

RENDERED: JANUARY 26, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2016-CA-000093-MR

JENEAN MCBREARTY

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT  
HONORABLE DARREN W. PECKLER, JUDGE  
ACTION NO. 15-CI-00023

JOSEPH LUKINS, MD

APPELLEE

NO. 2016-CA-001892-MR

JENEAN MCBREARTY

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT  
HONORABLE DARREN W. PECKLER, JUDGE  
ACTION NO. 15-CI-00023

EPHRAIM MCDOWELL  
REGIONAL MEDICAL CENTER

APPELLEE

OPINION  
DISMISSING APPEAL NO. 2016-CA-000093-MR  
AND AFFIRMING APPEAL NO. 2016-CA-001892-MR

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BEFORE: COMBS, JOHNSON AND D. LAMBERT, JUDGES.

COMBS, JUDGE: Jenean McBrearty, *pro se*, appeals from the January 8, 2016, summary judgment of the Boyle Circuit Court entered in favor of Dr. Joseph Lukins. She also appeals from the judgment entered in favor of Ephraim McDowell Regional Medical Center on December 9, 2016, following a jury trial. With respect to the judgment in favor of the hospital, we affirm. We dismiss the appeal of the summary judgment entered in favor of Dr. Lukins.

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.

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.

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.

As to Dr. Lukins, McBrearty alleged that he did not have her consent to prescribe Coumadin and that he had "engaged in behavior to coerce her consent [to ingest the medication] by threat, and deception, and by persuading [her] primary doctor to assist in overcoming her objections." She alleged further that Dr. Lukins had acted negligently by prescribing her Coumadin; that he had "berated her for not doing what the [p]hysical [t]herapists wanted her to do"; that he had "lied to [her] about [Medicare's] payment of her bill if she refused

medication”); and that he had participated in the elder abuse perpetrated by the hospital.

By order entered January 8, 2016, the circuit court granted summary judgment in favor of Dr. Lukins. The court determined that McBrearty’s proffered expert, a nurse practicing in Mexico, was not qualified to testify as to the requisite standard of care, a breach of the standard of care, or causation of any injury. It concluded that without expert testimony, McBrearty could not establish a *prima facie* case and that Dr. Lukins was entitled to judgment as a matter of law. The judgment contained the necessary finality language and provided that there was no just cause for delay. McBrearty filed a timely notice of appeal.

By order entered on March 21, 2016, the case against the hospital was set for jury trial beginning on November 14, 2016. The proceedings were expected to be completed on November 17, 2016.

The trial court’s session report indicates that *voir dire* began on the morning of November 14, 2016; that the parties gave opening statements; and that McBrearty took the stand and presented her case, *pro se*. The notes further indicate that the hospital began its defense on the morning of November 15, 2016, and concluded mid-morning on November 16, 2016. McBrearty cross-examined the hospital’s final witness and at 11:40 a.m., the court excused the jury for lunch. Shortly after 1:00 p.m., the trial resumed. The court instructed the jury, and the

defense gave its closing argument. McBrearty began her closing statement at 1:45 p.m. The jury began to deliberate for approximately thirty (30) minutes. At 2:45 p.m., it returned its verdict in favor of the hospital. Judgment was entered on December 9, 2016. This second timely appeal followed.

We shall address the separate appeals in the order in which they were filed. However, before reaching the merits of the appeal of the summary judgment in favor of Dr. Lukins, we must first consider his motion to dismiss.

McBrearty filed her brief with this court on March 30, 2016. She contended that the trial court erred by: concluding that her tendered expert witness was not qualified to testify; failing to consider the doctrine of *res ipsa loquitur*; concluding that Lukins's decision to prescribe Coumadin did not constitute battery; concluding that her assault claim against him was not viable; and failing to consider whether Lukins might be liable under the theory that he aided and abetted the hospital in her mistreatment.

On May 18, 2016, Dr. Lukins filed a motion with this court to strike McBrearty's brief and to dismiss the appeal or, alternatively, to apply a manifest-injustice standard of review to the issues she raised. By order of the court, the motion was passed to this panel for decision.

In his motion, Dr. Lukins contended that McBrearty's appeal should be dismissed pursuant to the provisions of CR<sup>1</sup> 76.34(6) on the ground that the appeal has not been prosecuted in conformity with our appellate rules. In her response to the motion, McBrearty staunchly defended her brief.

The provisions of CR 76.12(4)(c)(iv) require an appellate brief to contain a chronological summary of the facts and procedural events necessary to an understanding of the issues presented by the appeal with ample references to the specific pages of the record to support each of the statements included in the narrative. Similarly, the provisions of CR 76.12(4)(c)(v) require that the arguments included in the brief be amply supported by references to the record and to citations of authority. Additionally, each argument must contain a statement (again, with reference to the record) showing whether the issue was properly preserved for review and in what manner. *Id.*

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

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<sup>1</sup> Kentucky Rules of Civil Procedure.

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.<sup>2</sup>

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.*

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

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<sup>2</sup> See *McBrearty v. City of Brawley*, 59 Cal. App. 4th 1441 (1997); *McBrearty v. Livengood*, 117 Wash. App. 1094 (2003); *McBrearty v. District Bd. Of Trustees of So. Florida Community College*, 984 So. 2d 1256 (Fla. Dist. Ct. App. 2008).

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.

We now consider McBrearty's second appeal -- the appeal of the judgment entered on December 9, 2016, in favor of the hospital. McBrearty argues that the trial court erred by sustaining defense counsel's objection to the introduction of three photographs. She characterizes this ruling as palpable error. She also argues that the trial court acted outrageously by: instructing the jury in a manner that influenced its decision; allotting her only forty-five minutes to compose her closing statement; affording her insufficient time for a lunch break; and limiting the trial to three days. We shall address these arguments in the order in which they were presented.

At trial, McBrearty attempted to admit numerous photographs into evidence. Defense counsel objected, arguing that the photographs were inflammatory and, additionally, that there was no testimony from a medical expert that would connect the images in the photographs to the administering of Coumadin. The trial court agreed and ruled that the photographs would be excluded from evidence. On appeal, McBrearty contends that the trial court erred by ruling that the photographs were inflammatory.

The admission or exclusion of photographic evidence is a matter left largely to the discretion of the trial court. *City of Louisville v. Yeager*, 489 S.W.2d

819 (Ky. 1973). However, more critical to our review is the fact that McBrearty failed to introduce the proffered evidence into the record by avowal. Thus, the photographs are unavailable for our review. The appellant bears the burden to present a sufficiently complete record to support her claim of error. Because we are unable to view the photographs, we must assume that they were properly excluded by the trial court. *McDaniel v. Commonwealth*, 341 S.W.3d 89 (Ky. 2011).

Next, McBrearty contends that the trial court acted outrageously by instructing the jury in a manner that unfairly influenced its decision. However, this argument is not properly preserved for our review.

The record indicates that during the charge conference, the trial court offered to note each litigant's objection to its proposed instructions to the jury. However, McBrearty affirmatively rejected the offer by stating, "Well, I don't know. I think your instruction's pretty good." Having expressed to the court her satisfaction with the proposed instruction, McBrearty cannot now be heard to complain about it.

Finally, McBrearty argues that the trial court acted outrageously by failing to give her more time to prepare a closing argument, by failing to give her adequate time for lunch, and by failing to stretch the trial to five days. McBrearty

concedes that none of these arguments is properly preserved for our review. Nevertheless, she urges the court to conduct a limited review for manifest injustice.

Our rules of civil procedure permit an appellate court to consider palpable errors which affect the substantial rights of a party -- even where the errors are insufficiently preserved for review. CR 61.02. Appropriate relief may be granted upon a determination that manifest injustice has resulted from the errors. *Id.*

Our review indicates that the trial court exercised reasonable management of these proceedings and that it properly exercised its broad discretion. Its conduct does not constitute palpable error. McBrearty is not entitled to relief on this ground.

We affirm the judgment of the Boyle Circuit Court.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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