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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001675-MR

RIDGEWAY NURSING & REHABILITATION FACILITY, LLC, D/B/A HILLTOP NURSING AND REHABILITATION FACILITY; AND PROVIDER MANAGEMENT AND DEVELOPMENT CORPORATION — APPELLANTS

v.

APPEAL FROM BATH CIRCUIT COURT
HONORABLE FRANK A. FLETCHER, SPECIAL JUDGE
ACTION NO. 08-CI-90145

STELLA COLLINS, IN HER CAPACITY AS EXECUTRIX OF THE ESTATE OF ROGER COLLINS, DECEASED, AND STELLA COLLINS, INDIVIDUALLY — APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: COMBS, MAZE, AND STUMBO, JUDGES.

MAZE, JUDGE: Ridgeway Nursing & Rehabilitation Facility, LLC d/b/a Hilltop Nursing and Rehabilitation Facility (Hilltop) and Provider Management and Development Corporation (PMD) appeal from a judgment of the Bath Circuit Court which confirmed a jury verdict in favor of Stella Collins, Individually and as Executrix of the Estate of Roger Collins (the Estate). This Court heard oral arguments in this case on Wednesday, March 15, 2017, at the Powell County Courthouse in Stanton, Kentucky.[1] Hilltop and PMD argue that the trial court abused its discretion in granting a change in venue to Rowan County, by granting a directed verdict for the Estate on PMD's joint liability, and by denying its motions for directed verdict on the Estate's claims of negligence and gross negligence. We find no abuse of discretion in granting the change in venue. Furthermore, the trial court properly found as a matter of law that Hilltop and PMD were operating as a joint venture. We also conclude that there was substantial evidence to submit the issue of Hilltop's negligence to the jury. However, we find no substantial evidence to support a finding that Hilltop was grossly negligent. Consequently, the trial court erred in denying the motion for a directed verdict on punitive damages. Hence, we affirm in part, reverse in part, and remand for entry of a new judgment.

I. Facts and Procedural History

[1] On behalf of the Kentucky Court of Appeals, we would like to express our appreciation to the Hon. Frank A. Fletcher, Chief Circuit Judge, the Hon. Kenneth R. Profitt, Chief District Judge, Circuit Court Clerk Patty Wells, Powell County Sheriff Danny Rogers, and to all the personnel at the Powell County Courthouse.

Hilltop is a limited liability company that owns and operates a 39-bed long-term care facility in Owingsville, Kentucky. The shareholders of the LLC were John Sword and Delbert Ousley. PMD was a separate corporation that provided consulting and management services to thirteen nursing facilities in Kentucky, including Hilltop. Ousley and Sword are also primary shareholders and the sole directors of PMD.

On February 26, 2007, Roger Collins was admitted to Hilltop for nursing care following surgery. He was seventy-eight years old at the time. On March 25, 2007, Collins fell out of his wheelchair while reaching for his television remote. Staff members at Hilltop found him on the floor a short time later. He suffered a cut to his head, but stated that he was not hurt and that he wanted to be put back in his chair. The staff members picked him up, put him back in his wheelchair, cleaned his wound, and gave him medication for the pain.

After a while, Collins informed the staff that his neck was hurting, and he asked to go back to his room to lie down. The staff called for an ambulance, and Collins was transported to the hospital. After being diagnosed with several fractures to the bones in his neck, Collins was eventually transferred to University of Kentucky Medical Center. The hospital treated Collins with a halo - a metal brace placed around the head and affixed to the skull with four screws to immobilize the head and neck.

Collins returned to Hilltop on April 3. Because of the halo, Collins had to remain in bed, and was dependent on family and staff for food, water and personal hygiene. The halo screws also required daily cleaning.

On April 26, Collins returned to the hospital after suffering respiratory difficulties and because his neck was not healing properly. There are also records indicating that the halo screw sites became infected. He died on June 2. The death certificate listed the cause as dysphagia, with the fall and the neck fracture listed as being factors.

Thereafter, the Estate brought this action against Hilltop and PMD, alleging negligence and seeking compensatory and punitive damages. Following extensive discovery, the matter was scheduled for a jury trial. In August 2013, the trial court granted a mistrial based on allegations of *ex parte* contact between Hilltop's counsel and two jurors.[2] At the second trial in October 2014, the trial court called both the circuit and district court jury panels. But after noting that the majority of the members of both panels had family members or relatives that resided or worked in one of the nursing homes owned by Ousley, the trial court granted the Estate's motion for a change of venue to Rowan County.

The matter then proceeded to a jury trial in Rowan County in July 2015. At the conclusion of the trial, the jury found that Hilltop was grossly

[2] After the mistrial was declared, the trial judge recused himself, and a special judge was appointed. The matter was referred to the Kentucky State Police for an investigation of the allegation. Based on that investigation and other evidence provided at the evidentiary hearing, the court ultimately determined that there had been no improper contact between Hilltop's counsel and the jurors.

negligent, and returned a verdict in favor of the Estate. The jury awarded compensatory damages totaling $289,000 and punitive damages of $790,000. This appeal followed.

II. Change of Venue

As an initial matter, Hilltop and PMD argue that the trial court improperly granted the change in venue. KRS[3] 403.010(2) permits the court to grant a change of venue "when it appears that, because of the undue influence of his adversary or the odium that attends the party applying or his cause of action or defense, or because of the circumstances or nature of the case he cannot have a fair and impartial trial in the county." Hilltop contends that there was no evidence of any of the required elements under KRS 403.010(2) to support a change in venue.

The procedure governing a change in venue is governed by KRS 452.030. Unlike in *Blankenship v. Watson*, 672 S.W.2d 941, 944 (Ky. App. 1984), overruled on other grounds by *Dep't of Educ. v. Blevins*, 707 S.W.2d 782 (Ky. 1986), Hilltop does not argue that the motion was procedurally deficient or that the trial court failed to conduct a hearing as required by the statute. Under such circumstances, "[t]he granting of a change of venue shall be within the sound discretion of the court, and shall be granted by the court when justice so requires." KRS 403.010(2). The test for abuse of discretion is "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581

[3] Kentucky Revised Statutes.

(Ky. 2000). A trial court abuses its discretion when its decision rests on an error of law (such as the application of an erroneous legal principle or a clearly erroneous factual finding), or when its decision cannot be located within the range of permissible decisions allowed by a correct application of the facts to the law. *See Miller v. Eldridge*, 146 S.W.3d 909, 915, n.11 (Ky. 2004).

Hilltop notes that the court was able to seat a jury in Bath County at the first trial. Hilltop also disputes the finding after the second trial that a majority of the members of the expanded jury panel had connections to Hilltop or another Ousley-owned facility. Consequently, Hilltop maintains that the Estate failed to show that it could not empanel an impartial jury in Bath County.

However, the trial court was in the best position to judge the demeanor of the jurors during *voir dire* at the second trial. In addition, the Estate requested a change in venue based upon pre-trial publicity that this case had received in Bath County. Under the circumstances, we cannot say that the trial court's findings supporting the change in venue were clearly erroneous, or that the court abused its discretion in granting the motion for a change in venue.

III. Directed Verdict

The remaining issues involve the trial court's decisions to grant or deny directed verdicts. PMD argues that the trial court erred by granting a directed verdict for the Estate, concluding that PMD and Hilltop were operating as a joint venture. Hilltop further argues that the trial court erred by denying its motions for

directed verdict on the Estate's claims of negligence and gross negligence supporting punitive damages.

With respect to a directed verdict motion in a civil action, all reasonable inferences should be drawn in favor of the non-movant. *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459, 461 (Ky. 1990). All evidence favoring the non-movant must be taken as true and the reviewing court should not attempt to determine the credibility of the witnesses or the weight accorded the evidence. *Id. See also Gorman v. Hunt*, 19 S.W.3d 662, 671 (Ky. 2000). Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts, as well as matters affecting the credibility of witnesses. *Banks v. Fritsch*, 39 S.W.3d 474, 478 (Ky. App. 2001).

But when a trial court denies a motion for directed verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. *Brooks v. The Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 797 (Ky. 2004). Upon completion of such evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" *Id.* at 798, *quoting Lewis v. Bledsoe*, 798 S.W.2d at 461.

A. Whether PMD and Hilltop were engaged in a Joint Venture

PMD separately argues that the trial court erred when it found, as a matter of law, that Hilltop and PMD were engaged in a joint venture and thus

jointly liable for any negligence. Rather, PMD contends that there was no evidence showing that it was engaged in a joint venture, and that the trial court erred in denying its motion for directed verdict on this issue. A joint venture is "an informal association of two or more persons, partaking of the nature of a partnership, usually, but not always, limited to a single transaction in which the participants combine their money, efforts, skill, and knowledge for gain, with each sharing in the expenses and profits or losses." *Eubank v. Richardson*, 353 S.W.2d 367, 369 (Ky. 1962). The essential elements of a joint venture are: "(1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control." *Huff v. Rosenberg*, 496 S.W.2d 352, 355 (Ky. 1973), *citing Restatement (Second) of the Law of Torts*, § 491, cmt. c (1965). *See also Roethke v. Sanger*, 68 S.W.3d 352, 364 (Ky. 2001).

With respect to the third element, there must be a showing of an express or implied agreement to share profit and losses. *Drummy v. Stern*, 269 S.W.2d 198, 199 (Ky. 1954). PMD contends that there was no evidence to show that it actually shared profits or losses with Hilltop. However, there was extensive evidence of the close business and operating relationship between PMD and Hilltop. Both companies shared the same ownership. The administrator of the Hilltop facility, Steve Strunk, was employed by PMD and served as PMD's Chief Financial Officer. Strunk was in charge of staffing, employment, and training at

Hilltop. PMD executive Teresa Kiskaden had the authority to fire administrators at any PMD-managed facility, including Hilltop. In addition, Ousley admitted that PMD and Hilltop shared administrative expenses, and that PMD and Hilltop maintained a joint retirement plan for their employees. PMD and Hilltop also shared the expense of acquiring a new computer system at the Hilltop facility.

Furthermore, Ousley testified that PMD was responsible for nurse consultation and training at Hilltop. Moreover, on license applications, PMD stated that it managed the Hilltop facility. That representation was required in order for Hilltop to pay PMD out of its Medicaid and Medicare reimbursements. Based on all these admitted facts, we agree with the trial court that PMD and Hilltop had at least an implied agreement, if not an express one, to share in the profits and losses from the operation of the Hilltop facility. In the absence of any evidence to counter these admissions, the trial court properly granted the directed verdict and found that PMD and Hilltop were joint ventures and thus jointly liable.

B. **Sufficiency of the Evidence on Negligence**

The central question in this appeal is whether Hilltop and PMD were entitled to directed verdicts on the issues of negligence and gross negligence. On both matters, the Estate's claim of negligence breaks down to two periods of time: (1) the circumstances surrounding Collins's fall on March 25, 2007; and (2) Collins's treatment after he returned to Hilltop on April 3 until he returned to the hospital on April 26. On both points, Hilltop argues that there was no evidence to

support a finding either that it breached any duty which it owed to Collins, or that any negligence was the proximate cause of his injuries.

With regard to the fall on March 25, Hilltop contends that there was no evidence that it was negligent. Hilltop points to evidence that Collins was alert both before and after the fall. The physicians who attended to Collins just days before the call did not recommend a restraint or any type of alarm system. Collins did not have a history of falling or attempting to get up without assistance. Nurse Carol Hughes and Aide Gordie Conyers, checked on Collins several times that day. They assisted him with getting into the wheelchair and again a short time later to get the remote. The staff responded promptly upon discovering that Collins had fallen. Collins repeatedly stated that he was not hurt and insisted that the fall was his fault.

In response, the Estate's nurse Expert, Luanne Trahant, pointed that Hilltop's own initial intake sheet noted that Collins needed help with standing and sitting. Subsequent records confirmed that assessment. Several former employees of Hilltop testified that Collins was confused and unstable just prior to the fall. The employees also testified regarding staffing problems and their difficulty in promptly attending residents. The Estate also presented evidence of a state survey which cited care deficiencies and staffing issues at Hilltop in 2006.[4] Based on the

[4] In its brief, Hilltop contends that the trial court abused its discretion by allowing the Estate to introduce the state survey as evidence. We note that Hilltop preserved its objection to this issue at trial and identified it as an issue on appeal in its prehearing statement. However, Hilltop's brief only mentions the issue without any substantive legal argument to support its assertion that the evidence was inadmissible. Furthermore, Hilltop does not separately request a new trial based on the admission of this evidence. It is not the role of this Court to flesh out arguments on

records and the testimony of the Hilltop employees, Nurse Trahant testified Hilltop's conduct fell below the professional standard of care. She expressed the opinion that Hilltop's failure to provide adequate fall intervention, including provision of a restraint or a chair alarm, and Hilltop's inadequate staffing significantly contributed to Collins's fall and injuries.

With respect to Collins's treatment in April of 2007, Hilltop contends that there was no evidence that it failed to provide proper care for him. Hilltop disputes the testimony that the halo screw sites were infected or that the infection led to Collins's final hospitalization. Hilltop concedes that its records show that it provided an inadequate amount of fluids to Collins. However, Hilltop argues that those records do not reflect other fluids that Collins may have received during this period. Hilltop also points out that Collins was not assessed with dehydration when he returned to the hospital at the end of April.

In the response, the Estate again notes the testimony of former Hilltop employees who testified about inadequate staffing. The Estate also points to Hilltop's own records showing the amount of fluids provided to Collins in April 2007. In addition, the Estate focuses on the inadequate and erroneous records which Hilltop maintained. Records setting out the medication, fluids and care

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appeal, nor is this Court obligated to search the record to find where it may provide support for a party's contentions. *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006). Therefore, we deem the issue to be waived.

provided were filled out for days after Collins left. There was also testimony that the paychecks of Hilltop employees were withheld until charts were completed.

Furthermore, the Estate presented the testimony of Dr. Timothy Hammond, who testified that Hilltop's failure to properly care for Collins led to his eventual death. Dr. Hammond noted that Collins was diagnosed with acute renal failure, which was caused by dehydration. Dr. Hammond noted that Hilltop's records regarding Collins's fluid intake were consistent with this level of dehydration, demonstrating a cumulative fluid deficit of up to five gallons. Dr. Hammond also testified that the dehydration contributed to the failure of the neck fractures to properly heal, and the infections around the halo screw sites. Nurse Trahant testified that the documented level of care which Hilltop provided fell below the professional standard of care.

In light of the foregoing, the trial court properly denied Hilltop's motion for a directed verdict on the issue of negligence. While the evidence was conflicting, we conclude that there was sufficient evidence to support a finding that Hilltop's actions in both of these areas violated the standard of care and contributed to Collins's injury and ultimate death. Therefore, the trial court properly submitted these issues to the jury.

C. Sufficiency of the Evidence on Gross Negligence

The larger question is whether this evidence was sufficient to rise to the level of gross negligence. An instruction on punitive damages is warranted if there is evidence that the defendant acted with oppression, fraud, malice, or was

grossly negligent by acting with wanton or reckless disregard for the lives, safety or property of others. *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 51-52 (Ky. 2003). A party is entitled to have the jury instructed on the issue of punitive damages "if there was any evidence to support an award of punitive damages." *Shortridge v. Rice*, 929 S.W.2d 194, 197 (Ky. App. 1996).

The threshold for the award of punitive damages is whether the misconduct was "outrageous" in character, not whether the injury was intentionally or negligently inflicted. *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 389 (Ky. 1985). In a case where gross negligence is used as the basis for punitive damages, gross negligence has the same character of outrage justifying punitive damages as willful and malicious misconduct in torts where the injury is intentionally inflicted. Just as malice need not be expressed and may be implied from outrageous conduct, so too may wanton or reckless disregard for the rights of others be implied from the nature of the misconduct. *Id.* at 389–90.

However, a finding of gross negligence clearly requires more than a failure to exercise ordinary care. It requires a finding of a failure to exercise even slight care such as to demonstrate a wanton or reckless disregard for the rights of others. *Id. See also Phelps*, 103 S.W.3d at 51–52. In other words, gross negligence requires "a finding of failure to exercise reasonable care, and then an additional finding that this negligence was accompanied by 'wanton or reckless disregard for the lives, safety or property of others.'" *Gibson v. Fuel Transport,*

Inc., 410 S.W.3d 56, 59 (Ky. 2013). *See also Nissan Motor Co., Ltd. v. Maddox*, 486 S.W.3d 838, 840 (Ky. 2015).

With regard to the fall, Hilltop points out that it was not authorized to use physical restraints on Collins except under the direction of a physician. KRS 216.515(6). *See also* 902 KAR[5] 20:300(5)(1). Hilltop further notes that the nurse and aides checked on Collins at least three times shortly before the fall and promptly attended to him after the fall. In addition, there were at least four nurses or aides on duty at the time of the fall. Although the Estate complains that putting Collins back in the wheelchair was a "mistake," the staff also closely monitored Collins and called for an ambulance promptly when he complained of neck pain. Furthermore, there was no evidence that Collins suffered any additional injury when he was placed back in his wheelchair. The circumstances surrounding the fall are indicative of negligence, but do not suggest a failure to exercise slight care necessary to establish gross negligence.

The stronger case for gross negligence arises out of the Hilltop's alleged failure to provide proper care for Collins over the twenty-three day period in April 2007. The Estate again emphasizes Hilltop's erroneous and misleading recordkeeping during this period, arguing that it rises to the level of fraud. But where a party bases a claim for punitive damages on allegations of fraud arising after the wrongful conduct, the fraud is actionable only if the concealment itself caused damages independent of those flowing from the wrongful act attempted to

[5] Kentucky Administrative Regulations.

be concealed. *Hardaway Mgmt. Co. v. Southerland*, 977 S.W.2d 910, 917 (Ky. 1998). In this case, the Estate does not allege that Hilltop's deficient recordkeeping was intended to cover up the wrongful conduct or caused additional injury on its own.

Rather, the Estate suggests that the faulty recordkeeping is evidence of a larger pattern of reckless conduct by Hilltop in the care of its residents. The Estate argues that Hilltop knew that its level of staffing was inadequate since its staff did not have time to properly fill out charts. The Estate contends that Collins's deterioration in April of 2007 was the direct result of this understaffing, of which it had knowledge of through the 2006 state survey and its own attempts to compel its staff to complete patient charts well after medicine or treatment was allegedly provided.

In addition, the Estate points to the dehydration and otherwise poor condition which Collins exhibited when he returned to the hospital at the end of April. In addition to the dehydration and infection of the screw sites, the Estate notes that Collins was found in dried urine and feces. There was testimony that other residents at Hilltop were left in a similar situation due to the inadequate staffing. Essentially, the Estate argues that the pattern of these errors and negligence relating to both the fall and Collins's treatment in April of 2007 show extreme indifference and recklessness.

Hilltop responds that Collins actually received a significant level of care during April of 2007. There is no dispute that he received at least 27-30

ounces of water of liquid per day with his medications. Based on Dr. Hammond's testimony, this amount of fluids was inadequate and led to Collins's dehydration. Nevertheless, Hilltop argues that it still provided Collins with fluids on a regular basis, and consequently, that its conduct did not amount to a reckless disregard for Collins's health or safety.

Hilltop concedes that Collins was found in a wet or soiled brief on several occasions, but it contends that there was no evidence that this was a chronic problem. Hilltop takes issue with the Estate's assertion that the halo screw sites were infected. Hilltop also asserts that the deficiencies reported on the 2006 state survey were minor and unrelated to Collins's care.

As we noted above, the circumstances surrounding Collins's fall are indicative of only negligence. We are deeply concerned about Hilltop's treatment of Collins in April of 2007 leading up to his return to the hospital. But while that conduct clearly supports a finding of negligence, we conclude that it was not sufficient to support a finding of reckless disregard for Collins's health or safety. Even viewing Hilltop's entire course of conduct over both periods and drawing all reasonable inferences in the light most favorable to the Estate, the evidence did not support a finding of gross negligence. Therefore, we must conclude that the trial court erred in denying Hilltop's motion for a directed verdict on punitive damages. Based on this conclusion, we need not address whether the amount of punitive damages awarded was excessive.

Accordingly, we affirm the judgment of the Bath Circuit Court with respect to the award of compensatory damages, but we reverse the judgment awarding punitive damages. This matter is remanded to the Bath Circuit Court for entry of a new judgment consistent with this opinion.

ALL CONCUR.

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