

Appeal No. 06-2709

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MICHAEL APPLEBAUM, Special Administrator of the Estate of **JOSEPH APPLEBAUM**, deceased,

Plaintiff-Appellee,

v.

RUSH NORTH SHORE MEDICAL CENTER; RUSH UNIVERSITY MEDICAL CENTER; RUSH MEDICAL COLLEGE; DR. IBRAHIM, #074/MOD; EMEKA EZE, MD; JOSE VELASCO, MD; JOHN DOE DOCTOR #338; LAWRENCE LAYFER, MD; UNIVERSITY RHEUMATOLOGISTS; ALAN REICH, MD; NORTH SHORE RADIOLOGY; RUSH NORTH SHORE MEDICAL CENTER; DEPARTMENT OF RADIOLOGY; NORTH SHORE MRI/CT CENTRE; LEONARD BERLIN, MD; MICHAEL RACENSTEIN, MD; GARY NOVETSKY, MD; M. EDELMAN, MD; AVRUM EPSTEIN, MD; M. SMITH, MD; J. ALEXANDER, MD; C. FISHER, MD; CHEST MEDICINE CONSULTANTS; and VADIM LEYENSON, MD

Defendants-Appellants.

On appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, Cause No. 05 L 62044.
The Honorable **Mary K. Rochford**, Judge Presiding.

BRIEF AND ARGUMENT OF APPELLEE
MICHAEL APPLEBAUM, Special Administrator of the Estate of **JOSEPH APPLEBAUM**, deceased

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NATURE OF THE CASE

Plaintiff includes the following as the presentation by the defendants is deemed unsatisfactory.

This appeal arises in a tort action derived from the death of plaintiff's decedent, Joseph Applebaum, in December of 2003, while hospitalized at Rush North Shore Medical Center. (R. 23-69) The suit was timely filed by the special administrator of Joseph's estate, plaintiff Michael Applebaum, MD, a duly licensed Illinois attorney in good standing and listed on the Master Roll of Attorneys. (R. 200) Defendants attempted dismissal of the case with prejudice claiming that plaintiff was a "non-lawyer," "non-licensed plaintiff," etc., (Appellants' Brief pp. 1 and 2, respectively) and that the nullity rule was applicable to this matter. (Appellants' Brief p. 5) The circuit court denied their motion. (R. 186) The court cited as the basis for its ruling that the nullity rule was inapplicable to this matter: "'The rule prohibiting a person from representing other persons unless admitted to the practice of law is to protect litigants against the mistakes of the ignorant and the schemes of the unscrupulous and to protect the Court itself in the administration of its proceedings from those lacking the requisite skill.'...here the risks are not present..." (R. 205-206)

JURISDICTIONAL STATEMENT

Plaintiff includes the following as the presentation by the defendants is deemed unsatisfactory.

This Court has jurisdiction of this appeal pursuant to Illinois Supreme Court Rule 308, governing certain interlocutory appeals. On August 17, 2006, the circuit court denied defendants' motion to dismiss with prejudice the underlying action initiated by duly licensed Illinois attorney Michael Applebaum (R. 186) because the purposes for which the nullity rule is to be applied would not be served. (R. 206) Pursuant to Supreme Court Rule 308 this matter is brought before the Appellate Court.

STATEMENT OF FACTS

Plaintiff includes the following as the presentation by the defendants is deemed unsatisfactory.

Pursuant to Ill. Sup. Ct., R 701, attorney Michael Applebaum was admitted to the practice of law. (Appellants' Brief p. 3) Before and since the filing of the complaint plaintiff was listed on the Master Roll of Attorneys having paid his registration fees and was duly licensed. (R.202) Plaintiff has never been disbarred or disciplined by ARDC. (R.205) At the time of the filing of the complaint, he was on inactive status. (R. 200) The status of Attorney Applebaum's license was changed to active prior to the hearing on the motion in the lower court. (R. 206)

Michael Applebaum is the special administrator of Joseph Applebaum's estate. (R. 200) Michael Applebaum was the only child and sole beneficiary of Joseph Applebaum's estate. (R. 202) The estate of Joseph Applebaum had no creditors. At the time of Joseph Applebaum's death, Michael Applebaum, as the sole heir-at-law, immediately vested with the entirety, no asset excepted, of decedent Joseph Applebaum's estate subject to divestment upon admission of the will to probate. No probate of Joseph Applebaum's estate was opened. (R. 160)

ARGUMENT

I. APPLICATION OF THE NULLITY RULE IN THIS CASE WOULD BE CONTRARY TO THE ILLINOIS SUPREME COURT'S MOST RECENT HOLDING ON THE ISSUE AND GENERAL LAW.

A. Introduction

While defendants discuss much case law on the issue, they conspicuously fail to apply the detailed analysis of the nullity rule contained in the Supreme Court's decision in *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371 (2005). They even fail to mention the well-settled purpose of the rule, much less addressing whether its purpose could in any way be furthered by dismissal of this case. Defendants instead urge a mechanical application of the rule similar to the one rejected by the Supreme Court.

In addition, defendants posit a false dichotomy, claiming that the only "exception" to the nullity rule is the case of the "innocent litigant." To do so ignores the holding in *Ford Motor Credit* and the reasoning of the opinions defendants cite. Plaintiff's position (R. 159-160) and the position of the court below (R. 205-206) is not that plaintiff is entitled to an "exception" as an innocent litigant, but rather, as in *Ford Motor Credit*, that the nullity rule, whose sole purpose is to protect the public and the courts, is not applicable under the facts of this case.

Illustrative of that point is the fact that defendants cite not a single case where the nullity rule has been applied in similar circumstances, that is, to an otherwise duly licensed Illinois attorney whose claimed legal disability stemmed from the failure to pay an administrative fee, as opposed to a qualification- or fitness-based prohibition against the practice of law in Illinois. Hence, defendants' suggestion that declining to apply the nullity rule in this case would create an exception that would swallow the rule rings

hollow.

The entire premise of defendants' argument, rejected below, is that an attorney, who was admitted to practice law in Illinois and is registered with the ARDC, albeit on inactive status due the payment of a lesser fee, is indistinguishable from a layman an impostor or a disbarred practitioner.¹

However, defendants' unsupported premise is directly contrary to the holdings of the Illinois Supreme Court and Illinois appellate courts which unequivocally state that a failure to pay a fee is not related to the protection of the public and, unlike unauthorized practice by a layman, has no *per se* adverse effect on litigants or the administration of justice. *See People v. Brigham*, 151 Ill. 2d 58, 67, 70-71 (1992) (distinguishing unlicensed persons from attorneys who have not paid fees and concluding the latter are qualified to litigate); *People v. Elvart*, 189 Ill. App. 3d 524, 529-530 (1st Dist. 1989) (holding that an attorney who fails to pay State bar fees is "indistinguishable" from a valid practicing attorney as an effective counsel); *Joseph P. Storto, P.C. v. Becker*, 341 Ill. App. 3d 337, 341 (2nd Dist. 2003) (reasoning that failure of a law firm to register as a corporation is analogous to an attorney disqualified by failure to pay bar dues and therefore not requiring the harsh sanction of nullifying its right to fees). Indeed, virtually unanimous foreign and federal law is to the same effect. *See, e.g., Reese v. Peters*, 926 F.2d 668, 670 (7th Cir. 1991) ("Lawyers who do not pay their dues violate a legal norm, but not one established for the protection of clients") (quoted with approval in *People v. Brigham*, 151 Ill. 2d 58, 64-65)

¹ Defendants have claimed a supposed admission that plaintiff was practicing law without a license. (Appellants' Brief p.11) The record does not support this. (R. 159)

In sum, defendants' brief simply fails to address the key issue presented by the certified question, specifically, whether the nullity rule should be applied to "an attorney who has passed the bar and was on inactive status at the time of the filing of the complaint..." (Appellants' Brief p. 3)

Rather than aiding the Court in analyzing this issue, defendants prefer to ignore it, and answer a different, unasked question of their own devising. Defendants' reply brief is too late to address the certified question in the first instance.

B. The Nullity Rule Does Not Apply Where, As Here, The Purposes Of The Rule Are Not Advanced

The Illinois Supreme Court provides the definitive explication of the nullity rule:

This rule is grounded in the fact that there are risks to individual clients and to the integrity of the legal system inherent in representation by an unlicensed person: The purpose of the nullity "rule is *** to protect litigants against the mistakes of the ignorant and the schemes of the unscrupulous and to protect the court itself in the administration of its proceedings from those lacking requisite skills." *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371, 389-390 (2005) (citations omitted)

In *Ford Motor Credit* the nullity rule was invoked to avoid paying attorneys fees to a professional corporation that had neglected to register with the Illinois Supreme Court to do business in this fashion. It first noted that "orders should be characterized as void only when no other alternative is possible." (*Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371, 380) In that context, the Court found a controlling distinction between

“regulatory provisions [that] assure that only those individuals who are fit and qualified to practice law will be licensed in this state” and those that “do not have as their primary purpose the protection of the public safety.” *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371, 383-384

As *Ford Motor Credit* involved a regulation unrelated to the public safety, the Court concluded that the nullity rule was inappropriately applied because the “goals of protecting the public and ensuring the integrity of the court system which underpin the invocation of the nullity rule were not implicated by the facts in the instant cause.” *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371, 390-391

That is exactly the case presented here.

1. The Goals Of Protecting The Public And Ensuring The Integrity Of The Court System Are Not Implicated By The Facts Of This Case Because The Rules Regarding Fees Do Not Have The Primary Purpose Of Protecting Public Safety.

In this case, it is undisputed that Mr. Applebaum was duly licensed by the Illinois Supreme Court, and that he was found fit and qualified to practice law in Illinois. (Appellants’ Brief p.3)

It is also clear that the license fee requirements do not fall into the category of provisions that “assure that only those individuals who are fit and qualified to practice law will be licensed in this state.” Any linkage to the payment of fees and substantive qualifications to practice law in the Illinois courts has already been rejected by the Supreme Court.

In *People v. Brigham*, 151 Ill. 2d 58 (1992), the Court rejected the contention that an attorney who was suspended for failure to pay his fees was therefore ineffective counsel. It held that “...admission to the bar allows us to assume that he has the training,

knowledge, and ability to represent a client who has chosen him, and that he has retained the ability to render effective assistance to defendant at trial, notwithstanding his suspension for failure to pay his registration dues.” *People v. Brigham*, 151 Ill. 2d 58, 70-71

In *Brigham*, the Supreme Court pointed out that:

[T]he courts have noted an important distinction between (1) an unlicensed person (e.g., an imposter or a disbarred attorney), and (2) an attorney admitted to practice but under suspension for nonpayment of State bar dues. *People v. Brigham*, 151 Ill. 2d 58, 67. See also *People v. Elvart*, 189 Ill. App. 3d 524, 529-530 (1st Dist. 1989) (distinguishing between persons not admitted to practice and attorney suspended for nonpayment of fees).

Elvart also expressly rejected the contention that the wording of the Illinois rule, which stated that a lawyer failing to pay the requisite fee was “unauthorized” to practice law, required the conclusion that such unauthorized practice was the equivalent of practice by a person never admitted to the bar. (*People v. Elvart*, 189 Ill. App. 3d 524, 530) Defendants note that the wording of the rule here applicable is even milder, stating that plaintiff was not “eligible to practice law” (Appellants’ Brief p.11) during the pendency of his inactive status. Ill. Sup. Ct., R 756(a)(5)

As a textual matter, then, the Supreme Court’s choice of the words “not eligible” as opposed to the other choices available, such as “not licensed,” indicates an intent under the rule to differentiate between the type of unsanctioned practice defendants claim here, and the practice of law without a license. The text of the rule supports the distinction drawn by the Court in *Brigham*. On the other hand, the lack of such a distinction is the premise on which defendants here rely, without any authority or reasoning.

Ford Motor Credit Co. v. Sperry, 214 Ill. 2d 371 (2005) holds that the violation of a licensing rule that is not designed to protect the public cannot support the application of the nullity rule. Here, Illinois law makes clear that “Lawyers who do not pay their dues violate a legal norm, *but not one established for the protection of clients.*” *People v. Brigham* 151 Ill. 2d 58, 65, quoting *Reese v. Peters*, 926 F.2d 66, 69-70 (7th Cir. 1991)

Thus, the failure of Mr. Applebaum to pay the full registration fee in this case is clearly analogous to the failure of the law firm to register in *Ford Motor Credit*. Indeed, an Illinois appellate court has already reached that conclusion. *See Joseph P. Storto, P.C. v. Becker*, 341 Ill. App. 3d 337, 341 (2nd Dist. 2003) (reasoning that failure of a law firm to register as a corporation is analogous to an attorney disqualified by failure to pay bar dues and therefore not requiring the harsh sanction of nullifying its right to fees) (cited at length and with approval in *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371, 386-387)

In addition, *Storto* dispels any notion that the distinction between laymen and attorneys who fail a fee payment is limited to criminal or 6th Amendment questions. In any event, it would be shockingly inconsistent to hold that nonpayment of fees has no adverse effect where a defendant’s life or liberty is in jeopardy, while at the same time positing *per se* harm to litigants where the issues are merely civil.

In short, Illinois decisions teach that (a) the nullity rule is a “last resort”; (b) that it should not be invoked where its purpose to protect the public and the courts from incompetent counsel and fraudulent individuals is not served; and (c) the failure by an otherwise duly licensed Illinois attorney to pay a fee does not endanger litigants or the administration of justice.

It is therefore abundantly clear that the nullity rule should have no application to this case.

2. Defendants' Cases Are Inapposite Or Support the Plaintiff.

Each case cited by defendants that applied the nullity rule involved a lawsuit brought by one who was not qualified to practice law in Illinois. Not a single one involves a qualified, duly licensed attorney who is ineligible to practice law due to the failure to pay the appropriate fee. *See Ratcliffe v. Apantaku*, 318 Ill. App. 3d 621 (1st Dist. 2000) (layperson); *Blue v. People*, 223 Ill. App. 3d 594 (2nd Dist. 1992) (layperson); *Fruin v. Northwestern Medical Faculty Foundation, Inc.*, 194 Ill. App. 3d 1061 (1st Dist. 1990) (foreign attorney); *Midwest Home Sav. & Loan Assoc. v. Ridgewood, Inc.*, 123 Ill. App. 3d 1001 (5th Dist. 1984) (layperson); *People v. Dunson*, 316 Ill. App. 3d 760 (2nd Dist. 2000) (unlicensed felon)²; *Paddock v. Dept. of Employment Security*, 184 Ill. App. 3d 945 (1st Dist. 1989) (layperson).

Hence defendants' suggestion that "Settle [sic] Law Precludes Suits Such As This" is wholly unsupported. (Appellants' Brief p.10) Moreover, their suggestion that the case law strictly limits "exceptions" to the nullity rule to an "innocent litigant" is a misreading of the cases.

There was no "innocent litigant" in *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371 (2005). There the Court found that the order awarding fees to an unregistered law

²The court in *Dunson* does not clearly delineate the unlicensed prosecutor's status, and merely states the prosecutor was "not duly licensed to practice law"; however, given the prosecutor's later conviction of felonies and the fact that the issue was not raised or discussed, leads to the inference that the prosecutor was never admitted to the Illinois bar. In any event, because the case does not discuss the issue, it cannot support the appellants' undefended notion that ineligibility to practice law based on failure to pay a fee is a sufficient basis to invoke the nullity rule.

firm was not subject to the nullity rule, because the purpose of the nullity rule was not implicated by the facts of the case. (*Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371, 390-391) The plaintiff in *Joseph P. Storto, P.C. v. Becker*, 341 Ill. App. 3d 337, 341 (2nd Dist. 2003) was also not an “innocent litigant.” In any event, neither case found culpability of the litigant in failing to register worth discussing in relation to whether the nullity rule applied.

In *Dunson*, which defendants cite as an application of the nullity rule, the court rejected the strict application of the rule as too harsh and affirmed the trial court’s decision not to strictly apply the rule, but rather to vacate the conviction and grant a new trial. (*People v. Dunson*, 316 Ill. App. 3d 760, 762) It can hardly be contended (and it was not contended) that the State was somehow not culpable in allowing an unlicensed attorney to represent it, and the court did not discuss the issue as relevant.

None of the cases that defendants cite as limiting the “exception” to the nullity rule involved the case of an otherwise duly licensed Illinois attorney who was ineligible to practice law due to the failure to pay the appropriate fee. See *Janiczek v. Dover Management Co.*, 134 Ill. App. 3d 543 (1st Dist. 1985) (disbarred attorney); *Pratt-Holdampf v. Trinity Med. Ctr.*, 338 Ill. App. 3d 1079 (3rd Dist. 2003) (layperson); *McEvers v. Stout*, 218 Ill. App. 3d 469 (4th Dist. 1991) (foreign attorney). In addition, all of these cases were decided before *Ford Motor Credit*. And none of them state that an “innocent litigant” creates the *only* situation where the nullity rule should not be applied.

Most important, however, is that each of these cases, like *Ford Motor Credit*, grounds its refusal to apply the nullity rule in the considered conclusion that application of the rule to the particular facts *would not further the purpose of the rule*. *Janiczek v.*

Dover Management Co., 134 Ill. App. 3d 543, 546; *Pratt-Holdampf v. Trinity Med. Ctr.*, 338 Ill. App. 3d 1079, 1083; *McEvers v. Stout*, 218 Ill. App. 3d 469, 471. Not one of them stands for the proposition, pressed by defendants here, that a harsh sanction should be imposed where the purpose of the rule would not be served.

3. Defendants Have Conceded the Controlling Issue In This Case.

The court below specifically found that the “risks to individual clients and to the integrity of the legal system inherent in representation by a person who has never qualified to practice law are not present in the instant case” and that “the purposes for which the nullity rule is to be applied would not be served.” (R. 205-207)

The defendants offered no evidence or argument to the contrary in the court below, nor have they done so in their opening brief. Having conceded this controlling issue, they are constrained to argue that the rule should be mechanically applied as an empty form. As the Supreme Court has firmly rejected this position in *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371(2005), it is respectfully submitted that the defendants’ position should be rejected and the certified question be answered in the negative.

II. APPLICATION OF THE NULLITY RULE IN THIS CASE WOULD USURP THE DISCRETION OF THE COURTS IN DISCIPLINING AND SUPERVISING THE CONDUCT OF ATTORNEYS.

Another clear distinction between an attorney who has been admitted to practice law and imposters, laymen and the disbarred, is that the qualified attorney is subject to discipline and the continuing supervision of the Illinois Supreme Court. Here, much of defendants’ brief is devoted to addressing the degree of Mr. Applebaum’s culpability which they assess. Boiled down, defendants argue that Mr. Applebaum made mistakes of law and an ill-advised decision to save some money which, in their opinion, should result

in dismissal, one of the harshest sanctions in a court's repertoire. Yet, as *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371(2005) points out, the Illinois Supreme Court has "created a comprehensive scheme to regulate attorneys and discipline them for misconduct.... [and] has promulgated detailed rules which prescribe the appropriate discipline when the Rules of Professional Conduct are violated." (*Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371, 383) In light of this, the Supreme Court has held that liabilities to which non-lawyers are subject, should not be assumed to apply to attorneys, where the Court's comprehensive scheme regulates the same conduct. *See Cripe v. Leiter*, 184 Ill. 2d 185 (1998) (Illinois Consumer Fraud Act held not to apply to attorney over-billing where comprehensive disciplinary scheme regulates this issue) Given that the nullity rule apparently has not been used in the context of attorneys subject to discipline, plaintiff respectfully suggests that such an application would unnecessarily impinge on the Supreme Court's comprehensive disciplinary scheme.

In addition, Mr. Applebaum, while not inviting the use of same, recognizes that he is subject to the contempt powers of the trial court and this Court, as well as their inherent power to sanction him for engaging in acts prejudicial to the administration of justice. However, these powers are exercised in the courts' sound discretion to choose the most appropriate sanctions from a range of options, including dismissal of an action. In the defendants' view, however, the courts, for an attorney's violation of the fee payment rules, have no discretion to tailor an appropriate sanction of its officers, but, must, willy-nilly, impose the harsh sanction of dismissal.

Where, as here, an attorney's actions did not endanger litigants, the public or the administration of justice, and has therefore not resulted in discipline or sanctions by the

court or the ARDC following its investigation, it is respectfully submitted that the sanction of dismissal is overly harsh. The record shows that Mr. Applebaum committed no fraud on the court and no fraud on the public, clients or his adversaries. (R. 159) The record also shows that however successfully or unsuccessfully, he sought to earnestly avoid running afoul of the rules (R. 162) and was in unquestionable compliance with them before the motion to dismiss below was heard. (R. 202) It would be overly harsh to sanction him in the same manner as an imposter or disbarred attorney over whom the courts have little other control.

III. APPLICATION OF THE NULLITY RULE IN THIS CASE WOULD ENDANGER THE FINALITY OF JUDGMENTS AND ENCOURAGE COLLATERAL LITIGATION.

As the nullity rule renders cases void *ab initio*, and therefore subject to collateral attack at any time, an announcement by this Court that the failure of a qualified, licensed attorney to pay an appropriate fee is tantamount to representation by a non-lawyer (e.g., one who has never qualified to practice law, impostor, etc.) might give new hope to disappointed litigants. Certainly in large cases it would be worth a little “opposition research” to determine if victory could be snatched from the jaws of defeat.³ Where criminal defendants and habeas plaintiffs were prevented from obtaining a “get out of jail free” card by our Supreme Court’s holding in *People v. Brigham*, 151 Ill. 2d 58 (1992) for attorney lapses not related to their representation or the administration of justice, losing civil defendants would be under no such disability. And, while the narrow

³ The Court might take judicial notice that at least one high profile attorney (and Supreme Court nominee), and high stakes litigator, Harriet Meirs, was suspended from the bar for failure to pay her bar fees. *See, e.g.,* “Senators Assail Miers's Replies, Ask for Details” *The Washington Post*, October 20, 2005; Page A01 available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/19/AR2005101902402.html>.

“innocent litigant” exception defined by defendants might save some judgments, it seems that those claiming nullity would be entitled to at least take discovery upon and litigate the issue and that a corporate or sophisticated plaintiff could rarely be deemed “innocent” under the standard.

Therefore, the Supreme Court’s admonition in *Ford Motor Credit* that nullity should be invoked “only when no other alternative is possible” is well-taken in this case. *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371, 380 (2005). Attorneys’ obligations to pay an outstanding fee in order to exercise the privilege of practicing law can be enforced by the ARDC and the contempt and other inherent powers of the courts. It is not necessary to deploy a harsh, last-resort sanction from the judicial arsenal to compel duly licensed attorneys to pay money due to the ARDC.

In this matter, Mr. Applebaum voluntarily paid \$149 to the ARDC and his license status was changed to active.

CONCLUSION

For the reasons stated above, plaintiff respectfully requests that the Court find the nullity rule to be inapplicable to this case and answer the certified question in the negative.

Respectfully Submitted,

Michael Applebaum

Attorney for Plaintiff-Appellee