perpetuity and each subsequent year's collections were to be compared to the 1995 amount to calculate the current year's bonus. The parties never reduced this alleged agreement to writing. On April 4, 1999, Monahan resigned and shortly thereafter filed suit against Kennedy. She alleged that he had failed to honor the bonus agreement and had, in fact, constructively terminated her employment.

Prior to trial, Monahan sought, by motion, the circuit court's permission to present, pursuant to KRE 404(b), the testimony of two of Kennedy's former employees. According to Monahan's trial counsel, the former employees would have testified that they too had bonus agreements with Kennedy that he had failed to honor. On April 25, 2002, the circuit court excluded the employees' testimony. Later at trial, Monahan sought to introduce cell phone billing records that Kennedy had produced during discovery. Monahan's trial counsel attempted to introduce these records through Monahan during her direct testimony. However, Kennedy's counsel objected and argued that Monahan must present the testimony of a records custodian to authenticate the records. Monahan's counsel argued that no such witness was required since Kennedy had produced the records and the mere act of producing the records authenticated them. The circuit court sustained Kennedy's objection and excluded the phone records.

On appeal, Monahan argues that the Fayette Circuit Court erred when it excluded the cell phone billing records. Monahan argues, according to KRE 901(a), that it was unnecessary to have a records custodian authenticate the phone records since they were obviously what she claimed them to be. Monahan contends the records were authentic because Kennedy never questioned their veracity and because he produced the records in response to her discovery request. Alternatively, Monahan claims that the records were self-authenticating. Furthermore, Monahan cites KRE 901(b)(1), which provides for the authentication of a document by a person with knowledge. Monahan insists that both she and Kennedy were persons with knowledge and that either could have testified regarding the phone records' authenticity. Finally, Monahan argues that, according to KRE 901(b)(a), a document may be authenticated by its distinctive characteristics and that the phone records were so distinctive as to be easily identifiable. However, Monahan fails to describe the records' distinctive characteristics.

Monahan argues that the circuit court also erred when it excluded the testimony of Kennedy's former employees. According to Monahan, the employees would have testified about bonus agreements they had with Kennedy that he failed to honor. Monahan argues that the circuit court should have allowed the employees to testify pursuant to KRE 404(b) since their

testimony constituted evidence of other crimes, wrongs or acts. Pursuant to KRE 404(b), evidence other crimes, wrongs or acts is admissible at trial to show intent. Monahan meant to use the employees' testimony to show Kennedy's intent to violate KRS 337.385, which addresses an employer's liability for unpaid wages and liquidated damages. Furthermore, Monahan relies upon Zimmerman v. First Federal Sav. and Loan Ass'n, 848 F.2d 1047 (10th Cir. 1988). The Zimmerman court held that, pursuant to Federal Rules of Evidence 404(b), evidence of other crimes, wrongs or acts is admissible unless the sole purpose for its admission is to prove the defendant's disposition. Monahan argues that she intended to use the employees' testimony for purposes other than to prove Kennedy's disposition; thus, the circuit court should have allowed the employees to testify.

When we consider a trial court's evidentiary decision on appeal, we use abuse of discretion as our standard of review. Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 577 (2000).

Kennedy points out that Monahan failed to tender the records as an avowal exhibit and failed to present avowal testimony that would authenticate the cell phone billing records. Citing Commonwealth v. Ferrell, Ky., 17 S.W.3d 520 (2000), and Garrett v. Commonwealth, Ky., 48 S.W.3d 6 (2001), Kennedy insists that Monahan failed to preserve the records

issue for appeal. We agree. Monahan's trial counsel did indeed fail to take the necessary steps to preserve this issue for appeal.

However, even if the issue were properly preserved, Monahan would still not prevail. Regarding the introduction and use of business records at trial, we find Professor Robert G. Lawson's legal treatise, The Kentucky Evidence Law Handbook § 8.65 at 463 (3d Ed. Michie 1993), to be most enlightening:

Business records are writings. Writings must be authenticated, i.e., accompanied by preliminary evidence sufficient to support a finding that they are what their proponents claim. This preliminary proof is commonly referred to as "foundation." KRE 803(6) requires "testimony of the custodian or other qualified witness" concerning the prerequisites for admitting business records. . . . [I]t is "essential" testimony without which business records "must be excluded."

It is also well-settled that the foundation witness need not be the custodian of the records nor the person who made them. Anyone who can testify from personal knowledge about the circumstances surrounding the making and keeping of the records can qualify as a foundation witness. As stated by one authority, "in the end the requirement may be satisfied by the testimony of anyone who is familiar with the manner in which the record was prepared, and even if he did not himself either prepare the record or even observe its preparation."

(Citations omitted.) KRE 803(6) requires the proponent of a business record to present evidence regarding its authenticity.

Monahan's trial counsel failed to present any evidence regarding the authenticity of the phone records. Due to the lack of foundation evidence, the circuit court properly excluded the phone records.

Contrary to Monahan's assertion, the phone records were not self-authenticating. Monahan never presented evidence that the records meet the requirements set forth in KRE 902, the rule that governs self-authenticating documents. For a business record to be self-authenticating, the proponent must certify it according to the requirements of KRE 902(11). This certification process requires the proponent to acquire a written declaration from the records custodian that was made under oath and subject to the penalty of perjury. KRE 902(11). Monahan failed to do this.

Monahan correctly states that a person with knowledge may lay the foundation for introduction of a business record. A person with knowledge may be anyone who is familiar with, understands and can testify about the record keeping system of the business organization that generated the record in question. United States v. Hathaway, 798 F.2d 902, 906 (6th Cir. 1986). However, Monahan's trial counsel failed to elicit avowal testimony from either Monahan or Kennedy that would show that either possessed the necessary familiarity with the records

keeping systems of any of the cell phone companies that generated the records.

As with the phone records, Monahan's trial counsel failed to present the testimony of Kennedy's former employees by avowal. "Ordinarily, a trial court ruling excluding evidence must be preserved for appellate review by an avowal of the witness." Noel v. Commonwealth, Ky., 76 S.W.3d 923, 931 (2002) (citations omitted). As the Supreme Court explained, "without an avowal to show what a witness would have said an appellate court has no basis for determining whether an error in excluding [the] proffered testimony was prejudicial." Cain v. Commonwealth, Ky., 554 S.W.2d 369, 375 (1977). Monahan's assertion that her brief provides a sufficient record for this Court to review the circuit court's decision to exclude the former employees' testimony is without merit. We cannot determine whether the trial court erroneously excluded the testimony without having that testimony in the record. As the Supreme Court held:

Counsel's version of the evidence is not enough. A reviewing court **must** have the words of the witness.

Partin v. Commonwealth, Ky., 918 S.W.2d 219, 223 (1996)

(emphasis added). Unfortunately for Monahan, her trial counsel failed to preserve this issue for appeal.

The judgment of the Fayette Circuit Court is affirmed.

GUIDUGLI, JUDGE, CONCURS.

McANULTY, JUDGE, DISSENTS.

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