

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001526-MR

CHARLES V. BEALL AND
MARILYN C. BEALL

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
ACTION NO. 94-CI-02470

T. W. SWERCZEK, D.V.M. AND
K. B. POONACHE, D.V.M.

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: EMBERTON, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Charles V. and Marilyn C. Beall (the Bealls) appeal from an order of the Fayette Circuit Court entered May 19, 1998, granting summary judgment on behalf of Thomas W. Swerczek, D.V.M. and K. B. Poonache, D.V.M. (the Appellees). We affirm.

The Bealls have been engaged in the equine industry for over fifty years. They train and breed thoroughbred horses on their farm in Fayette County and elsewhere in central Kentucky. In 1993, the Bealls noticed that one of their mares was experiencing degenerating vision and partial blindness and

suspected that the mare was afflicted with leptospirosis.¹ The disease would eventually spread to eight horses, six of which would experience either partial or total blindness. The Bealls contacted the Appellees after the first mare began experiencing problems in order to obtain a diagnosis of the afflicted mare. The Appellees are veterinarian pathologists employed as professors by the University of Kentucky Livestock Diagnostic Disease Center. Although both are licensed veterinarians, neither Appellee actively practices veterinary medicine.

The Appellees instructed the Bealls to obtain blood samples from the horses in which leptospirosis was suspected and to bring the blood samples to the Appellees for the purposes of testing and analysis. Diagnostic tests performed by the Appellees on the blood samples brought to them by the Bealls failed to confirm the presence of leptospirosis with any degree of certainty. The Appellees released the test results to the Bealls sometime in July of 1993. Prior to releasing the test results, Dr. Swerczek visited the Bealls' farm personally to visually inspect the horses and the farm's water supply. During that visit, Dr. Swerczek informed the Bealls that their horses may be suffering from leptospirosis but that he could not draw a definite conclusion at that time. Further, he requested that the Bealls donate any of the horses that suffered mortal injury as a

¹Leptospirosis is the common term for a condition caused by *Leptospira interrogans*, a bacterial disease that affects a wide range of domestic animals, including horses, and can result in equine opthalmia (moon blindness) in adult horses. See K. B. Poonache, D.V.M., Ph.D., Equine Leptospirosis, VET-29, University of Kentucky College of Agriculture Extension Service, 1990.

consequence of the progression of the disease to the University of Kentucky for research.

In August of 1993, the Bealls retained Dr. James Donahue (Dr. Donahue), a professor of microbiology at the University of Kentucky, to treat their afflicted horses. Dr. Donahue performed another battery of blood tests and immediately reported to the Bealls that, in his opinion, the horses were afflicted with leptospirosis and that treatment should commence forthwith. On September 30, 1993, the Bealls consulted with Dr. James Smith, D.V.M. (Dr. Smith), a specialist in equine ophthalmology. After another series of blood tests and physical examinations, Dr. Smith concluded that the horses were most likely infected with leptospirosis. Thereafter, the Bealls commenced a series of vaccinations for all twenty-eight horses. The course of treatment suspended the transmission of the disease and caused remission in the horses afflicted with partial blindness. The totally blind horses remained in that condition.

On August 16, 1994, the Bealls file a pro se complaint in the Fayette Circuit Court against the Appellees. On February 27, 1998, the parties attended a pre-trial conference in which the Bealls agreed to certain stipulations on the record. However, at a later date, the Bealls refused to sign such stipulations. On March 27, 1998, the trial court granted the Appellees' motion to compel the Bealls to sign the previously agreed to stipulations. The only stipulation relevant to this appeal, reads as follows:

It is further stipulated by the parties that the attached blood work and pathology report performed at the Livestock Diagnostic Disease Center are accurate documents and the results

of the testing performed at the Livestock Diagnostic disease Center is accurate and was performed in a reasonable standard of care of a pathologist.

On March 31, 1998, based upon this stipulation, the Appellees filed a motion for summary judgment. On April 24, 1998, the trial court held a hearing on the motion and on May 19, 1998, the trial court granted summary judgment in favor of the Appellees. Thereafter, the Bealls filed a motion to reconsider, which the trial court denied. This appeal followed.

A moving party is entitled to summary judgment only where "the pleadings, depositions, answers to interrogatories, stipulations, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. In the oft cited case Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991), the Supreme Court of Kentucky stated:

[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.

...[A] judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances....

...

[T]he rule [CR 56.03] is to be cautiously applied. 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. Even though a trial court may believe the party opposing the motion may not succeed at trial,

it should not render a summary judgment if there is any issue of material fact.

In viewing the record in a light most favorable to the Bealls, we believe that the trial court properly granted summary judgment in favor of the Appellees. The Bealls raise two issues on appeal. First, the Bealls argue that summary judgment was inappropriate because the trial court did not consider their claim that the Appellees were negligent not only for failure to diagnose their horses' condition, but also for failure to treat the horses. Second, the Bealls argue that summary judgment was inappropriate because the trial court failed to consider their allegations of conspiracy and fraud against the Appellees.

We think it is important to reiterate that the Bealls filed a pro se complaint. Moreover, they proceeded pro se throughout the trial court proceedings. The complaint itself presents mere factual allegations instead of legal causes of action. However, pro se pleadings in general are not required to meet the same legal standards as those prepared by legal counsel. Beecham v. Commonwealth, Ky., 657 S.W.2d 234 (1983). In order to raise a legal claim, a complaint "need only give fair notice of a cause of action and the relief sought." Pike v. George, Ky., 343 S.W.2d 626 (1968) (citations omitted). In giving the Bealls the benefit of the doubt, we liberally construe their complaint to raise a legal claim for both medical malpractice and fraud.

However, it is clear to us from the record that the Bealls abandoned their claim of fraud and intended to pursue only their claim for medical malpractice at trial. When asked to submit a pre-trial memorandum to the trial court specifying their legal

causes of action, the Bealls raised only the following question of law:

1. Standard of care.

The Defendants [Appellees] were expected to exhibit a degree of skill and care of veterinarian pathologists acting under the same or similar circumstances. Blair v. Eblen, Ky., 461 S.W.2d 371, 373 (1970).[sic] Plaintiff [Appellants] contends that the Defendants failed or refused to meet their duty.

Trial courts have discretion to direct party litigants to attend pre-trial conferences in order to simplify the issues for presentation at trial. CR 16.1(a). The party litigants are bound by the issues raised at the pre-trial conference. Sapp v. Massey, Ky., 358 S.W.2d 490 (1962). The Supreme Court stated in Sapp:

One of the chief purposes of pre-trial procedure, and the principal usefulness of a pre-trial order, is to formulate the issues to be litigated at trial. The parties are bound by the pre-trial order. They may not later inject an issue not raised at the pre-trial conference. Otherwise the primary objective of pre-trial procedure would be defeated.

Id. at 492. It is clear from the Bealls' pre-trial memorandum that the only issue they intended to pursue at trial was the issue of medical malpractice. The Bealls may not now on appeal raise the abandoned issue of fraud.

With regard to the issue of medical malpractice, the Bealls now claim that they intended to pursue claims against the Appellees both for the diagnosis and treatment of their horses. However, the record indicates that the Bealls only sought damages from the Appellees for their alleged failure to properly diagnose

their horses. The Bealls' pre-trial memorandum alleges that the Appellees failed to meet their duty of care as veterinary pathologists. However, veterinary pathologists are not in the business of treating animals. They attempt to discover the cause of an animal's condition through blood tests and physical examinations. Treatment of animals, however, is left to practicing veterinarians. Appellees did not hold themselves out as practicing veterinarians. Further, the Bealls stated emphatically during the proceedings in this case that they had not asked the Appellees to treat their animals. Therefore, the only issue before the trial court after the pre-trial conference was whether the Appellees had met their duty to properly diagnose the Bealls' horses.

In cases of professional malpractice, the plaintiff must show that the defendant failed to exhibit the degree of care and skill reasonably expected of a similar trained professional acting under the same or similar circumstances. Blair v. Eblen, Ky., 461 S.W.2d 371 (1970). By the Bealls' own admission, the Appellees exercised the degree of skill reasonably expected of veterinary pathologists in performing the blood work on their horses. The Bealls offered this stipulation in their own pre-trial memorandum and agreed to this stipulation at the pre-trial conference. With no other issue before it, the trial court did not abuse its discretion in granting summary judgment to the Appellees.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES:

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