

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000399-MR

SAMEENA AZMAT, as Mother and
Next Friend of NAUSHER AZMAT

APPELLANTS

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 12-CI-000645

GEORGE W. BAUER, III, M.D.
AND ELIZABETHTOWN
PHYSICIANS FOR WOMEN, P.S.C.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, D. LAMBERT AND NICKELL, JUDGES.

D. LAMBERT, JUDGE: Nausher Azmat, by and through his mother and next friend Sameena Azmat, appeals the entry of summary judgment by the Hardin

Circuit Court and dismissal of the complaint with prejudice. Having reviewed the record and finding no error, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

This appeal originated as a medical malpractice action by Sameena Azmat, proceeding on behalf of Nausher Azmat, a minor child at the time, against George W. Bauer, III, M.D. and Elizabethtown Physicians for Women, P.S.C.

In 1997, while pregnant with Nausher, Sameena sought pre-natal care from Bauer at the Elizabethtown Physicians for Women's clinic. On July 3, 1997, Sameena presented to Bauer with complaints of a decrease in fetal movement. Bauer ran tests and instructed Sameena to return on July 5, 1997, to deliver the baby as they had previously planned. Bauer delivered Nausher on July 5, 1997. Nausher suffered two instances of cardiac arrest within three hours and required resuscitation. Nausher was then transported to the Kosair Children's Hospital in Louisville, where he received treatment in the neo-natal intensive care unit for fifteen days.

Sameena, acting solely as Nausher's next friend and asserting no claims of her own, retained counsel¹ and instituted the action below on March 27, 2012. The trial court entered its first scheduling order on May 1, 2013, setting the date for Appellants' CR² 26 expert witness disclosures at September 2, 2013, and trial for February 24, 2014.

¹ The Court will refer to the attorney who represented the Appellants below, but not on appeal as "Plaintiff's counsel."

² Kentucky Rules of Civil Procedure.

The CR 26 deadline having passed with no disclosures having been made, Plaintiff's counsel then moved to extend the deadline on October 1, 2013. The trial court granted the motion and entered its second scheduling order on October 8, 2013. This order set the CR 26 deadline at January 22, 2014, and the trial date at May 28, 2014. On December 6, 2013, Plaintiff's counsel moved to reassign the trial date, which the trial court granted. The trial court entered its third scheduling order on March 26, 2014, setting the deadline for Appellant's CR 26 disclosures at April 30, 2014, and the trial date at September 22, 2014.

On April 16, 2014, citing an irreconcilable breakdown in communication between attorney and client, Plaintiff's counsel moved to withdraw. The same motion also sought to continue the action. The trial court granted the motion on April 22, 2014, and in its order doing so, also extended all pretrial deadlines by sixty days.

Sameena, who at no point disputed the fact that she lacks a license to practice law in Kentucky, filed, on Nausher's behalf, the outstanding CR 26 disclosures on April 28, 2014. She further moved the trial court to reassign the trial date on July 10, 2014, which it denied in an order entered on August 8, 2014. The trial court issued an order on September 9, 2014, directing the parties mediate and rescheduling the trial date to March 30, 2015.

The Appellees filed a motion to preclude Sameena from further acting as counsel for Nausher and to strike any pleadings filed while so acting. The trial court entered an order on November 5, 2014, finding Sameena to have engaged in

the unauthorized practice of law, and ordering her to obtain licensed counsel to represent Nausher in the matter within thirty days or all pleadings filed by Sameena would be stricken from the record. With no attorney having entered an appearance on Nausher's behalf, the trial court entered an order on January 21, 2015, granting the Appellees' motions to “disqualify” Sameena from further “*pro se*” litigation of the matter and to strike all pleadings filed by her. This order included Sameena's CR 26 expert disclosures.

Appellees moved for summary judgment and for dismissal of the complaint with prejudice on January 28, 2015, which the trial court granted on February 11, 2015. The motion and order were based on the failure of the Appellants to offer expert testimony sufficient to establish a *prima facie* case for medical negligence.

Sameena at that point retained counsel and this appeal ensued.

II. ANALYSIS

A. STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases and avoid unnecessary trials where the record presents no genuine issues of material fact. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Absent a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. CR 56.03. In reviewing a motion for summary judgment, a court must review the record in the light most favorable to the non-moving party, and draw all reasonable inferences in his favor. *Bituminous*

Casualty Corp. v. Kenway Contracting, Inc., 240 S.W.3d 633 (Ky. 2007). Only when it appears impossible from the record that the non-moving party can produce any evidence at trial upon which the fact-finder could possibly find in his favor should a court grant summary judgment. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky.App. 1996).

This Court serves the role on appeal of reviewing whether the record presents an unresolved issue of material fact.

B. THE TRIAL COURT ACTED WITHIN ITS AUTHORITY IN STRIKING SAMEENA'S PLEADINGS

The complaint which initiated this action asserted no independent causes of action for injuries to Sameena. Indeed, even if it had, any such claims would have been precluded by operation of the statute of limitations on personal injury actions long before the institution of this litigation. Sameena pursued the personal injury claims of Nausher solely in her capacity as his next friend.

A “next friend” is defined as one “who appears in a lawsuit for the benefit of an incompetent or minor plaintiff, but who is not a party and is not appointed as a guardian.” *Black's Law Dictionary* (8th Ed. 2004). In other words, Sameena acted solely as Nausher's agent and not on her own as a party. *Branham v. Stewart*, 307 S.W.3d 94, 97 (Ky. 2010) (citing *Cozine v. Bonnick*, 245 S.W.2d 935 (Ky. 1952)).

Because Sameena acted only as a stand-in for Nausher to assert his rights, Sameena must obtain the services of a licensed attorney to do so. Case law

in Kentucky is replete with examples of non-lawyers being punished for engaging in such non-*pro se* litigation, even in instances where they have an interest in the case. In *Ky. Bar Ass'n v. Fox*, 536 S.W.2d 469 (Ky. 1976), the Kentucky Supreme Court held that a non-attorney individual, who did business as a sole proprietor under a trade name, had impermissibly practiced law without a license when initiating litigation in the name of the business. The Supreme Court echoed that sentiment in an action in 2005 with nearly identical facts. *Ky. Bar Ass'n v. Brooks*, 173 S.W.3d 617 (Ky. 2005). There is no functional difference between the non-lawyers in those cases and the situation here. The trial court thus correctly found that Sameena had engaged in the unauthorized practice of law.

The analysis now turns to whether the sanction imposed by the trial court, dismissing all unauthorized pleadings, was proper. In *Brozowski v. Johnson*, 179 S.W.3d 261 (Ky.App. 2005), attorney licensed in Illinois, but not licensed in Kentucky, filed a complaint in a Kentucky court. The trial court dismissed the complaint with prejudice for failure of plaintiff's counsel to procure a license to practice *pro hac vice*, and this Court upheld that dismissal, noting that “CR 11 provides that the remedy for 'attacking a deficient pleading... is to have it stricken as sham and false.’” *Id.* at 264.

The deficiency in the pleading in *Brozowski* was the same as it is here: the offending pleadings were not signed by an attorney licensed to practice law in Kentucky. The trial court thus acted appropriately in ordering any such pleadings stricken from the record.

C. THE TRIAL COURT PROPERLY GRANTED SUMMARY

JUDGMENT TO THE APPELLEES

Kentucky law requires expert testimony in medical negligence cases. *Andrews v. Begley*, 203 S.W.3d 165 (Ky.App. 2006); *Meador v. Arnold*, 94 S.W.2d 626 (Ky. 1936); *Reams v. Stutler*, 642 S.W.2d 586 (Ky. 1982). Such proof not only establishes the standard of care, but also whether a doctor-defendant breached the applicable standard. Further, in order to recover, a plaintiff must offer proof of causation to a reasonable degree of medical probability. *Sakler v. Anesthesiology Associates, P.S.C.*, 50 S.W.3d 210 (Ky.App. 2001). Such proof is also required in the form of expert testimony in instances where causation is not so obvious as to amount to *res ipsa loquitur*. *Id.*

However, this Court already having concluded that the trial court properly ordered Sameena's unauthorized pleadings stricken from the record, the Appellants lack the requisite proof to establish a *prima facie* case for medical negligence. In light of this absence, it becomes functionally impossible for Nausher to have produced proof allowing a fact-finder to reach a conclusion in his favor, as contemplated in *Scifres*. The trial court correctly found that no unresolved issue of material fact existed, and consequently acted within its authority when it granted summary judgment. Because the entry of summary judgment here was a matter of law, it is an adjudication on the merits of a case and such judgment is necessarily considered “with prejudice.” *See Medcom*

Contracting Services, Inc. v. Shepherdsville Christian Church Disciples of Christ, Inc., 209 S.W.3d 681 (Ky.App. 2009).

III. CONCLUSION

Having reviewed the record and finding no error, we hereby AFFIRM the judgment of the Hardin Circuit Court.

ALL CONCUR.

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