

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

CAROLYN J. BARKER, et al., :
 :
 Plaintiffs-Appellants, : CASE NO. CA2008-06-145
 :
 - vs - : OPINION
 : 6/8/2009
 :
 GLEN MEADOWS :
 NURSING HOME, et al., :
 :
 Defendants-Appellees.

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2005-02-0614

McKinney & Namei, Co., L.P.A., Firooz T. Namei, Vanessa S. Teodoro, 15 East Eighth Street, Cincinnati, OH 45202, for plaintiffs-appellants

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YOUNG, P.J.

{¶1} Plaintiffs-appellants, the Estate of Carolyn J. Barker and Ronald Barker, appeal a decision of the Butler County Court of Common Pleas dismissing with prejudice pursuant to Civ.R. 41(B)(2) their claims for negligence and loss of consortium against defendant-appellee, Glen Meadows Nursing Home. We affirm.

{¶2} Carolyn Barker was a resident patient at Glen Meadows Nursing Home. On

July 15, 2002, Carolyn fell on a wet floor and sustained an injury that required her to undergo surgery. On July 9, 2003, Carolyn and her husband and guardian, Ronald Barker, filed a complaint against Glen Meadows in the Butler County Court of Common Pleas, raising claims for negligence and loss of consortium. In January 2005, the Barkers voluntarily dismissed their complaint without prejudice.

{¶3} On February 22, 2005, the Barkers re-filed their complaint against Glen Meadows, alleging that Glen Meadows was negligent in, among other things, failing to provide Carolyn with a safe environment and to prevent her from sustaining injury; that Glen Meadows breached an implied contract that existed between it and Carolyn; and that Ronald had suffered the loss of Carolyn's consortium as a result of her injuries. While this case was pending, Carolyn died in May 2005 from causes unrelated to her fall on July 15, 2002, and Ronald continued the action on behalf of himself and Carolyn's estate.

{¶4} On May 23, 2008, the trial court sustained a number of Glen Meadows' motions in limine and announced that it would preclude from evidence (1) unauthenticated medical records of Carolyn's treating physicians that contained opinions and diagnoses of Carolyn's mental health condition, and any reference to Carolyn's mental health condition both before and after her fall on July 15, 2002; (2) the testimony of the Barkers' expert witness, Byron Arbeit; and (3) any proof that Carolyn suffered from lithium toxicity or dehydration at the time of her fall on July 15, 2002.

{¶5} Immediately after the trial court announced its decision on Glen Meadows' motions in limine, the Barkers' counsel waived their request for a jury trial and agreed to allow the trial court to hold a trial on their claims that same day, which the trial court proceeded to do. At trial, the Barkers' counsel waived opening statement and declined to present evidence in support of the Barkers' claims, explaining that as a result of the trial court's ruling on Glen Meadows' motions in limine, "plaintiffs cannot present any evidence, and therefore, plaintiff

[sic] rests." Glen Meadows then moved for dismissal pursuant to Civ.R. 41(B)(2), which the trial court granted.

{¶6} Appellants now appeal the trial court's decision, assigning the following as error:

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFFS-APPELLANTS IN GRANTING APPELLEES' MOTION FOR A DIRECTED VERDICT ON THE PLAINTIFFS-APPELLANTS' OPENING."

{¶9} In their sole assignment of error, appellants argue the trial court erred in granting Glen Meadows' motions in limine to exclude from evidence the unauthenticated medical records of Carolyn's attending physician, containing the physician's diagnoses and opinions, and the testimony of appellants' expert on nursing home care, and therefore, the trial court erred in "directing a verdict" against them. We find this argument unpersuasive.

{¶10} Initially, the trial court did not direct a verdict against appellants' claims, as their counsel alleges in his brief, but instead, dismissed appellants' action pursuant to Civ.R. 41(B)(2), which states:

{¶11} "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Civ. R. 52 if requested to do so by any party."

{¶12} Appellants argue the trial court erred by granting Glen Meadows' motions in

limine to exclude from evidence the unauthenticated medical records of Carolyn's treating physician containing the physician's diagnoses and opinions, and the testimony of appellants' expert on nursing home care. However, appellants' counsel failed to preserve these issues for review and therefore has waived them.

{¶13} "[I]t is incumbent upon a [party] who has been temporarily restricted from introducing evidence by virtue of a motion *in limine*, to seek the introduction of the evidence by proffer or otherwise [at trial] in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal." *Garrett v. Sandusky*, 68 Ohio St.3d 139, 141, 1994-Ohio-485, quoting *State v. Grubb* (1986), 28 Ohio St.3d 199, paragraph two of the syllabus.

{¶14} "An appellate court need not review the propriety of [a decision on a motion in limine] unless the claimed error is preserved by an objection, proffer, or ruling on the record when the issue is actually reached and the context is developed at trial." *Id.* at 203, quoting Palmer, Ohio Rules of Evidence Rules Manual (1984) 446. See, also, *Estate of Beavers v. Knapp*, 175 Ohio App.3d 758, 787, 2008-Ohio-2023, ¶69.

{¶15} In this case, appellants' trial counsel failed to introduce or proffer at trial the evidence and testimony that the trial court determined should be excluded when it granted Glen Meadows' motions in limine. As a result, appellants' attorney failed to properly preserve for review the evidentiary issues raised in appellee's motions in limine and therefore has waived appellants' right to argue those issues on appeal. See *Garrett* and *Estate of Beavers*.

{¶16} Appellants' sole assignment of error is overruled.

{¶17} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.

[Cite as *Barker v. Glen Meadows Nursing Home*, 2009-Ohio-2626.]