

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000903-MR

VERONICA CANTRELL-MAY,
AS MOTHER AND NEXT FRIEND
OF ALEXANDRIA MAY

APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 06-CI-00440

BRENDEN M. WETHERTON, M.D.

APPELLEE

OPINION AND ORDER
DISMISSING

** ** *

BEFORE: VANMETER, ACTING CHIEF JUDGE; STUMBO AND TAYLOR,
JUDGES.

TAYLOR, JUDGE: Veronica Cantrell-May, as mother and next friend of
Alexandria May, brings this appeal from a March 18, 2009, judgment of the
Shelby Circuit Court in favor of Brenden M. Wetherton, M.D., dismissing the
complaint. For the reasons stated, we must reluctantly dismiss this appeal.

Fifteen year-old Alexandria May suffered an ischemic stroke in late December 2005. Veronica Cantrell-May subsequently instituted this medical malpractice action as “Mother and Next Friend of Alexandria May” by filing a complaint in the Shelby Circuit Court against Brenden M. Wetherton, M.D. Wetherton had treated Alexandria in the emergency room at Jewish Hospital in Shelbyville, Kentucky, on December 30, 2005.

While the circuit court action was pending, counsel for Alexandria filed a Notice of Substitution. Therein, counsel asserted that Alexandria had reached the age of majority and, thus, Alexandria “is substituted as Plaintiff in place of her mother, Veronica Cantrell-May, who was proceeding as her next friend.” Following a jury trial, the circuit court entered judgment in favor of Brenden M. Wetherton, M.D., and the complaint was dismissed. The only party named as plaintiff in the judgment was “Alexandria May.”

Thereafter, a notice of appeal was filed from the judgment. The notice of appeal named in both the caption and text “Veronica Cantrell-May as mother and next friend of Alexandria May” as the only appellant. This appeal follows.

From the above procedural facts, it is clear that Alexandria, upon attaining majority, was substituted as plaintiff in the stead of her next friend, Veronica, and proceeded to prosecute the action below in her own right. Indeed, the final judgment identifies Alexandria as the only plaintiff. The notice of appeal, however, solely named as appellant “Veronica Cantrell-May, as mother and next

friend of Alexandria May.” The law is well-settled that only a party of record to a proceeding in circuit court may file a notice of appeal therefrom. Kentucky Rules of Civil Procedure 73.02; *Bartholomew v. Paniello*, 287 S.W.2d 616 (Ky. 1956); *White v. England*, 348 S.W.2d 936 (Ky. 1961). Veronica, as next friend, had no authority to file a notice of appeal as she was no longer a party to the action below after Alexandria was substituted as plaintiff. Our courts have long recognized that an infant, upon reaching majority, must pursue an appeal in his or her own name and not through a representative. *Parks v. Barnes*, 173 Ky. 589, 191 S.W. 447 (1917). Additionally, the Kentucky Supreme Court has held that substantial compliance is inapplicable to the failure to name an indispensable party in the notice of appeal. *City of Devondale v. Stallings*, 795 S.W.2d 954 (Ky. 1990).

As noted by the Kentucky Supreme Court in *City of Devondale*, the failure to name an indispensable party in a notice of appeal is a jurisdictional defect. The Supreme Court recently expounded upon jurisdictional defects on appeal in *Wilson v. Russell*, 162 S.W.3d 911 (Ky. 2005). The Supreme Court stated the following:

It is fundamental that a court must have jurisdiction before it has authority to decide a case. Jurisdiction is the ubiquitous procedural threshold through which all cases and controversies must pass prior to having their substance examined. So fundamental is jurisdiction that it is the concept on which first-year law students cut their teeth. . .

. . . .

However, even though not raised, “jurisdiction may not be waived, and it can not be conferred by consent of the parties. This [C]ourt must determine for itself whether it has jurisdiction.” *Hubbard v. Hubbard*, 303 Ky. 411, 197 S.W.2d 923 (Ky. 1946).

Id. at 913.

In conclusion, Veronica, as next friend, could not pursue the instant appeal as Alexandria had reached majority and was substituted as plaintiff in the action below. Alexandria is an indispensable party to this appeal. *See id.* Unfortunately, since Veronica, as next friend, is the only appellant named in the notice of appeal, the appeal must be dismissed. *City of Louisville v. Christian Business Women’s Club, Inc.*, 306 S.W.2d 274 (Ky. 1957).

Now, therefore, be it ORDERED that Appeal No. 2009-CA-000903-MR is DISMISSED.

ALL CONCUR.

ENTERED: June 11, 2010

/s/ Jeff S. Taylor
JUDGE, COURT OF APPEALS

BRIEF AND ORAL ARGUMENT
FOR APPELLANT:

Brian E. Clare
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BRIEF FOR APPELLEE:

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ORAL ARGUMENT FOR
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