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Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000690-MR

JERRY STAMPER, AS ADMINISTRATOR
OF THE ESTATE OF JOSEPH STAMPER,
DECEASED

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 08-CI-00738

BEREA AREA DEVELOPMENT, LLC,
D/B/A THE TERRACE NURSING AND
REHABILITATION FACILITY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, J. LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: Jerry Stamper, as Administrator of the Estate of Joseph Stamper, deceased (the Estate), appeals from a judgment of the Madison Circuit Court confirming a jury verdict in favor of Berea Area Development, LLC, d/b/a The

Terrace Nursing and Rehabilitation Facility (the Terrace). The Estate argues that the trial court abused its discretion by denying its motion to excuse two potential jurors for cause and by excluding a portion of its expert's testimony. We find no abuse of discretion on either issue. The Estate further argues that the trial court erred by failing to instruct the jury on the separate duties arising under the Residents' Rights Act. Based on the recent decision of the Kentucky Supreme Court in *Overstreet v. Kindred Nursing Centers Ltd. P'ship*, 479 S.W.3d 69 (Ky. 2015), we conclude that the statutory duties merely involve a legislative codification of the common-law standard of care or do not survive the death of the resident. Since the jury instructions adequately set out the Terrace's duties and standard of care, the exclusion of specific duties under the Act was at most harmless error. Hence, we affirm.

The relevant facts of this appeal are not in dispute. The Terrace is a long-term care facility located in Berea, Kentucky. In January 2006, Joseph Stamper was admitted to the Terrace with a diagnosis of renal failure, Encephalopathy (dementia), and non-insulin dependent diabetes. At the time of his admission, Stamper was 68 years old. In February of 2007, Stamper suffered a series of infections requiring his transfer to Pattie A. Clay Regional Medical Center. He was diagnosed with a gangrene infection in his right leg, caused by a pressure sore. A physician at the Hospital recommended amputation of the leg below the knee. Stamper's family declined that procedure and chose to treat the infection using antibiotics.

Stamper was transferred back to the Terrace on March 7, 2007. To prevent the advancement of existing pressure wounds, the staff at the Terrace put Stamper in an air bed. In addition, the staff placed side rails on the bed to prevent Stamper from attempting to get out of bed. However, two days later, staff members found Stamper on the floor after he attempted to get out of bed. The Estate alleges that the family was not notified of the fall until the following day.

Stamper's condition worsened, and he was transferred back to the Hospital. On March 21, 2007, Stamper underwent an amputation of his right leg due to the gangrenous infection. During the post-operative period, Stamper was also found to have suffered a left humeral head fracture. Stamper remained at the Hospital, where he died on March 31.

Thereafter, Joseph's son, Jerry Stamper, qualified as the Administrator of Stamper's Estate. In May 2008, the Estate brought this action against the Terrace, alleging negligence, medical negligence, wrongful death, and violations of the long-term Residents' Rights Act, KRS¹ 216.515. After extensive discovery, the matter proceeded to a jury trial in February 2014.² At the conclusion of the evidence, the jury found that the Terrace breached the duties which it owed to Stamper. But by a vote of 10-2, the jury also found that the Terrace's failure to observe these duties was not a substantial factor in causing Stamper's injury. The Estate now appeals from this judgment.

¹ Kentucky Revised Statutes.

² By agreed order, the wrongful death claim was dismissed prior to trial.

The Estate first argues that the trial court erroneously denied its motion to excuse two potential jurors for cause. The trial court enjoys broad discretion in deciding whether a juror should be excused for cause. *Grubb v. Norton Hosp., Inc.*, 401 S.W.3d 483, 485 (Ky. 2013). “The central inquiry is whether a prospective juror can conform his or her views to the requirements of the law, and render a fair and impartial verdict based solely on the evidence[.]” *Wood v. Commonwealth*, 178 S.W.3d 500, 516 (Ky. 2005). However, there is no “magic question” to rehabilitate a juror who should be considered disqualified by his personal knowledge or his past experience, or his attitude as expressed on *voir dire*. *Montgomery v. Commonwealth*, 819 S.W.2d 713, 717-18 (Ky. 1993). Rather, the test is whether, based on the totality of the circumstances, the nature and strength of the juror’s opinion are such as in law necessarily raise the presumption of partiality. *Id.* at 716. We will reverse only upon a showing that the trial court abused its discretion. *Rankin v. Commonwealth*, 327 S.W.3d 492, 498 (Ky. 2010).

During *voir dire*, the Estate’s counsel asked the panel whether anyone had a relationship with one of the owners of the Terrace, John Sword. Juror # 164 responded that he had met Sword on several occasions. Upon further questioning at the bench, Juror # 164 explained that he and his family were good friends with a former business partner of Sword, Mike Eaves. The court asked Juror # 164 whether this relationship would affect his ability to render a fair verdict based upon

the evidence. Juror # 164 replied that it would not. Based on this response, the trial court denied the Estate's motion to excuse Juror # 164 for cause.

Later in *voir dire*, the Estate asked the panel about their sentiment toward plaintiffs in lawsuits, and about their perception of the impact of civil suits on the healthcare industry. Juror # 80 approached the bench. He stated his belief that large damages awards were harmful to the healthcare industry, and that there should be a cap on damages to prevent excessive awards to plaintiffs. Upon further questioning by the trial court, Juror # 80 stated that, if he was asked to award damages within a provided range, he could award any amount within that range based on the evidence presented. The trial court denied the Estate's motion to excuse Juror # 80 for cause. Subsequently, the Estate exercised two of its peremptory challenges to strike Jurors # 164 and # 80.

We find no basis to compel the disqualification of Juror # 164. Juror # 164 stated that he and his family have a close friendship and ongoing business relationship with a former business partner of John Sword. However, Juror # 164 had only met Sword on a few occasions and had never had any personal or business dealings with him. The juror's relationship with Sword was not so close as to raise a presumption of partiality.

On the other hand, Juror # 80 expressed strong views about personal-injury plaintiffs in general and the propriety of large damage awards in particular. But in assessing a potential juror's impartiality, the test is not whether a juror agrees with the law when it is presented in the most extreme manner, but is

whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict.

Little v. Commonwealth, 422 S.W.3d 238, 244 (Ky. 2013), citing *Stopher v. Commonwealth*, 57 S.W.3d 787, 797 (Ky. 2001), and *Mabe v. Commonwealth*, 884 S.W.2d 668, 671 (Ky. 1994).³ Here, Juror # 80 stated that he could set aside his opinions and render a verdict and an award based solely on the evidence presented. Under the circumstances, we cannot say that the trial court abused its discretion by denying the Estate's motion to excuse Juror # 80 for cause.

The Estate next argues that the trial court abused its discretion by limiting certain testimony from its expert witness, Cynthia Clevenger, R.N. (Nurse Clevenger). The Estate called Nurse Clevenger to testify about the proper standard of care for nursing interventions and treatment of residents, including fall risk assessment and prevention, documentation of residents' medical conditions, and proper interventions for wound management and therapy. During her deposition testimony, Nurse Clevenger pointed out that Stamper's care plan as of March 7 called for a tab alarm to be added to his bed.

However, Nurse Clevenger stated that there was no documentation showing that the tab alarm was actually placed on Stamper's bed until after his fall on March 9. She also noted that there was no documentation that an alarm had gone off at the time Stamper fell. In contrast, Nurse Clevenger pointed to

³ Recently, in *Sturgeon v. Commonwealth*, 521 S.W.3d 189, (Ky. 2017), our Supreme Court called this test into question, noting that it diverged from the specific language of RCr 9.36(1). But in the absence of a corresponding Civil Rule, it appears that this test remains applicable in civil cases.

documentation showing that Stamper was placed in a wheelchair with a tab alarm. Based on these discrepancies, Nurse Clevenger believed that the Terrace did not place a tab alarm on Stamper's bed until after his fall, and that its failure to do so was a breach of the applicable standard of care.

Prior to trial, the Terrace moved to exclude this portion of Nurse Clevenger's testimony, arguing that her conclusion was speculative. Eventually, the trial court agreed, and granted the motion to exclude this testimony. On appeal, the Estate argues that Nurse Clevenger's opinion was not based on speculation, but was based upon reasonable inferences arising from the documentation of Stamper's care plan.

The Terrace did not question Nurse Clevenger's qualifications generally to testify about the standard of care. But the Terrace argued that her testimony about the presence of a tab alarm was unreliable because it was based merely on speculation and conjecture. The admission of expert testimony is governed by KRE⁴ 702, which states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise

KRE 702 specifically codifies the standard adopted by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S.

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Kentucky Rules of Evidence.

579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and its progeny in evaluating the testimony of expert witnesses. *West v. KKI, LLC*, 300 S.W.3d 184, 193 (Ky. App. 2008). The *Daubert* decision established a procedure in which the trial court acts as a gatekeeper, ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. *Daubert*, 509 U.S. at 597, 113 S. Ct. at 2799. In exercising this gatekeeping role, the trial court must make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid, and whether that reasoning or methodology can properly be applied to the facts in issue. *Id.* at 592–93, 113 S. Ct. at 2796. The proper standard for review of evidentiary rulings is abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000).

It is well-established that expert opinion evidence must be founded on probability and not on mere possibility or speculation. *Young v. L.A. Davidson, Inc.*, 463 S.W.2d 924, 926 (Ky. 1971). However, the substance of the testimony should prevail over form, and the court's inquiry should be focused on the total meaning rather than a word-by-word construction. *Baylis v. Lourdes Hosp., Inc.*, 805 S.W.2d 122, 124 (Ky. 1991). Nevertheless, the expert's opinion must be couched in terms of probability or reasonable certainty, and opinions which are expressed using language such as "possibility" may be properly excluded as speculative. *Combs v. Stortz*, 276 S.W.3d 282, 296 (Ky. 2009), citing *Schulz v. Celotex Corp.*, 942 F.2d 204, 208-09 (3d Cir. 1991).

In the current case, Nurse Clevenger could and did testify about the standard of care in documenting elements of a patient's care plan. She also properly testified about the contents and documentation of Stamper's care plan, including when the records showed that a tab alarm was placed on his bed. But here, she was specifically asked to express an opinion whether a tab alarm was placed on Stamper's bed prior to his fall. Nurse Clevenger testified that her "best nursing guess" was that the Terrace did not add the tab alarm to Stamper's bed until after his fall. Her opinion was based on the lack of documentation, as well as her experience that the placement of a tab alarm would normally be documented in the patient's care plan. However, she was unable to express that opinion in terms of reasonable certainty. Under the circumstances, we cannot say that the trial court abused its discretion by excluding this testimony

Finally, the Estate primarily argues that the trial court erred by refusing to adopt its tendered instruction setting out the specific duties owed by the Terrace under the Residents' Rights Act. The Act sets forth certain rights of nursing home residents and permits a resident or his guardian to bring an action for violation of those rights. KRS 216.515. The Estate argued that the Act creates a new cause of action, and consequently, it was entitled to a separate instruction setting out each of the duties under the Act. However, the instructions given to the jury only set out the general duty of care for long-term nursing care providers and two specific duties within that general duty.

In *Allen v. Extendicare Homes*, No. 2012-CA-000050-MR, 2012 WL 6553823 (Ky. App. 2012), and *Kindred Nursing Centers Ltd. P'ship v. Overstreet*, No. 2011-CA-002294-MR, 2013 WL 4033906 (Ky. App. 2013), this Court held that KRS 216.215 does not create any new statutory theory of liability, but merely sets forth standards of care created by legislative fiat. *Allen*, 2012 WL 6553823 at *3-4, and *Overstreet*, Slip Op. at 7-8. Based on this conclusion, this Court held in both cases that the appellants' claims were governed either by the one-year statute of limitations in KRS 413.140(1)(a), or the two-year statute of limitations under KRS 413.180 (applicable when the plaintiff dies prior to the commencement of the action). *Id.* In this case, the trial court adopted this reasoning in declining to instruct the jury as the Estate requested.

Subsequently, the Kentucky Supreme Court accepted discretionary review in *Overstreet*. While this appeal was pending, our Supreme Court affirmed, but on slightly different grounds. *Overstreet v. Kindred Nursing Centers Ltd. P'ship, supra*. The Court agreed that most of the rights set forth in KRS 216.515 merely involved a legislative codification of common-law standards of care. *Id.*, 479 S.W.3d at 75. But the Court also held at least some of the rights set out in the Act have no apparent nexus with a common-law personal-injury action. *Id.* Thus, to the extent that the Act creates new theories of liability, those claims are subject to the five-year limitation period of KRS 413.140. *Id.* at 75-76. However, the Court went on to hold that any such claims are personal, and do not survive the death of the resident. *Id.* at 77-78.

While *Overstreet* involved a statute-of-limitations issue, the parties agree that it is applicable to the question of instructions at issue in this case. As a general rule, Kentucky employs the use of “bare bones” jury instructions that avoid an abundance of detail, providing only a framework of the applicable legal principles. *Hilsmeier v. Chapman*, 192 S.W.3d 340, 344 (Ky. 2006). However, a general negligence instruction is not appropriate where a statute imposes specific duties beyond the common-law standard of care. *Martin v. Ohio Cnty. Hosp.*, 295 S.W.3d 104, 114 (Ky. 2009). The content of a jury instruction is an issue of law and subject to *de novo* review on appeal. *Sargeant v. Shaffer*, 467 S.W.3d 198, 204 (Ky. 2015).

As noted in *Overstreet*, most of the provisions of KRS 216.515 merely codify the common-law standard of care and do not create a new theory of liability. *Overstreet*, 479 S.W.3d at 74. In such cases, the statute’s enumeration of specific duties merely amplifies the requirements of the general duty to use ordinary care and does not expand such duties. *Hamby v. Univ. of Kentucky Med. Ctr.*, 844 S.W.2d 431, 434 (Ky. App. 1992). Consequently, the jury instructions need not set out the specific statutory duties. *Id.* Furthermore, to the extent that the Residents’ Right Act establishes new theories of liability, those claims do not survive the death of the resident. *Overstreet*, 479 S.W.3d at 77. As a result, the trial court did not err by declining to separately instruct the jury as to these duties.

Nevertheless, the Estate argues that the trial court erred by failing to instruct the jury on at least one statutory right set out in KRS 216.515(6) – the right

to be free from mental and physical abuse. However, the trial court did instruct the jury about the Terrace's general duty of care, and included the specific duties to:

1. Treat each resident with consideration, respect and full recognition of his dignity, including privacy in treatment and in care for his personal needs;
2. Notify each resident's responsible party or family member immediately of any accident or anything unusual involving the resident.

At oral argument, the Estate's counsel asserted that the trial court's inclusion of only these two duties, without the other two duties included in its tendered instructions, rendered the negligence instruction misleading and confusing to the jury. Counsel suggested that the instruction would have been less misleading if the court had not included any of the specific duties, leaving only the general negligence standard. But after reviewing the record, we find the Estate never argued to the trial court the instruction given was materially misleading because it included only two of the statutory duties. Rather, the Estate maintained that it was entitled to a negligence instruction which included four of the statutory duties, as well as a separate instruction detailing all of the duties under the Resident's Rights Act and associated regulations. Under the circumstances, we conclude that this particular argument is not preserved for review.

Furthermore, when examining jury instructions for error, the instructions must be read as a whole. *Bills v. Commonwealth*, 851 S.W.2d 466, 471 (Ky. 1993). See also *Carmical v. Bullock*, 251 S.W.3d 324, 328 (Ky. App. 2007). The fundamental function of instructions is to fully and correctly advise the

jury what it must believe from the evidence in order to resolve each dispositive factual issue in favor of the party who has the burden of proof on that issue.

Equitania Ins. Co. v. Slone & Garrett, P.S.C., 191 S.W.3d 552, 554 (Ky. 2006).

While the jury instructions in this case did not specifically include the duty set out in KRS 216.515(6), we conclude that duty was necessarily encompassed under the instruction given. Therefore, the trial court's failure to give the applicable portion of the requested instruction was, at most, harmless error. Consequently, we decline to reverse the judgment on this ground.

Accordingly, we affirm the judgment of the Madison Circuit Court.

ALL CONCUR.

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