RENDERED: MARCH 22, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000831-MR

DR. VENETA KOTEVSKA; AND
PERIODONTAL & IMPLANT ASSOCIATES, PC — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 18-CI-000007

RUBY FENTON; RUBY FENTON, PLLC; AND
TILFORD DOBBINS AND SCHMIDT, PLLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, KRAMER, AND MAZE, JUDGES.

JONES, JUDGE: This case involves a lawsuit for legal malpractice filed by Dr. Veneta Kotevska and Periodontal & Implant Associates, PC (collectively referred to as "Dr. Kotevska") against the attorney and law firm that represented her in a suit brought by Dr. Kotevska's former employer. The Jefferson Circuit Court granted summary judgment to Appellees, Ruby Fenton, Ruby Fenton, PLLC, and

Tilford Dobbins and Schmidt, PLLC (collectively referred to as "Ms. Fenton"), and dismissed the legal malpractice action. Dr. Kotevska now appeals. Following a review of the record and applicable law, we AFFIRM.

I. BACKGROUND

Dr. Kotevska is a periodontist who worked for Dr. Kenneth Parrish at United Smiles Centres ("USC") from June 13, 2012, through February 11, 2015. Before Dr. Kotevska began her employment with USC, she signed an employment agreement which prohibited her from, among other things, opening her own practice within "fifteen miles of any office of Parrish, then being utilized as such by Parrish," for three years following Dr. Kotevska's ending her employment with USC.

In the summer of 2014, Dr. Kotevska began to consider leaving USC to open her own practice. Dr. Kotevska retained a realtor and a general business advisor, Chuck Thieman, to help her find a location that was suitable to her needs and would not be violative of her employment agreement. On July 29, 2014, Dr. Kotevska emailed Ms. Fenton, an attorney at Tilford Dobbins and Schmidt, PLLC, and asked her to review the employment agreement and offer advice as to where Dr. Kotevska could open her new practice. Two days later, Dr. Kotevska sent Ms. Fenton a list of potential office locations that she had received from her realtor and asked her what she thought. Some of those locations given were outside of the

fifteen-mile radius surrounding USC, but some were not. In response to Dr. Kotevska's email, Ms. Fenton sent the following:

> I recommend, obviously, that you first look at the properties that are clearly over fifteen miles out. That said, as long as a property is more than 14.5 miles out, you could probably go ahead and look at those too. Pushing it much more than that is not a good idea. Also, you understand that you still run the risk of having to defend a lawsuit if you set up shop inside the 15 mile [sic] mark.

R. 38.

Without further consulting Ms. Fenton, Dr. Kotevska found a location to her liking, which was located approximately fifteen miles away from USC.[1] She then began the process of converting that space into a suitable dentist's office. Dr. Kotevska ended her employment with USC on February 11, 2015, and began operating Periodontal & Implant Associates, PC, out of the office space she had selected. Less than a month later, Dr. Kotevska received a cease and desist letter from USC's counsel, which alleged that she had committed multiple violations of her employment agreement, including opening a competing practice within a fifteen-mile radius of the USC office. USC subsequently filed suit against Dr.

[1] Dr. Kotevska's selected location was determined to be 14.7 miles away from USC using an "as the crow flies" measurement; the location was located fifteen miles away from USC when measured according to driving distance.

Kotevska and her practice. Dr. Kotevska emailed Ms. Fenton on March 4, 2015, stating that "just as you [Ms. Fenton] predicted," she was being sued by USC. Dr. Kotevska retained Ms. Fenton to represent her in that action (the "Underlying Action").

In the Underlying Action, Dr. Kotevska defended USC's claim that she had breached the non-compete covenant by arguing that the location that she had selected was not in violation of her employment agreement. In an affidavit filed in the Underlying Action and sworn by Dr. Kotevska on January 6, 2016, (the "First Kotevska Affidavit") Dr. Kotevska averred that:

> I advised both my realtor and Mr. Thieman about the mileage restriction in my Employment Agreement, telling them that I could not do anything that would violate that agreement. **I therefore only looked at properties which were 15 or more miles away from USC and did not decide on my location until I was satisfied of that. Even then, only when Mr. Thieman advised me that the location I had chosen was the best location in light of the restrictions in my Employment Agreement did I move forward formally with a letter of intent relating to my current location.**

R. 76, ¶ 13 (emphasis added).

Dr. Kotevska averred that she "made a conscious effort to avoid breaching her employment agreement" by "paying lawyers, Coulter Mapping, and other practice professionals to advise [her]," including her realtor and Mr. Thieman. *Id.* at ¶ 17. Dr. Kotevska stated that she had made these efforts because

the employment agreement did not specify whether the fifteen-mile restriction "was to be measured by driving distance . . . or something called 'as the crow flies', or radius." R. 77, ¶ 13(a). She testified that she had used various methods to calculate the distance between her current office and USC's office; when using an "as the crow flies" measurement, the distance between the two offices was fifteen miles and when using driving distance, the distance was more than fifteen miles. *Id.* at ¶ 13(b)-(c).

On June 23, 2016, Dr. Kotevska discharged Ms. Fenton from legal representation in the Underlying Action. On November 3, 2017, a jury returned a verdict in the Underlying Action finding that Dr. Kotevska had violated the employment agreement by opening her practice within fifteen miles of USC. For this violation, USC was awarded lost and forecasted profits in the total amount of $94,382.86. Dr. Kotevska filed a motion for judgment notwithstanding the verdict on December 1, 2017. In that motion, Dr. Kotevska again noted that the employment agreement had not specified how the fifteen-mile restriction was to be calculated. Dr. Kotevska contended that she had researched and relied upon numerous valid sources, which had shown that her new practice was outside of the restricted area. Dr. Kotevska additionally argued that the restriction in her employment agreement was greater than necessary to protect USC, and that the

court should blue-pencil the restriction of fifteen miles and reduce it to ten miles. The trial court denied Dr. Kotevska's motion.

On January 2, 2018, Dr. Kotevska filed the present action against Ms. Fenton alleging that Ms. Fenton had been "negligent in giving Dr. Kotevska advice on whether opening her practice at 4801 Paoli Pike, Floyds Knob, IN 47119 would be a violation of her employment contract with [USC]." R. 2. Ms. Fenton filed an answer on January 22, 2018, admitting that she and her firm had represented Dr. Kotevska in a limited capacity regarding her employment agreement, but denying all other allegations.

On March 2, 2018, Ms. Fenton filed a motion for summary judgment. In the memorandum accompanying that motion, Ms. Fenton contended that Dr. Kotevska was judicially estopped from arguing that she had relied on her advice in selecting the 4801 Paoli Pike location when, in the Underlying Action, Dr. Kotevska had contended that she had selected that location "only when" Mr. Thieman had advised her that the location was best in light of the employment agreement. Ms. Fenton additionally argued that the First Kotevska Affidavit demonstrated that Dr. Kotevska was well aware of the risks she would subject herself to by opening her practice within a fifteen-mile radius of USC. She contended that, while Dr. Kotevska had ultimately been unsuccessful in the Underlying Action, the trial court had still accepted her position regarding

selection of the 4801 Paoli Pike location. Further, Ms. Fenton argued that the theory Dr. Kotevska was arguing in the present action was inconsistent with the theory that she had argued in the Underlying Action. Ms. Fenton noted that in the Underlying Action, Dr. Kotevska had argued that she had researched and relied on valid sources before selecting her new office space, which was clearly outside of the fifteen-mile restriction. In the present action, however, Dr. Kotevska was arguing that she had relied on Ms. Fenton's statement that she could probably look at a property that was located only 14.5 miles away from USC in making her selection.

Ms. Fenton additionally argued that the evidence demonstrated that Dr. Kotevska could not establish a claim for legal malpractice for two reasons. First, Ms. Fenton contended that the evidence showed that she had competently advised Dr. Kotevska of the risks of opening a practice less than fifteen miles away from USC and that Dr. Kotevska had understood those risks. Second, the First Kotevska Affidavit indicated that Dr. Kotevska had relied upon the advice of someone else in choosing the 4801 Paoli Pike location, meaning that Ms. Fenton could not have been the proximate cause of Dr. Kotevska's harm.

Dr. Kotevska filed a response to Ms. Fenton's motion for summary judgment on March 22, 2018. Therein, Dr. Kotevska contended that based upon Ms. Fenton's advice, she did not "consider several better options that were less

than 14.5 miles away," but believed that she had been "green-lighted on locations more than 14.5 miles away." R. 218-19. Dr. Kotevska contended that she had requested that Ms. Fenton argue that she had relied on Ms. Fenton's advice when selecting the 4801 Paoli Pike location—which was 14.7 miles away from USC—in the Underlying Action, but that Ms. Fenton had apparently failed to do so. In support of this statement, Dr. Kotevska attached an email she had written to Ms. Fenton, dated January 24, 2016, in which Dr. Kotevska had stated: "I feel that it also [sic] critical to mention that I sought your advice on this prior to proceeding. You advised me that I could probably go ahead and look at the properties that are at least over 14.5 miles." R. 262.

Dr. Kotevska disputed Ms. Fenton's argument that her claim was barred by the doctrine of judicial estoppel. Dr. Kotevska contended that judicial estoppel could not apply in the present action, as the position she was taking in the present action—that she had relied on Ms. Fenton in selecting the 4801 Paoli Pike location—was the same position she had asked Ms. Fenton to argue in the Underlying Action and was consistent with the First Kotevska Affidavit. Dr. Kotevska acknowledged that she had sworn that she had relied on the advice of Thieman and her real estate agent in the First Kotevska Affidavit. She, however, clarified that she had relied on those individuals only to advise her about financing and suitable locations that were at least 14.5 miles away from USC, not to advise

her on which locations could be considered in light of the employment agreement. Additionally, Dr. Kotevska contended that it would be inappropriate to apply judicial estoppel in the present action when she had been unsuccessful in the Underlying Action.

Dr. Kotevska contended that the evidence demonstrated that she could establish a claim for legal malpractice against Ms. Fenton. She attached an affidavit sworn by a local attorney, Harley Blankenship, in which he gave the opinion that Ms. Fenton had deviated from the standard of care by advising Dr. Kotevska that it was "probably okay" to look at properties more than 14.5 miles away and by failing to withdraw as counsel when it became apparent that Dr. Kotevska wanted her to argue that she had relied upon advice of counsel in picking the 4801 Paoli Pike location (hereinafter, the "Blankenship Affidavit").

Additionally, Dr. Kotevska attached an affidavit to her reply (the "Second Kotevska Affidavit") in which she testified that Ms. Fenton had told her that locations "greater than fifteen miles would be better but that those above 14.5 miles were probably okay and that she should not consider any location less than 14.5 miles." R. 243, ¶ 6. Dr. Kotevska averred that, based on Ms. Fenton's statement, she had "only considered those locations beyond 14.5 miles and . . . decided that was [sic] 14.7 miles away was the best of those." *Id.* at ¶ 7. Dr. Kotevska additionally alleged that "[i]f [Ms. Fenton] had simply said that I should

avoid any location less than fifteen miles away, I would not have considered any locations that were less than that distance, just like I did not consider any locations less than 14.5 miles away." *Id.* at ¶ 8.

Ms. Fenton filed a reply in support of her motion for summary judgment on April 2, 2018. She contended that there was no dispute that the email she had sent to Dr. Kotevska on July 31, 2014, advised Dr. Kotevska that choosing a location less than fifteen miles away from USC would expose her to a risk of litigation. Further, it was undisputed that, after communicating with Ms. Fenton in July of 2014, Dr. Kotevska had not further consulted Ms. Fenton before selecting the 4801 Paoli Pike location. As to Dr. Kotevska's contention that Ms. Fenton had gone against Dr. Kotevska's wishes by failing to draft an affidavit in which Dr. Kotevska could testify that she had relied on the advice of counsel in selecting the 4801 Paoli Pike location, Ms. Fenton acknowledged that she had drafted the First Kotevska Affidavit. However, Ms. Fenton noted that contemporary correspondence between Dr. Kotevska and herself—which was attached as an exhibit to the reply—demonstrated that Dr. Kotevska had actively participated in the drafting process. Further, Ms. Fenton noted that Dr. Kotevska had not requested that Ms. Fenton make the advice of counsel argument until weeks after the First Kotevska Affidavit had been sworn and filed. Ms. Fenton stated that she had received the January 24, 2016, email from Dr. Kotevska the night before a

motion hour where she requested oral argument. She had not been permitted to make any arguments on that date, but rather an evidentiary hearing had been scheduled for March 11, 2016, then rescheduled several times before finally being held on July 15, 2016. By that time, Dr. Kotevska had already discharged Ms. Fenton from representation. Accordingly, Ms. Fenton argued that she never had the opportunity to make the advice of counsel argument on Dr. Kotevska's behalf. Ms. Fenton reiterated her arguments that Dr. Kotevska's claim was barred by judicial estoppel and that the evidence demonstrated that Dr. Kotevska could not establish a claim for legal malpractice. Dr. Kotevska filed a sur-reply on April 12, 2018, contending that Ms. Fenton should have filed a supplemental affidavit after Dr. Kotevska informed her that she wanted to include an advice of counsel argument.

Apparently, oral arguments on Ms. Fenton's motion for summary judgment were held on May 21, 2018; however, the video recording of those arguments is not included in the record before this Court. The trial court entered an opinion and order granting Ms. Fenton's motion for summary judgment on May 24, 2018, concluding that Dr. Kotevska's own words "prevent[ed] her from proving a claim of legal negligence against Fenton." R. 406. The trial court noted that in the Underlying Action, Dr. Kotevska had maintained under oath that she relied upon Mr. Thieman's advice in determining where to locate her new practice,

and that she had only looked at property located more than fifteen miles away from USC, statements on which the court in the Underlying Action had clearly relied. Accordingly, the trial court found that judicial estoppel was appropriate in the present case. Additionally, the trial court concluded that summary judgment was appropriate because the record showed that Ms. Fenton had given Dr. Kotevska competent legal advice; but, that Dr. Kotevska had ignored that advice.

This appeal followed.

II. STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scrifes v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing CR[2] 56.03). Because summary judgment involves no fact finding, we review the trial court's decision *de novo*. *3D Enters. Contracting Corp., v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citing *Dosset v. New York Mining & Mfg. Co.*, 451 S.W.2d 843 (Ky. 1970)). Summary judgment is only appropriate when "it

[2] Kentucky Rules of Civil Procedure.

appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Id.* at 483 (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)). "'[I]mpossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

III. ANALYSIS

Dr. Kotevska makes numerous arguments on appeal, which we categorize into three primary arguments: that summary judgment was premature, as discovery had not yet taken place; that the trial court erred in concluding that judicial estoppel applied in the present action; and that the trial court erred in concluding that she could not establish a successful claim of legal malpractice against Ms. Fenton.

A. Summary Judgment Was Not Premature

The present action was filed on January 2, 2018, and summary judgment was granted on May 24, 2018. Thus, a little under six months had passed before Dr. Kotevska's claim was dismissed on summary judgment. The brevity of an action, alone, does not necessarily mean that summary judgment was improperly granted. However, "summary judgment should not be granted unless 'a party has been given ample opportunity to complete discovery.'" *Benton v. Boyd & Boyd, PLLC*, 387 S.W.3d 341, 343 (Ky. App. 2012) (quoting *Pendleton*

Bros. Vending, Inc. v. Commonwealth, Fin. & Admin. Cabinet, 758 S.W.2d 24, 29 (Ky. 1988)).

Dr. Kotevska argues that summary judgment was improper in the present action because she had not yet deposed Ms. Fenton, despite her serving a notice of deposition on Ms. Fenton shortly before Ms. Fenton moved for summary judgment. She contends that deposing Ms. Fenton was necessary because the trial court needed to understand what legal basis Ms. Fenton had for "advis[ing] that some locations less than fifteen miles [away from USC] are probably okay[.]"

We disagree that summary judgment was premature. As an initial matter, we note that nothing Dr. Kotevska filed with the trial court contended that summary judgment was inappropriate because discovery had not yet been completed. Further, nothing that Dr. Kotevska contends would have been revealed through the deposition of Ms. Fenton would create a genuine issue of material fact. The record as submitted to the trial court clearly demonstrated that Ms. Fenton had advised Dr. Kotevska that she could probably go ahead and look at properties located more than 14.5 miles away from USC, but that choosing a property less than fifteen miles away from USC would put her at risk of having to defend a lawsuit. As discussed, *infra*, this was sufficient information for the trial court to determine that summary judgment was appropriate. Understanding why Ms. Fenton made that statement was not necessary. As Dr. Kotevska has not "provided

specific examples of what discovery could have been undertaken that would have affected the outcome had it been conducted," we do not conclude that the trial court prematurely considered Ms. Fenton's motion for summary judgment. *Benton*, 387 SW.3d at 344.

B. Judicial Estoppel Applies in the Present Action

"The doctrine of judicial estoppel . . . can be applied to prohibit a party from taking inconsistent positions in judicial proceedings." *Hisle v. Lexington-Fayette Urban Cty. Gov't*, 258 S.W.3d 422, 434 (Ky. App. 2008) (citing 28 AM. JUR. 2D *Estoppel and Waiver* § 74; *Colston Inv. Co. v. Home Supply Co.*, 74 S.W.3d 759 (Ky. App. 2001)). Judicial estoppel's "purpose is 'to protect the integrity of the judicial process' . . . by 'prohibiting parties from deliberately changing positions according to the exigencies of the moment[.]'" *New Hampshire v. Maine*, 532 U.S. 742, 749-50, 121 S.Ct. 1808, 1814, 149 L.Ed.2d 968 (2001) (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982); *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993)).

Factors that can be considered in determining whether judicial estoppel applies include: (1) whether the party's later position and earlier position are "clearly inconsistent"; (2) whether a court accepted the party's earlier position; and (3) whether "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not

estopped." *Hisle*, 258 S.W.3d at 434-35 (citing *New Hampshire*, 532 U.S. at 750-51, 121 S.Ct. at 1815). These factors, however, are not meant to serve as "inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts." *New Hampshire*, 532 U.S. at 751, 121 S.Ct. at 1815. Dr. Kotevska contends that none of the above-listed factors exist in the present action. She claims that a close reading of the First Kotevska Affidavit and the Second Kotevska Affidavit shows that the positions taken are, in fact, consistent; that judicial estoppel cannot apply because she did not prevail in the Underlying Action; and that she would not have been given an unfair advantage in this action if the trial court had considered her testimony in the Second Kotevska Affidavit.

We must disagree with Dr. Kotevska's contention that her testimony in the First Kotevska Affidavit and the Second Kotevska Affidavit is consistent. Contrary to Dr. Kotevska's statement in her brief to this Court, nowhere in the First Kotevska Affidavit does Dr. Kotevska testify that the mapping service she utilized informed her that the 4801 Paoli Pike location was only 14.7 miles away from USC using any method of measurement. The First Kotevska Affidavit does state that Dr. Kotevska relied on different services to determine the distance between the 4801 Paoli Pike location and USC, and that she used both driving

distance and "as the crow flies" measurements. When discussing the various methodologies used, however, Dr. Kotevska repeatedly states that the distances measured at least fifteen miles. Further, in the First Kotevska Affidavit, Dr. Kotevska affirmatively testifies that she "only looked at properties which were fifteen or more miles away from USC and did not decide on [her] location until [she] was satisfied of that." R. 76, ¶ 13. While Dr. Kotevska does aver that she "made a conscious effort to avoid breaching [her] employment agreement" with USC by "paying lawyers, Coulter Mapping, and other practice professionals to advise [her]," *Id.* at ¶ 17, she clearly states that she selected the 4801 Paoli Pike location "only when Mr. Thieman advised [her] that the location [she] had chosen was the best location in light of the restrictions in [her] Employment Agreement." *Id.* at ¶ 13. Dr. Kotevska's testimony in the Second Kotevska takes an entirely different position. In the Second Kotevska Affidavit, Dr. Kotevska testifies that she and her real estate agent only considered locations more than 14.5 miles away from USC and decided that the 4801 Paoli Pike location, which was 14.7 miles away from USC, was the best choice. R. 243, ¶ 7. Dr. Kotevska additionally averred, in contrast to her testimony in the First Kotevska Affidavit, that she only considered the 4801 Paoli Pike location based on Ms. Fenton's email advising her that she could probably look at properties located at least 14.5 miles away from USC. *Id.* at ¶ 8.

In arguing that the First Kotevska Affidavit and the Second Kotevska Affidavit are not inconsistent, Dr. Kotevska makes much of the fact that the issues in the Underlying Action and the present action are not the same. The fact that the two cases concerned different issues does not mean that judicial estoppel cannot apply and does not work to change inconsistent statements into consistent ones. "[A]s a general proposition . . . where a party assumes a certain position in a legal proceeding, and succeeds[3] in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ." *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S.Ct. 555, 558, 39 L.Ed. 578 (1895). The position taken by Dr. Kotevska in the Underlying Action and the position she takes in the present action are clearly inconsistent. In the Underlying Action, Dr. Kotevska repeatedly maintained that she only considered properties located *at least fifteen miles away* from USC and chose the 4801 Paoli Pike location only after Mr. Thieman assured her that was the best location in light of the employment agreement. In the present action, Dr. Kotevska argues that she only looked at properties *at least 14.5 miles away* from USC and chose the 4801 Paoli Pike location because Ms. Fenton had advised her that would probably be okay.

[3] "Success," as used in the judicial estoppel context, does not mean that the party against whom the doctrine is invoked must have prevailed on the merits. Rather, "success" is recognized when the first court has adopted the position urged by the party. *Colston Invest. Co. v. Home Supply Co.*, 74 S.W.3d 759, 763 (Ky. App. 2001) (quoting *Reynolds v. Comm'r*, 861 F.2d 469, 472-73 (6th Cir. 1988)).

Dr. Kotevska contends the fact that she did not prevail in the Underlying Action indicates that the trial court did not accept her position. Prevailing on the merits, however, is not dispositive of whether a court accepted a party's position. *Colston Invest. Co.*, 74 S.W.3d at 763 (quoting *Reynolds*, 861 F.2d at 472-73); *see also Norrell v. Elect. & Water Plant Bd. of City of Frankfort*, 557 S.W.2d 900, 903 (Ky. App. 1977). "[J]udicial acceptance means only that the first court has adopted the position urged by the party . . . ." *Id.*

The First Kotevska Affidavit was initially filed with the trial court after USC sought a temporary injunction barring Dr. Kotevska from operating her practice out of the 4801 Paoli Pike location. Dr. Kotevska's response to USC's motion for a temporary injunction—consistent with the First Kotevska Affidavit—contended that the 4801 Paoli Pike location was more than fifteen miles away from USC, and that USC had "found only one questionable source saying that Dr. Kotevska's office is 1547 feet under [the fifteen-mile] restriction." R. 131. USC's motion for a temporary injunction was ultimately denied. Following entry of judgment in the Underlying Action, both Dr. Kotevska and USC filed motions for attorney fees and costs. On March 9, 2018, the trial court in the Underlying Action entered a consolidated opinion and order denying Dr. Kotevska's motion for attorney fees and costs and granting USC's motion. However, the trial court

only awarded USC 10% of the amount it claimed and declined to award it any pre-judgment interest. The trial court explained its decision stating:

> The ambiguity of the proximity clause combined with the location of Dr. Kotevska's practice as being only three tenths of a mile from the 15-mile boundary render awarding pre-judgment unjust. It is difficult to conclude that Dr. Kotevska was intentionally using the money or property of USC given the circumstances.

R. 284. Among those circumstances were Dr. Kotevska's repeated claims that she had attempted in good faith to find an office space that complied with the fifteen-mile restriction. Accordingly, it appears that the trial court in the Underlying Action did accept Dr. Kotevska's position.

If judicial estoppel were not applied, Dr. Kotevska would gain an advantage in the present case in that she would be able to argue that she actively considered properties located only 14.5 miles away from USC and relied on Ms. Fenton's advice in so doing. If the trial court were to accept Dr. Kotevska's argument that she did consider properties less than fifteen miles away from USC—rather than inadvertently select a property less than fifteen miles away from USC—Dr. Kotevska's claim against Ms. Fenton would be much stronger. Obviously, such a position would work as a disadvantage to Ms. Fenton.

Dr. Kotevska additionally argues that judicial estoppel cannot apply because there is not an identity of parties in the Underlying Action and the present action and that, therefore, Ms. Fenton cannot argue that she relied on Dr.

Kotevska's statements in the Underlying Action. This argument represents a misunderstanding of the doctrine of judicial estoppel. "Unlike equitable estoppel, judicial estoppel may be applied even if detrimental reliance or privity does not exist." *Edwards*, 690 F.2d at 598. Based on the above, we agree with the trial court that judicial estoppel bars Dr. Kotevska from making inconsistent statements in the present case.

C. Dr. Kotevska Cannot Establish a Legal Malpractice Claim

In order to succeed on her legal malpractice claim, Dr. Kotevska was required to show that Ms. Fenton "neglected [her] duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances" and that Ms. Fenton's negligence was the proximate cause of her damages in the Underlying Action. *Stephens v. Denison*, 64 S.W.3d 297, 298-99 (Ky. App. 2001). "In order to show that the 'attorney caused the plaintiff harm, the plaintiff must show that he/she would have fared better in the underlying claim; that is, but for the attorney's negligence, the plaintiff would have been more likely successful." *Osborne v. Keeney*, 399 S.W.3d 1, 10 (Ky. 2012) (quoting *Marrs v. Kelly*, 95 S.W.3d 856, 860 (Ky. 2003)). Dr. Kotevska contends that Ms. Fenton was negligent in her representation on two separate occasions: when Ms. Fenton gave advice to Dr. Kotevska in the July 31, 2014, email, *supra* p. 3; and when Ms. Fenton failed to withdraw as Dr. Kotevska's counsel after Dr. Kotevska asked Ms.

Fenton to argue that she had relied on the advice of counsel in selecting the 4801 Paoli Pike location.

The trial court concluded that Ms. Fenton had given Dr. Kotevska competent legal advice, but that Dr. Kotevska had ignored that advice. Dr. Kotevska contends that this conclusion was made in error, as she submitted the Blankenship Affidavit, which gave the opinion that Ms. Fenton had been negligent in her representation of Dr. Kotevska. Dr. Kotevska argues that because the Blankenship Affidavit was the only evidence of record concerning Ms. Fenton's representation of her, the trial court was required to conclude that Ms. Fenton's representation was in fact negligent. We disagree. The Blankenship Affidavit did give the opinion that Ms. Fenton had been negligent, but it was not the *only* evidence of Ms. Fenton's representation. The record before the trial court contained numerous correspondences between Dr. Kotevska and Ms. Fenton demonstrating Ms. Fenton's advice and representation.

Nonetheless, we need not determine whether Ms. Fenton's representation of Dr. Kotevska was negligent to conclude that Dr. Kotevska cannot establish a viable legal malpractice claim. "For an attorney to be found liable for legal malpractice, it must be shown that the attorney violated the standard of care *and* that such violation was the proximate cause of injury to the client . . . ." *Id.* at 12. The record makes clear that Dr. Kotevska cannot establish proximate cause.

Dr. Kotevska is judicially estopped from contending that she relied on the advice Ms. Fenton offered her in the July 31, 2014, email when selecting the 4801 Paoli Pike location. As discussed in detail, *supra* pp. 15-20, in the Underlying Action Dr. Kotevska maintained that she had only looked at properties located more than fifteen miles away from USC—therefore not utilizing Ms. Fenton's advice that it was "probably okay" to look at properties located only 14.5 miles away from USC—and that she had only selected the 4801 Paoli Pike location after Mr. Thieman had advised her that that location was best in light of the fifteen-mile restriction contained in the employment agreement. Accordingly, Dr. Kotevska cannot demonstrate that it was Ms. Fenton who caused her to locate her practice where she did and ultimately be sued for violation of the restrictive covenant in the employment agreement.

Additionally, Dr. Kotevska cannot establish that Ms. Fenton's failure to argue that Dr. Kotevska had relied on her advice in selecting the 4801 Paoli Pike location caused her any harm. Ms. Fenton did not make an advice of counsel argument when arguing against USC's motion for a temporary injunction and Dr. Kotevska succeeded in defeating that motion. Thereafter, no further arguments were made to the court until Ms. Fenton had already been discharged as counsel and Dr. Kotevska had retained new counsel. It is unclear from the record before this Court whether either of Dr. Kotevska's newly retained attorneys made an

advice of counsel argument on Dr. Kotevska's behalf. However, it does not appear that such argument would have impacted the jury's determination that Dr. Kotevska had breached her employment agreement. The record indicates that the jury in the Underlying Action was instructed to find whether Dr. Kotevska "provided dental treatments, examinations, or services, within fifteen (15) miles of any office of [USC], then being utilized as such by [USC], within a period of three (3) years immediately following March 10, 2015." R. 266. There was no consideration of whether Dr. Kotevska had violated the Employment Agreement in good faith or in bad faith. Further, in arguing for a judgment notwithstanding the verdict, Dr. Kotevska continued to argue that even if she had violated the fifteen-mile restriction, she had done so "based on a good faith understanding, and in reliance on advice that its location confirmed with the fifteen mile [sic] restriction provided for in the Employment Agreement." R. 109. While the trial court considered this argument in reducing the amount of attorney fees Dr. Kotevska was required to pay to USC, it was unpersuasive in altering the verdict. Accordingly, we cannot conclude that the outcome of the Underlying Action would have been any different had Ms. Fenton made an advice of counsel argument.

IV. CONCLUSION

In light of the foregoing, we AFFIRM the opinion and order of the Jefferson Circuit Court granting summary judgment in favor of Ms. Fenton.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Kevin George
Louisville, Kentucky

BRIEF FOR APPELLEES:

Matthew W. Breetz
Bethany A. Breetz
Carolyn Yvonne Purcell
Louisville, Kentucky