RENDERED: JUNE 15, 2018; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001823-MR

PATTY JENNINGS, AS ADMINISTRATRIX
OF THE ESTATE OF ELIZA JENNINGS,
DECEASED, AND ON BEHALF OF THE
WRONGFUL DEATH BENEFICIARIES OF
ELIZA JENNINGS — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 10-CI-00551

BEREA AREA DEVELOPMENT,
LLC, d/b/a THE TERRACE NURSING &
REHABILITATION FACILITY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND J. LAMBERT, JUDGES.

LAMBERT, J., JUDGE: Patty Jennings, as Personal Representative of the Estate of Eliza Jennings, deceased, and on behalf of the Wrongful Death Beneficiaries of

Eliza Jennings (the Estate), appeals from a judgment of the Madison Circuit Court granting a new trial to Berea Area Development, LLC, d/b/a The Terrace Nursing and Rehabilitation Facility (the Terrace) after a jury verdict in favor of the Estate.[1] The Estate argues that the circuit court abused its discretion in granting the Terrace's motion and that, at most, it should have granted only a partial retrial. We find no abuse of discretion. 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, as the statutory duties merely codify the common-law standard of care and do not survive the death of the resident, the circuit court properly set aside the jury verdict and ordered a new trial. 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 2004, Eliza Jennings, no longer able to care for herself, became a resident of the Terrace. At the time of her admission, Jennings was 85 years old. She remained there, except for hospitalizations in the interim, until her death on January 15, 2009.

[1] Provider Management and Development Corporation (PMD), now known as Simpson Lane Consulting, Inc., moved for and was granted a summary judgment prior to trial. That order was not designated as final and appealable. As such, PMD has moved this Court to be dismissed as a party to this appeal. We shall deal with that issue in the body of this opinion.

In April 2010, the Estate[2] brought this action against the Terrace, alleging negligence, medical negligence, corporate negligence, wrongful death, and violations of the long-term Residents' Rights Act, Kentucky Revised Statute (KRS) 216.515. The parties conducted extensive discovery and engaged in motion practice over the next five years.

The matter proceeded to a jury trial on June 15, 2015. The trial lasted eight days. At the conclusion of the evidence, the jury found that the Terrace breached the duties it owed to Jennings. The jury also found that the Terrace's failure to observe these duties was a substantial factor in causing Jennings' injuries and hastened her death. The verdict was apportioned as follows:

- Physical pain and suffering, mental anguish, and loss of enjoyment of life until the time of death: $4,000,000.00.
- Deprivation or infringement of right to be free from chemical and physical restraints except in emergencies or except as thoroughly justified in writing by a physician for a specified and limited period of time and documented in the resident's medical record: $500,000.00.
- Failure to treat the resident with consideration, respect, and full recognition of dignity and individuality, including privacy in treatment and in care for personal needs: $2,000,000.00.
- Failure to inform the resident and responsible party or family member or guardian of the resident's medical condition unless medically

[2] James W. Jennings, Eliza's grandson, was the original personal representative for the Estate; in November 2016, Patty Jennings, Eliza's daughter and administratrix of the Estate, was substituted as party plaintiff.

contraindicated and documented by a physician in the resident's medical record: $500,000.00.

- Failure to suitably dress and maintain body hygiene and good grooming: $1,500,000.00.
- Punitive damages: $9,500,000.00.

In its July 9, 2015, "Trial Order, Verdict, and Judgment," the Madison Circuit Court entered the jury's verdicts. It reserved ruling on costs and attorney fees. It also granted (with prejudice) summary judgment to Provider Management and Development Corporation, and dismissed (with the Estate's agreement) the wrongful death claim.

The Terrace filed a motion for new trial or for judgment notwithstanding the verdict, pursuant to Kentucky Rule of Civil Procedure (CR) 59.01. The Terrace renewed its pretrial argument (a motion which had been filed in April 2015) that the resident's rights claims were duplicative of the negligence claim. While the CR 59.01 motion was pending, the Kentucky Supreme Court issued its decision in *Overstreet*, *supra*. *Overstreet* specifically held that "actions otherwise brought to enforce rights created exclusively by KRS 216.515 must be brought by the 'resident or his guardian' pursuant to KRS 216.515(26), and therefore do not survive the resident's death." *Id.* at 71.

The circuit court granted the Terrace's motion for new trial on September 23, 2015, pursuant to CR 59.01(h) ("Errors of law occurring at the trial

and objected to by the party under the provisions of these rules."). Specifically, the circuit court ruled:

> Eliza Jennings died prior to the filing of this action, and the Resident's Rights claims under KRS 216.515 could not be pursued after Eliza Jennings' death. Therefore, the Court finds that the jury instructions were erroneous based on the recent Supreme Court of Kentucky decision of *Overstreet v. Kindred Nursing Centers Limited Partnership, et al.* [*supra*]. Under the circumstances, the erroneous instructions created a material prejudice such that a new trial is warranted. The Court finds that the defect can only be corrected with a new trial. The Court finds that an injustice will result, with reasonable certainty, unless a new trial is granted.

The Estate subsequently moved the circuit court to reverse itself and vacate its order setting aside the verdict. The motion was denied on March 30, 2016, and the Estate appealed.

The Estate first argues that the Terrace waived its lack of standing defense, and that it was required to allege it specifically as an affirmative defense in its motion for directed verdict at the conclusion of the Terrace's evidence and again at the conclusion of all evidence as well as in its jury instructions. We disagree.

Our Supreme Court enunciated the standard of review for a new trial order in *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64 (Ky. 2010):

> Appellate courts must give "a great deal of deference" to a trial court's decision to grant a new trial per CR 59.01. *Bayless v. Boyer*, 180 S.W.3d 439, 444

> (Ky. 2005). In fact, the trial court's decision whether to grant a new trial "is presumptively correct." *City of Louisville v. Allen*, 385 S.W.2d 179, 184 (Ky. 1964) (Clay, Comm'r), *overruled on other grounds by Nolan v. Spears*, 432 S.W.2d 425, 427 (Ky. 1968). Furthermore, an "appellate court is more reluctant to reverse an order granting a new trial than one denying it". *Louisville Mem'l Gardens, Inc. v. Com., Dept. of Highways*, 586 S.W.2d 716, 717 (Ky. 1979) (*citing Allen*, 385 S.W.2d at 181). This high level of deference by an appellate court is necessary because the decision to grant a new trial "'depends to a great extent upon factors which may not readily appear in the appellate record.'" *Id.* (*quoting Turfway Park Racing Ass'n v. Griffin*, 834 S.W.2d 667, 669 (Ky. 1992)). Indeed, unlike appellate judges, the trial judge "has heard the witnesses firsthand and observed and viewed their demeanor and . . . has observed the jury throughout the trial." *Davis v. Graviss*, 672 S.W.2d 928, 932 (Ky.1984).
>
> It is important to remember that the trial court's observations "cannot [be] replicate[d] by reviewing a cold record." *Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 366 (3d Cir. 1999). Consequently, an appellate court is "precluded from stepping 'into the shoes' of a trial court" in reviewing decisions under CR 59.01. *Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001) (citing *Prater v. Arnett*, 648 S.W.2d 82 (Ky. App.1983)).

CertainTeed, 330 S.W.3d at 71.

The Madison Circuit Court based its decision to grant a new trial under CR 59.01(h). The question is whether the circuit court correctly granted a new trial because "errors of law occurred at the trial."

> [I]n most cases, a discretionary decision will be a close one, at least from the appellate perspective, and will not be disturbed by an appellate court unless it "'is firmly

> convinced that a mistake has been made.'" *Walters* [*v. Moore*], 121 S.W.3d [210,] 215 [Ky. App. 2003] (*quoting Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 615 (6th Cir. 1995)). An appellate court can only reverse the trial court's decision if it is sure that the decision is incorrect—any doubts must be resolved in favor of the trial court:
>
> > If there is doubt about the correctness of [its] ruling, it must be upheld. If the record supports [its] ruling, it will not be reversed. Even if in our opinion the record would more strongly support a different conclusion, if there is substantial reason for [its] decision, then [it] has not clearly erred.
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> *Allen*, 385 S.W.2d at 184.

CertainTeed, 330 S.W.3d at 72–73.

As the Terrace correctly states, the defense was not available at the time suit was filed or during the trial itself. In its order denying the Estate's motion to set aside the order vacating the jury verdict, the circuit court held:

> The KRS 216.515 Resident's Rights claims of the [Estate] were improperly submitted to the jury, as those claims ceased to exist upon the resident's death. The question of [the Estate's] ability to assert those claims did not present an issue of standing. [The Terrace] asserted an affirmative defense in its Answer stating that [the Estate] failed to state a cause of action upon which relief could be granted. Additionally, [the Terrace] properly preserved all objections to the inclusion of the Resident's Rights claims, and all evidence offered in support of those claims, by tendering initial jury instructions that contained no instruction on resident's rights violations, and by orally objecting during all relevant jury instruction discussions[.]

(Internal citation to *Overstreet* omitted.) Having resolved any doubts in favor of the circuit court (*CertainTeed*, 330 S.W.3d at 73), we affirm its holding that, not only had the Terrace preserved the issue of standing, but also the KRS 216.515 claims were improperly submitted to the jury because the resident had predeceased the claim under the statute. *Overstreet*, 479 S.W.3d at 77 ("To the extent that the claims are based upon liabilities created by KRS 216.515, and are not simply restatements of the common law personal injury action, KRS 411.140 does not provide for their survival beyond the death of the resident.").

The Estate next argues that the circuit court erred in ordering a total retrial on liability and damages rather than simply setting aside the portions of the verdict pertaining to recovery under KRS 216.515. The circuit court explained its reasoning in ordering a complete retrial in its March 30, 2016, order:

> The inclusion of evidence offered to prove the [Estate's] Resident's Rights claims was so intermixed and comingled with the evidence that supported the [Estate's] claim of negligence that the evidence became inseparable on the issues of liability (both standard of care and causation) and damages. This improper evidence tainted the evidence of proof offered on [the Estate's] negligence and punitive damages claims, creating verdicts which were not separable post-trial (creating a scenario in which this Court could not "unscramble the egg").

This was a complex case and required over a week to present to the jury. The circuit court certainly would have taken the easier path of separating the

specific verdicts if it felt it was possible to do so. Instead it chose the harder task of ordering a complete retrial. The record supports this ruling, and we must uphold it. *Allen*, 385 S.W.2d at 184.

We are lastly asked to consider PMD's pending motion to be dismissed as a party to this appeal. As the Terrace aptly notes, the Estate has acknowledged in its brief that the circuit court's order granting PMD's motion for summary judgment was not made final and appealable and is thus not properly before this Court. CR 54.02; *Francis v. Crounse Corp.*, 98 S.W.3d 62, 65 (Ky. App. 2002). PMD's motion to be dismissed was granted by a separate order.

The orders of the Madison Circuit Court are affirmed.

ACREE, JUDGE, CONCURS.

CLAYTON, CHIEF JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

Corey T. Fannin
Ross F. Mann
Lexington, Kentucky

BRIEF FOR APPELLEES:

Calvin R. Fulkerson
T. Chad Thompson
Lexington, Kentucky