RENDERED: NOVEMBER 16, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001908-MR

JENEAN MCBREARTY — APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 15-CI-00382

MARILYN PETERSON; LAURA EMBREE;
COURTNEY MARTIN; SUSAN REYNOLDS;
JENNIFER SULLIVAN; AND MARK MILNER

APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, J. LAMBERT, AND NICKELL, JUDGES.

KRAMER, JUDGE: Jenean McBrearty, *pro se*, appeals from the November 21, 2017 summary judgment of the Boyle Circuit Court entered in favor of the above-captioned appellees. McBrearty alleges the circuit court erred by granting the appellees summary judgment under the doctrine of *res judicata*, which denied her

the opportunity to litigate her claims. After careful review of the record and applicable law, we find no error in the circuit court's determination. Therefore, we affirm.

FACTS AND PROCEDURAL BACKGROUND

We quote the underlying facts of this case from a prior Opinion of this Court, which affirmed in part and dismissed in part McBrearty's appeal surrounding the same claims raised in the present appeal.

> In February 2014, McBrearty was a patient at Ephraim McDowell Regional Medical Center where Dr. Lukins performed an open reduction internal fixation to repair a right hip fracture. After surgery, Dr. Lukins prescribed Coumadin, an anticoagulant used to help prevent blood clotting in arteries and veins, which is often used following the surgical repair of a bone fracture. McBrearty took three doses of five milligrams of Coumadin on February 11, 12, and 13, 2014. Following her discharge, McBrearty's prescription for Coumadin was filled at a local pharmacy.
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> On February 16, 2014, McBrearty was seen in the hospital emergency room with a swollen and tender right thigh and bruising above the surgical incision. She was diagnosed with a hematoma and was treated with two units of packed red blood cells and Vitamin K. The prescription for Coumadin was switched on February 17, 2014.
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> On January 15, 2015, McBrearty, *pro se*, filed a complaint in Boyle Circuit Court. The complaint contained allegations against the hospital, numerous members of its nursing and administrative staff (Does 1-99), and Dr. Lukins. McBrearty alleged that hospital staff gave her Coumadin against her wishes on three

> occasions following surgery. She also alleged that hospital employees battered her, verbally assaulted her, and were guilty of elder abuse. By order entered on December 17, 2015, the circuit court dismissed with prejudice McBrearty's claims of assault, battery, and elder abuse with respect to the hospital staff. McBrearty's claim that the hospital administered Coumadin without her consent was set for trial.

McBrearty v. Lukins, No. 2016-CA-000093-MR, 2018 WL 565827, at *1 (Ky. App. Jan. 26, 2018).

McBrearty's prior lawsuit was tried before a jury in November 2016. Ultimately, the jury returned a verdict in December 2016 in favor of Ephraim McDowell Regional Medical Center ("EMRMC") and "Does 1-99."[1] Before the completion of the first lawsuit, McBrearty moved to amend her original complaint or, alternatively, to join several additional defendants to her suit. Her motion was denied in September 2015.

Subsequently, McBrearty initiated separate litigation forming the basis of the instant appeal. As before, her complaint surrounded her stay at EMRMC between February 10, 2014, and February 24, 2014, and the injuries she allegedly sustained while there. Likewise, she asserted the same operative nucleus of facts, including but not limited to her being transferred from an emergency room gurney to a hospital bed. However, McBrearty repackaged her claims as assault,

[1] The circuit court had previously granted summary judgment in favor of Dr. Lukins on January 8, 2016. *McBrearty*, 2018 WL 565827, at *1.

battery, and conspiracy to cover up elder abuse. And, she asserted these claims against ostensibly different parties, *i.e.*, Courtney Martin, Marilyn Peterson, Laura Embree, Susan Reynolds, Jennifer Sullivan, and Mark Milner.

In a September 2017 order, the circuit court dismissed all claims and issues of elder abuse. Therefore, the only claim left was the allegation of assault and battery against Courtney Martin. However, the order dismissing the claims of elder abuse was not made a final and appealable order. Thereafter, the appellees moved for summary judgment based on the affirmative defense of *res judicata* regarding McBrearty's assault and battery claim. On November 21, 2017, the circuit court granted the appellees' motion for summary judgment, finding that *res judicata* barred all claims in McBrearty's second complaint.

This appeal followed.

ANALYSIS

At the outset, we pause to note that McBrearty's brief does not comply with the requirements set forth in CR[2] 76.12(4)(c)(v), which states that

> [a]n "ARGUMENT" conforming to the statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.

[2] Kentucky Rule of Civil Procedure.

In her brief, McBrearty does not properly preserve the issues for review, nor does she provide supportive citations to the record. In fact, there are no specific citations to the record in the entirety of her brief, consequently, McBrearty only cites to exhibits attached to her brief.

This Court has previously explained that the requirement to point out where the argument is preserved,

> is so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration. It also has a bearing on whether we employ the recognized standard of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.

Oakley v. Oakley, 391 S.W.3d 377, 380 (Ky. App. 2012).

McBrearty has previously been cautioned by this Court that compliance with the rules of this Court is necessary.

> McBrearty is well aware that we require *pro se* litigants to follow our rules of procedure. *See Louisville and Jefferson Cty. Metropolitan Sewer Dist. v. Bischoff*, 248 S.W.3d 533 (Ky. 2007). We told her so directly in *McBrearty v. Kentucky Community and Technical College System*, 262 S.W.3d 205 (Ky. App. 2008). In that case, we addressed the merits of McBrearty's *pro se* appeal under circumstances that clearly warranted its dismissal. Moreover, McBrearty has extensive experience in the appellate courts of California, Washington, and Florida where she must have become familiar with the rules governing civil procedure and appellate practice.

> McBrearty's brief is glaringly deficient. We are not inclined to ignore her failure to comply with our rules again—particularly where some of the most relevant factual and legal assertions included in the brief either are being raised for the first time or appear to contradict medical records, deposition testimony, pleadings, and/or the trial court's own record. Legal actions are not to be commenced, defended, or prosecuted on appeal cavalierly. Our appellate rules "help assure the reviewing court that the arguments are intellectually and ethically honest." *Hallis v. Hallis*, 328 S.W.3d 694, 697 (Ky. App. 2010). Furthermore, adherence to the rules "enables opposing counsel to respond in a meaningfully [sic] way to the arguments so that dispute about the issues on appeal is honed to a finer point." *Id.*
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> Where a litigant's brief is non-compliant, we may strike it. CR 76.12(8)(a), and we opt to do so. McBrearty's brief is hereby stricken. Furthermore, for failure to prosecute the appeal in conformity with our rules of procedure, the appeal is dismissed. CR 76.34. We shall do so by a separate order reflecting the striking of the brief and the dismissal of this appeal.

McBrearty, 2018 WL 565827, at *2-3.

We would well be acting within our discretion to strike McBrearty's brief. We note, however, that appellees did not move the Court to strike her brief. Given that the issues before us are easily discernible and easily resolved on the merits, we will not strike her brief. Regardless, our leniency in not striking McBrearty's brief should not be taken as condoning her failure to follow the civil rules. Our tolerance with McBrearty's continued flouting of the civil rules has reached its limits.

Turning to the issues, McBrearty alleges that: (1) the circuit court erred in granting summary judgment under the doctrine of *res judicata* because the circuit court abused its discretion by not allowing her to join the appellees in the first lawsuit; and (2) the circuit court erred in granting summary judgment regarding her conspiracy claim because conspiracy is an independent cause of action. We disagree.

By merely presenting the same arguments from the first lawsuit in different packaging, this appeal represents an attempt to have a second bite at the apple. The issues presented in this appeal have either been decided or could and should have been addressed in the previous appeal. McBrearty asserts that because the circuit court did not allow her to join the appellees in the first lawsuit they were ultimately severed. However, McBrearty provides no legal support for this assertion, nor could we find any.

The denial of her motion to join the appellees should have been addressed in the first appeal. The allegations in this appeal are identical to those previously alleged and surround the same common nucleus of operative facts. Under the doctrine of *res judicata*, "[i]f the two suits concern the same controversy, then the previous suit is deemed to have adjudicated every matter which was or could have been brought in support of the cause of action." *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 465 (Ky. 1998).

Therefore, the doctrine of *res judicata* prevents relitigating the same issues on a subsequent appeal. This includes every matter belonging to the subject of the litigation that could and should have been raised in the first appeal. A review of the record supports the circuit court's determination that the appellees were entitled to summary judgment under the doctrine of *res judicata*.

McBrearty's claim of conspiracy also fails. This Court has previously stated that, "the law in Kentucky requires the actual commission of the tortious act or a concert of action where substantial assistance has been provided in order for liability to attach based on a civil conspiracy theory." *James v. Wilson*, 95 S.W.3d 875, 897-98 (Ky. App. 2002). In the present case, McBrearty has failed to produce evidence that there was any participation by any of the appellees to act in furtherance of the alleged conspiracy. Likewise, her claim of conspiracy surrounds her allegation of elder abuse, which was addressed in her first appeal. McBrearty could and should have raised this issue in her first appeal.

CONCLUSION

For the above stated reasons, we affirm the summary judgment order of the Boyle Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jenean McBrearty, *pro se*
Danville, Kentucky

BRIEF FOR APPELLEE:

Joshua D. Johnson
Lexington, Kentucky