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Supreme Court of Kentucky

FINAL

2016-SC-000560-DG DATE 5/9/19 Kim Redmon, DC

SAMEENA AZMAT, AS MOTHER AND NEXT FRIEND OF NAUSHER AZMAT — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2015-CA-000399-MR
HARDIN CIRCUIT COURT NO. 12-CI-00645

GEORGE W. BAUER, M.D. III AND ELIZABETHTOWN PHYSICIANS FOR WOMEN, P.S.C. — APPELLEES

OPINION OF THE COURT BY JUSTICE KELLER

REVERSING AND REMANDING

Sameena Azmat appeals from an opinion of the Court of Appeals which upheld the Hardin Circuit Court's dismissal of the case. The dismissal arises from an action brought by Sameena as mother and "next friend" of her son, Nausher Azmat.[1] This Court granted discretionary review to address the important issues presented. Because we find error in the courts below, we reverse and remand the case to the Hardin Circuit Court for further proceedings.

[1] Appellants will be collectively referred to as "Azmat." When a distinction needs to be made between Sameena Azmat and Nausher Azmat, we will respectfully refer to the individuals by their first names, "Sameena" and "Nausher."

I. FACTUAL AND PROCEDURAL BACKGROUND

Sameena gave birth to Nausher on July 5, 1997. Dr. George Bauer at Elizabethtown Physicians for Women, P.S.C., provided Sameena with prenatal care. Sameena was concerned that she did not seem to be gaining weight similarly to other pregnant women, but Dr. Bauer informed her that her child would be small because Sameena was a petite woman.

After Sameena had completed her regular prenatal appointments, the child was scheduled to be delivered on July 5, 1997. However, on July 3, 1997, Sameena noticed a decrease in fetal movement. Dr. Bauer performed an ultrasound and noted that everything was normal. When Sameena arrived for her child to be delivered on July 5, she was told the baby was in distress and a caesarian section would be performed.

Nausher was born blue and suffered cardiac arrest post-delivery. His birth history included hypoxia, aspiration of meconium, Intrauterine Growth Restriction, a "paucity" of amniotic fluid, two cardiac arrests, a 14-day hospital stay, perinatal asphyxia, intubation for the first week of life, Persistent Pulmonary Hypertension of the Newborn (PPHN), cardiorespiratory arrest with CPR required, and coagulopathy of such severity that he was not a candidate for ECMO.[2]

Sameena brought suit, by and through counsel, on March 27, 2012, as mother and next friend of Nausher, against Dr. Bauer and Elizabethtown

[2] Extracorporeal membrane oxygenation.

Physicians for Women, P.S.C. Sameena alleged that Nausher's developmental delays were caused by Dr. Bauer's negligence in Sameena's prenatal care and Nausher's delivery. Discovery commenced thereafter. Although numerous, the circuit court proceedings are all relevant to this matter, thus we outline them below.

The circuit court entered a Pretrial Order on May 2, 2013 setting a date for jury trial as well as deadlines for the parties' expert witness disclosures. In October 2013, Azmat's attorney filed a motion for an extension to file expert disclosures and a request to reschedule the trial date. The justification for the motion and the extension was that Nausher was to undergo genetic testing. Dr. Bauer had no objection to Azmat's request for an extension, and the trial court granted the motion and entered a new Pretrial Order.

In December 2013, the parties jointly filed a motion for a new trial date. The circuit court granted the motion and rescheduled the jury trial.[3] On April 16, 2014, Azmat's counsel moved to withdraw from the case and also requested a 90-day continuance of all deadlines. Counsel cited irreconcilable differences and a breakdown in communication as grounds for withdrawal. Counsel also told the court that he had advised Sameena of his intention to withdraw and sent her a copy of the motion via certified mail. The record does not purport to show Sameena's presence at this hearing. Neither counsel nor the court directed any questions towards Sameena nor otherwise acknowledged her presence, so this Court cannot conclusively determine if Sameena was

[3] The new trial date conflicted with a prior trial date for defense counsel. Defense counsel subsequently moved for a new date in early 2015.

present.[4] The trial court granted counsel's motion to withdraw by order entered on April 24, 2014, and continued deadlines for 60 days for Sameena to find replacement counsel, or she would be deemed to proceed *pro se.*

On April 28, 2014, Sameena filed expert disclosures. It appears that the disclosures had already been prepared by prior counsel, but Sameena signed the documents and filed them. On June 20, 2014, Sameena wrote a letter to the judge requesting additional time to find counsel. On July 2, 2014, Dr. Bauer filed his expert disclosures and objection to Azmat's request for additional time to find replacement counsel. Dr. Bauer pointed out that Sameena filed her expert disclosures *pro se* and such filing was an effective entry of appearance as a *pro se* litigant.

On July 3, 2014, Dr. Bauer moved to compel Sameena to provide dates for experts to be deposed, or, in the alternative, to exclude Sameena's experts. On July 10, 2014, Sameena moved for more time to find an attorney.[5] On July 17, 2014, the trial court entered an order compelling Sameena to provide dates for her experts to give depositions. On July 28, 2014, Sameena refiled her motion for an extension of time.

On July 31, 2014, Sameena sent defense counsel an email giving date ranges for depositions based on her experts' availability. Also, on July 31, 2014, the defense moved to exclude experts for failure to disclose dates for depositions and for summary judgment. The defense argued that because the

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[4] We also note that Sameena resided in Georgia during this litigation.

[5] This motion was not heard because it was improperly filed for a day in which the trial court did not have motion docket.

possible dates for depositions were after the scheduled trial date, Sameena had not effectively complied with the court's order, and exclusion was warranted. If the experts were excluded, defense argued they would be entitled to judgment as a matter of law because a plaintiff in a medical malpractice case must provide expert testimony as part of the *prima facie* case.

On August 8, 2014, the trial court denied Sameena's motion for an extension of time. On August 18, 2014, Sameena responded to defense's motion to exclude experts and summary judgment. By order entered September 4, 2014, the trial court rescheduled the trial for March 30, 2015, ordered that depositions be scheduled before March 2, 2015, and that the parties mediate before March 16, 2015. The trial court further indicated that there was no finding that Sameena had deliberately disregarded the court's prior orders.

On September 9, 2014, Dr. Bauer moved to strike Sameena's experts alleging Sameena had engaged in the unauthorized practice of law. The defense argued that Sameena, as "next friend," had no claims in the case, thus she could not proceed *pro se* on behalf of Nausher. The trial court set forth a briefing schedule on the issue of the unauthorized practice of law. Sameena did not file a response and Dr. Bauer submitted his reply brief on October 17, 2014.

On November 10, 2014, the trial court entered an order finding that Sameena had engaged in the unauthorized practice of law and stated that Sameena's experts would be stricken unless she found an attorney within 30 days. On January 26, 2015, an order was entered striking Sameena's expert

witnesses. On February 13, 2015, the trial court entered an order dismissing the case with prejudice.

On March 13, 2015, Sameena secured counsel to file her notice of appeal from the grant of summary judgment to Dr. Bauer. The Court of Appeals affirmed, holding that Sameena did engage in the unauthorized practice of law, thus it was proper for the trial court to strike her pleadings and grant summary judgment to Dr. Bauer. Sameena, without counsel, filed a motion for discretionary review with this Court. Dr. Bauer moved to strike and dismiss the motion because it was not filed by counsel. This Court passed Dr. Bauer's motion to the consideration of the merits of the motion for discretionary review. Because we granted discretionary review, any challenge to the motion or to this appeal being properly before this Court is rendered moot.[6]

II. ANALYSIS

"Actions involving unmarried infants or persons of unsound mind shall be brought by the party's guardian or committee, but if there is none, or such guardian or committee is unwilling or unable to act, a next friend may bring the action." Kentucky Rules of Civil Procedure (CR) 17.03(1). "[T]he 'next

[6] We are also compelled to provide a cautionary note to counsel. While persuasive argument is required and expected in appellate briefing, this Court neither appreciates nor tolerates misrepresentations of the record; as such it would behoove counsel to accurately cite to the record. Counsel's brief to this Court implied that Azmat was to blame for the entire delay in the case. Yet, the record belies this general characterization. Specifically, the first request to reschedule the trial, filed by Azmat's counsel, garnered no objection from the defense. The next request was a joint motion. Defense counsel also made its own request due to a conflict with a scheduled trial date. This motion by defense counsel requested a trial date in early 2015, and when the trial was scheduled for March 2015, defense counsel vehemently opposed.

friend' device is a procedural one by which a minor's claim is brought into court and a person acting as such is only a nominal party with no unilateral statutory or other authority to settle the minor's claim." *Jones By and Through Jones v. Cowan*, 729 S.W.2d 188, 190 (Ky. App. 1987). A next friend is the minor's agent, merely bringing an action on the minor's behalf. "[T]he minor is the real party in interest in any lawsuit filed on the minor's behalf by the minor's next friend." *Branham v. Stewart*, 307 S.W.3d 94, 97-98 (Ky. 2010). *The attorney "has an attorney-client relationship with, and owes professional duties to, the minor." Id.* at 99 (emphasis added).

None of the alleged errors are preserved for review. Nonetheless, this Court can review the claims under the palpable error standard.

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

CR 61.02.

A. The trial court erred in permitting Azmat's attorney to withdraw.

There are certain instances in which counsel is required to decline or terminate the representation of a client. Supreme Court Rules (SCR) 3.130(1.16)(a)(1)(2)and(3). There are also instances where a lawyer may be able to withdraw from representing a client if:

(1) Withdrawal can be accomplished without material adverse effect on the interests of the client; or

(2) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; or

(3) The client has used the lawyer's services to perpetrate a crime or fraud; or

(4) The client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; or

(5) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; or

(6) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) Other good cause for withdrawal exists.

SCR 3.130(1.16)(b)(1)(2)(3)(4)(5)(6) and (7).

Azmat's counsel moved to withdraw from the case via motion filed on April 16, 2014. As justification for the motion, "counsel states that irreconcilable differences and breakdown in communications have arisen between the undersigned and the Plaintiffs that preclude further representation, the details of which are within the confines of the attorney-client privilege. Counsel avows that reasonable grounds exist for the Court to grant this Motion."

"Section (b) of SCR 1.16 gives the trial court broad discretion in granting such motions liberally, *as long as the client's interests are not affected.*" *Lofton v. Fairmont Specialty Ins. Managers, Inc.*, 367 S.W.3d 593, 596 (Ky. 2012)

(emphasis added). We must review the trial judge's grant of permission for counsel to withdraw under an abuse of discretion standard. *St. Clair v. Commonwealth*, 140 S.W.3d 510, 561 (Ky. 2004) (citing *Jacobs v. Commonwealth*, 58 S.W.3d 435, 449 (Ky. 2001)). "An abuse of discretion occurs if the trial court's ruling is 'arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Doyle v. Doyle*, 549 S.W.3d 450, 456-57 (Ky. 2018) (citing *Garrett v. Commonwealth*, 534 S.W.3d 217, 224 (Ky. 2017) citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). This Court finds an abuse of discretion because the trial court's actions were unreasonable in these circumstances and caused great injustice to Azmat.

The hearing on counsel's motion to withdraw was held on April 22, 2014. Azmat's attorney indicated that the hearing was pursuant to his motion to withdraw, but the actual hearing focused on the continuance of deadlines.[7] Counsel stated that he had notified Sameena of his intention to withdraw. Counsel also asserted, and the judge acknowledged the assertion, that Sameena had no objection to the withdrawal.

The motion to withdraw hearing lasted less than six minutes[8], and as stated above, focused on counsels' respective positions as to the continuance of the deadlines in the case. The trial judge stated, "[W]e have a September trial date that was just set a few weeks ago . . . and . . . I realize it's going to be challenging for any counsel to take the case."[9]

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[7] Hearing, April 22, 2014, 9:30:04-9:35:51 a.m.

[8] Hearing, April 22, 2014, 9:30:04-9:35:51 a.m.

[9] Hearing, April 22, 2014, 9:32:39-9:33:01 a.m.

As stated above, in actions brought by a "next friend," the minor or incompetent is the real party in interest and the lawyer's duty is to such minor or incompetent. The record is completely void of any evidence that irreconcilable differences or a breakdown in communication occurred between Sameena and counsel. But more accurately, and certainly more importantly, the record is completely void of *even an inquiry* into whether irreconcilable differences or a breakdown in communication had occurred between counsel and his client, Nausher.

Dr. Bauer points out, and this Court agrees, that one does not have a substantial right to an attorney in a civil case. *Parsley v. Knuckles*, 346 S.W.2d 1, 2 (Ky. 1961). However, we do not hold that the trial court erred in not providing the Azmats with counsel, but rather we find error in the actions by the court after Azmat's counsel brought the claim. Dr. Bauer further argues that to hold for the Azmats would require an attorney to pursue a case he/she no longer believes to be meritorious, a case he/she can no longer financially afford, or a case he/she simply no longer can physically pursue. To the contrary, the concerns Dr. Bauer points to are precisely the sufficient justifications for a trial court to consider in permitting an attorney to withdraw from a case; such justifications were only summarily cited by Azmat's counsel and not explored by the trial judge.

"The trial judge is charged with knowing how to conduct a fair and impartial trial. He should know what is necessary to be said and when it should be said[.]" *Collins v. Sparks*, 310 S.W.2d 45, 49 (Ky. 1958). "Where legal disability of the individual is shown, the jurisdiction of the court is

plenary and potent to afford whatever relief may be necessary to protect his interests and preserve his estates[.]" *DeGrella By and Through Parrent v. Elston*, 858 S.W.2d 698, 704 (Ky. 1993) (internal citations omitted). Because the trial court did not inquire into the justification for counsel's withdrawal from the case, we find that the trial court acted unreasonably and unfairly to Nausher's substantial detriment. CR 61.02.

Additionally, the trial court's grant of permission for counsel to withdraw is not within the allowance of the rule because it could not be accomplished without material adverse effects on the client, Nausher. SCR 3.130(1.16)(b)(1). The judge acknowledged the previously scheduled trial date as well as the unlikelihood that replacement counsel could be found. While the trial was scheduled for September, and the motion to withdraw was granted in April, this action by the trial court less than six months prior to trial in a complex medical malpractice case was clearly erroneous. Therefore, we remand the case to the trial court for the appropriate inquiry.

If, upon remand, the trial court finds sufficient justification permitting counsel's withdrawal, and Azmat has not acquired substitute counsel, we direct the trial court to hold the case in abeyance for a reasonable time for Azmat to secure counsel. If substitute counsel cannot be found in a reasonable amount of time, then the trial court should strongly consider dismissing the case *without* prejudice.

It has long been the law of the Commonwealth that an infant or a person of unsound mind may bring an action within the applicable statute of limitations after a disability has been removed. Kentucky Revised Statutes

(KRS) 413.170 ("If a person entitled to bring any action mentioned in KRS 413.090 to 413.160, except for a penalty or forfeiture, was, at the time the cause of action accrued, an infant or of unsound mind, the action may be brought within the same number of years after the removal of the disability or death of the person, whichever happens first, allowed to a person without the disability to bring the action after the right accrued."); see also *Newby's Adm'r v. Warren's Adm'r*, 126 S.W.2d 436 (Ky. 1939) (The statute of limitations does not begin to run until the individual under disability is capable of bringing suit.). "A cause of action accrues when a party has the right and capacity to sue[.]" *Creson v. Scott*, 275 S.W.2d 406, 408 (Ky. 1955). Thus, trial courts must be cautious in such cases as this so as not to dismiss the case with prejudice, and thereby foreclose the disabled party from any future ability to pursue his or her claim. The proper procedure is for the trial court to abate the action pending procurement of replacement counsel, and, if such attempt is not successful, dismiss the case without prejudice, leaving available to the real party in interest the ability to bring his or her claims when minority or disability is removed, or the party is otherwise able to present his case to the courts.[10]

B. Sameena did not engage in the unauthorized practice of law and the trial court's act of striking the pleadings was in error.

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[10] Dismissal without prejudice is the followed procedure in other jurisdictions as well. "It would be inconsistent for a court to hold that a non-attorney had no authority to assert a claim on behalf of another, yet hold that the claim the non-attorney had wrongfully attempted to assert on behalf of that party was, as a result, subject to dismissal with prejudice." *Kinasz v. S.W. Gen. Health Ctr.*, No. 100182, 2014 WL 504885, *1 at *5 (Ohio Ct. App. Feb. 6, 2014) (quoting *Williams v. Global Constr. Co., Ltd.*, 498 N.E.2d 500, 502 (Ohio Ct. App. 1985)).

1. Unauthorized Practice of Law.

Our unauthorized practice of law statute, KRS 524.130, states as follows:

(1) Except as provided in KRS 341.470 and subsection (2) of this section, a person is guilty of unlawful practice of law when, without a license issued by the Supreme Court, he engages in the practice of law, as defined by the Supreme Court.

(2) A licensed nonresident attorney in good standing, although not licensed in Kentucky, is not guilty of unlawful practice if, in accordance with rules adopted by the Supreme Court, he practices law under specific authorization of a court.

(3) Unlawful practice of law is a Class B misdemeanor.

The Supreme Court has defined the practice of law as "any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services." SCR 3.020. The unauthorized practice of law is the performance of those services by "non-lawyers" for "others." *Countrywide Home Loans, Inc. v. Kentucky Bar Ass'n*, 113 S.W.3d 105, 108 (Ky. 2003).

> [T]he basic consideration in suits involving unauthorized practice of law is the public interest. Public interest dictates that the judiciary protect the public from the incompetent, the untrained, and the unscrupulous in the practice of law. Only persons who meet the educational and character requirements of this Court and who, by virtue of admission to the Bar, are officers of the Court and subject to discipline thereby, may practice law. The sole exception is the person acting in his own behalf.

Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778, 782 (Ky. 1964), *as modified* (1965).

This Court could find no cases, from this jurisdiction or any jurisdiction in the country, where a trial court erroneously ordered *pro se* representation constituting the unauthorized practice of law. "Error correction is not the purpose of discretionary review. Special reasons must exist such as novel questions of law and the interpretation of statutes, matters of general public interest and the administration of justice, or clearly erroneous judgments resulting in manifest injustice." 7 Kurt A. Philipps, David V. Kramer and David W. Burleigh, *Kentucky Practice–Rules of Civil Procedure Annotated*, Rule 76.20, cmt. 1 (5th ed. West Group 1995). This case requires not only error correction by this Court but raises timely issues of public interest. The other important issues we confront are the resulting manifest injustice to Azmat, as well as the interpretation of our unauthorized practice of law statute and our rules of civil procedure.

Sameena did not engage in the unauthorized practice of law because she was specifically authorized and ordered to proceed as such according to the circuit court's order. "The law is well settled that the parties are bound by a pre-trial order." *Commonwealth ex rel. Marcum v. Smith*, 375 S.W.2d 386, 387 (Ky. 1964) (citing *Sapp v. Massey*, 358 S.W.2d 490 (Ky. 1962)); *see also* CR 16. However, our Court of Appeals has held that a non-lawyer cannot bring a claim on behalf of another, and to do so constitutes the unauthorized practice of law. *See Sosa v. Irving Materials, Inc.*, No. 2002-CA-000796-MR, 2003 SL 1227234, *1 (Ky. App. Jan. 17, 2003); *Brozowski v. Johnson*, 179 S.W.3d 261 (Ky. App. 2005); *Bobbett v. Russellville Mobile Park, LLC*, No. 2007-CA-000684-DG, 2008 WL 4182001, *1 (Ky. App. Sept. 12, 2008) as modified (Oct. 17, 2008)).

CR 16 is entitled Pretrial procedure; formulating issues, and states as follows:

(1) In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

(a) The simplification of the issues;

(b) The necessity or desirability of amendments to the pleadings;

(c) The possibility of obtaining admissions of fact and documents which will avoid unnecessary proof;

(d) The limitation of the number of expert witnesses;

(e) The advisability of a preliminary reference of issues to a commissioner;

(f) Such other matters as may aid in the disposition of the action.

(2) The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at or before the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either

confine the calendar to jury actions or to nonjury actions or extend it to all actions.

"CR 16 provides that a pre-trial order limits the issues and 'controls the subsequent course of action[.]'" Smith, 375 S.W.2d at 387.

At first glance, it would appear that there is a conflict between KRS 524.130 and CR 16. However, upon closer examination, no conflict exists. Once the Hardin Circuit Court entered its order directing Sameena to find replacement counsel or to automatically be deemed to proceed *pro se*, and after Sameena's subsequent inability to procure counsel, Sameena was obligated to do as the trial court ordered. Because the trial court did not extend the deadlines regarding expert disclosures, and because the trial court entered the order days before such disclosures were due, Sameena had to follow the court's directive, for not doing so would have made her not only non-compliant with a court-ordered obligation but also potentially subject to the court's contempt power.

As stated above, this Court decides what constitutes the unauthorized practice of law. This issue is a matter of first impression and this Court has never held that a next friend representing the real party in interest has engaged in the unauthorized practice of law when explicitly directed by the trial court to proceed in such a manner. Therefore, no conflict exists between KRS 524.130 and CR 16, and we hold that Sameena did not engage in the unauthorized practice of law. This holding is necessarily narrow as we find it a rare oddity for trial courts to explicitly direct those unauthorized to practice law to engage in the practice of law.

2. Striking Pleadings.

The trial court struck Sameena's expert disclosures solely because of its determination that Sameena had engaged in the unauthorized practice of law. Dr. Bauer argues that any pleading that is filed by someone engaging in the unauthorized practice of law is void *ab initio*, thus, the circuit court had no choice but to strike Azmat's expert disclosures. Because this Court holds that Sameena was not engaged in the unauthorized practice of law, we must also hold that it was error for the trial court to strike the expert disclosures.

C. Summary judgment was improper.

As stated above, it was improper for the circuit court to strike the expert disclosures. The trial court's grant of summary judgment was premised on the fact that expert proof is required to establish a medical negligence claim. *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010). While it is certainly true that a plaintiff must provide expert proof to sustain a medical malpractice action, the trial court's entry of summary judgment here was the final of several compounded errors.

We note Dr. Bauer's assertion that: "Sameena['s] [] inability to find counsel to take on [Nausher's] case, and the consequent failure of [Nausher] to respond to motions, failure to comply with Trial Court orders, and/or failure to appear in front of the Trial Court for a dispositive motion ruling are the direct causes for his claims being dismissed." "Still more, the Trial Court's decision to grant dismissal, especially when [Sameena] failed to respond to the motion for summary judgment, is in no way a manifest injustice to [Sameena]."

We note that it was defense counsel who first requested that Sameena be deemed to proceed *pro se* in the event replacement counsel was not found.[11] It was defense counsel who treated Sameena as a *pro se* litigant, certifying service to Sameena for various motions and requesting that the court take action against Sameena for alleged violations of discovery orders. This placed Sameena in a catch-22 dilemma; her hands being forced to practice law and then suffering the allegations of the unauthorized practice of law and its consequences.

Dr. Bauer argues that neither the circuit court nor the parties have the ability to waive or permit the unauthorized practice of law. *See, e.g., Naylor Senior Citizens Hous., LP v. Sides Constr. Co.*, 423 S.W.3d 238, 250 (Mo. 2014) ("'[O]ne cannot consent to the unauthorized practice of law' or waive the requirement that all parties other than natural persons be represented by licensed attorneys.'"). Based on the facts of this case, we do not find Dr. Bauer's argument persuasive. Dr. Bauer's argument is not only legally incorrect, as evidenced by our holdings here today, but on its face appears to lack genuineness, or, at the least, logic.[12]

It is abundantly clear that everyone involved in this litigation was educated and versed in the law – everyone except Sameena and Nausher

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[11] Hearing, April 22, 2014, 9:31:38 – 9:31:48 a.m. "We would ask for 30 days. I would like an order that says 30 days to obtain new counsel or inform the court that you intend to proceed pro se."

[12] Dr. Bauer alleges Sameena committed the unauthorized practice of law in following the circuit court's directive, yet argues for the affirmance of the entry of summary judgment based on Sameena's lack of response to defense's motion. We posit that had Sameena responded to Dr. Bauer's motion for summary judgment, Dr. Bauer would have moved for that response to be stricken from the record as well.

Azmat. While "[t]rial judges are presumed to know the law and to apply it in making their decisions," *Bowling v. Commonwealth*, 168 S.W.3d 2, 13 (Ky. 2004) (quoting *Walton v. Arizona*, 497 U.S. 639, 653, 110 S.Ct. 3047, 3057, 111 L.Ed.2d 511 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.E.2d 556 (2002)), we again acknowledge the novelty of the issue presented. Nevertheless, justice demands that "[a]ll courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Kentucky Constitution Section 14.

Dr. Bauer's request that Sameena be deemed to proceed *pro se*, whether because of strategy or otherwise, and the trial court's erroneous order constitutes manifest injustice that "seriously affected the fairness, integrity, or public reputation of the proceeding." *Wise v. Commonwealth*, 422 S.W.3d 262, 276 (Ky. 2013) (internal citations omitted). We find the case of *Ward v. Houseman* somewhat instructive. 809 S.W.2d 717 (Ky. App. 1991). The Ward's attorney untimely filed supplemental answers to interrogatories identifying expert witnesses. 809 S.W.2d 717, 718. The *Ward* case was dismissed on summary judgment because the trial court concluded there was no genuine issue of material fact because of Ward's failure to timely supply the name of an expert. *Id.* The Court of Appeals held that "summary judgment is not to be used as a sanctioning tool" for failure to follow pretrial orders. *Id.* at 719.

If summary judgment should not be used for sanctioning the noncompliance with a trial court order, certainly it must not be used when there is actual compliance with the court's order. Sameena presented expert witnesses sufficient to survive a motion for summary judgment. It is clear that the experts were considered by counsel, as it appears counsel prepared such disclosures. Expert witnesses were proffered, Sameena's disclosure should not have been stricken, and summary judgment was improper. We reverse and remand.

D. "Next friend" cannot proceed *pro se* on behalf of a real party in interest.

This Court granted discretionary review, in part, to address whether a "next friend" can provide *pro se* representation to the real party in interest. Despite our holdings here today, which are specific to the facts and procedural posture of Azmat's case, we hold that a "next friend" cannot provide *pro se* representation to the real party in interest. The reasoning is simple: the interests of the "next friend" and the interests of the real party in interest may not always be aligned. When such respective interests become adverse, the "next friend" no longer acts as agent for the minor or incompetent because the only reason the "next friend" is even a nominal party in the case, rests upon the premise that the "next friend" brings the minor or incompetent's claims.

"The general rule appears to be that the existence of adverse interests which are likely to raise antagonisms or opposite purposes in the proceedings constitute sufficient grounds for the disqualification of one acting as next friend of an infant, who otherwise might be qualified." *Rosenberg v. Green*, 187 S.W.2d 1013, 1015 (Ky. 1945) (citing 27 Am.Jur. § 123, p. 845). Because such

adverse interests disqualify an otherwise appropriate "next friend," we also hold that the "next friend" is precluded from providing *pro se* representation in such capacity.

We do acknowledge that some federal courts have held to the contrary. In these cases, the courts have focused on the fact that the parent, or "next friend," was the primary caregiver and would receive the benefits of successful litigation, showing that the parent's and child's interests were sufficiently similar to permit representation. *See Machadio v. Apfel*, 276 F.3d 103 (2nd Cir. 2002); *Harris v. Apfel*, 209 F.3d 413 (5th Cir. 2000); *Thomas v. Astrue*, 674 F.Supp.2d 507 (S.D.N.Y. 2009); *Tindal v. Poultney High School District*, 414 F.3d 281 (2d Cir. 2005). We do not adopt the holdings of these courts at this time.

This Court is mindful of its duty to protect the due process rights of all litigants before it. In addition to the right of Nausher Azmat to have his cause of action heard, this Court recognizes that, likewise, Dr. Bauer and his associates are entitled to a just and timely defense. This matter is now over six years old and, while recognizing the complexities it presents, this Court urges immediate attention and timely resolution of this case upon remand.

IV. CONCLUSION

For the foregoing reasons, we reverse and remand to the Hardin Circuit Court for further proceedings consistent with this opinion. The circuit court shall conduct an appropriate hearing on Azmat's counsel's motion to withdraw and shall proceed accordingly. The guidance provided herein shall be noted by

all courts of this Commonwealth when presiding over litigation involving minors, incompetents, or "next friends."

Minton, C.J., Buckingham, Hughes, Keller, VanMeter and Wright, JJ., sitting.

All concur. Lambert, J., not sitting.

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James Eric Smith
Gazak Brown, PSC

Supreme Court of Kentucky

2016-SC-000560-DG

SAMEENA AZMAT, AS MOTHER AND NEXT FRIEND OF NAUSHER AZMAT — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2015-CA-000399-MR
HARDIN CIRCUIT COURT NO. 12-CI-00645

GEORGE W. BAUER, M.D. III AND ELIZABETHTOWN PHYSICIANS FOR WOMEN, P.S.C. — APPELLEES

ORDER GRANTING PETITION FOR MODIFICATION AND WITHDRAWING AND REISSUING OPINION

The Court, being fully and sufficiently advised, ORDERS that:

1. Appellant's Petition for Modification is GRANTED; and,
2. The Opinion of the Court rendered herein on September 27, 2018 is hereby withdrawn and the attached Opinion is reissued in lieu thereof.

Minton, C.J., Buckingham, Hughes, Keller, VanMeter and Wright, JJ., sitting. All concur. Lambert, J., not sitting.

ENTERED: April 18, 2019

CHIEF JUSTICE