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Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001841-MR

TRILOGY HEALTHCARE OF FAYETTE I, LLC
d/b/a THE WILLOWS AT HAMBURG; TRILOGY HEALTHCARE
CENTERS, LLC; TRILOGY HEALTH SERVICES, LLC;
TRILOGY MANAGEMENT SERVICES, LLC; TRILOGY
MANAGEMENT HOLDINGS, LLC; TRILOGY INVESTORS, LLC;
AND CARA CLARK, EXECUTIVE DIRECTOR OF TRILOGY
HEALTHCARE OF FAYETTE I, LLC¹ APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 14-CI-01890

JOEL TECHAU, INDIVIDUALLY AND AS CO-EXECUTOR
OF THE ESTATE OF KENNETH C. TECHAU; NEAL TECHAU,
INDIVIDUALLY AND AS CO-EXECUTOR OF THE ESTATE OF
KENNETH C. TECHAU APPELLEES

¹ Although Cara Clark was named as a party to this appeal, she was dismissed with prejudice by the circuit court pursuant to an agreed order entered August 14, 2017.

OPINION AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** **

BEFORE: ACREE, GOODWINE AND KRAMER, JUDGES.²

KRAMER, JUDGE: Joel and Neil Techau (“Appellees”), Individually and as Co-Executors of the Estate of Kenneth Techau (their deceased father) brought action against Trilogy Healthcare of Fayette I, LLC d/b/a The Willows at Hamburg under KRS³ 216.515, alleging violations of certain residents’ rights during Kenneth’s brief stay at The Willows. The complaint also listed causes of action for negligence and punitive damages. The jury returned a verdict in favor of Appellees, including punitive damages. After the trial, the circuit court awarded attorney’s fees to Appellees pursuant to KRS 216.515(26). After careful review, we affirm in part, reverse in part, and remand.

FACTUAL AND PROCEDURAL HISTORY

The sufficiency of evidence, including expert testimony and any reasonable inferences that could be drawn from it, continue to be contested between the parties. “Upon appellate review, we are constrained to view the

² This case was originally assigned to Presiding Judge Debra Lambert to be heard December 2018. However, Judge Debra Lambert was elected to the Kentucky Supreme Court and began serving on that Court in January 2019. This case was subsequently reassigned to this panel to be heard in June 2019. Due to this case having been administratively delayed, this panel elected to make rendering a decision in this case a priority and held arguments in May of 2019.

³ Kentucky Revised Statutes.

sufficiency of evidence in the light most favorable to the verdict. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence.” *Saint Joseph Healthcare, Inc. v. Thomas*, 487 S.W.3d 864, 868 (Ky. 2016) (internal citations omitted).

Kenneth suffered a stroke in 2012. He recovered, but could not manage his medications on his own, suffered memory problems, had a pacemaker, and was unable to ambulate unassisted. Kenneth’s family had additional concerns that his current wife was over-sedating him. His health was managed at home with 24-hour nursing care and family intervention until late 2013. At that time, the family made the decision that Kenneth needed more supervised care than they could provide. Kenneth’s family decided to admit him into long-term care at The Willows.

Kenneth’s family moved him into The Willows on January 20, 2014. He was 87 years old at the time. The Willows did not request a physician’s assessment or a physician’s admission order prior to admitting Kenneth, nor did The Willows make it known to the family that either was required by Kentucky regulations. From the beginning, there was confusion on the part of The Willows over the identity of Kenneth’s primary care physician. There was also confusion regarding which physician could provide The Willows a current and accurate list of Kenneth’s medications. Kenneth was being seen by the Veteran’s

Administration Hospital (“VA”) in Lexington, Kentucky, for management of his diabetes and for other health-related issues, but the family did not advise The Willows that either of the doctors seen regularly by Kenneth at the VA was his primary care physician. However, an outdated medication list from a Dr. Wright in Cynthiana, Kentucky, was provided to The Willows. A more recent list was provided from Dr. Jackson at Cardinal Hill Rehabilitation Center. The family also provided their own list to The Willows. Dr. Jackson eventually verified his medication list with a signature, although he made it clear via a telephone call to The Willows that he was not Kenneth’s primary care physician. Rather, Dr. Jackson treated Kenneth during his stay at Cardinal Hill following the stroke.

The Willows assigned Dr. John Richard to be Kenneth’s attending physician. Dr. Richard worked through Bluegrass Extended Care Services, LLC, which contracted to provide medical care to residents at The Willows. Bluegrass employed a nurse practitioner, Amie Osborne, who worked closely with Dr. Richard and also cared for patients at The Willows.

At the time of admission, Kenneth’s diabetes was being managed by medications prescribed through the VA. Specifically, he was taking Lantus (long-acting insulin) and Novolog (rapid-acting insulin). He had also been taking Metformin (also used to lower blood glucose levels), but it had been discontinued by the VA prior to Kenneth’s admission at The Willows. Due to the confusion in

obtaining an accurate medication list for Kenneth, his son Joel stayed at The Willows with Kenneth on the first night to check his blood sugar and administer his medications. Joel came back the following morning (January 21, 2014), tested Kenneth's blood sugar, administered his medication, and took him to an appointment at the VA. After returning from the VA, Joel again tested Kenneth's blood sugar and administered his medication. Joel left his father in the dining room at The Willows for lunch and went home.

Sometime after lunch, nurse Kim Barrow tested Kenneth's blood sugar. Prior to admission at The Willows, Kenneth's blood sugar had been tested only before meals. Nurse Barrow testified that, at 1:45 p.m., she performed two separate finger sticks and obtained elevated blood sugar readings of 358 and 398. Upon noting the elevated levels, she called Nurse Practitioner Osborne. Nurse Practitioner Osborne returned Nurse Barrow's telephone call at 2:10 p.m. From that telephone call, a new medication order was written. The telephone call and the medication order that resulted are the greatest source of contention between the parties. Nurse Barrow testified that Nurse Practitioner Osborne gave the medication order orally over the telephone. Nurse Practitioner Osborne testified that she never gave the order. The medication order stated that Kenneth's Lantus and Novolog were to be discontinued. The order further changed Kenneth's medication regime to include 1000 mg of Metformin, twice per day; 25 units of

Levemir (long-acting insulin) in the morning; and 30 units of Levemir at bedtime. Expert testimony revealed that the new medication order meant that Kenneth went from receiving 10 units of insulin per day prior to admission at The Willows, to 55 units of insulin per day. This medication change occurred without Kenneth being seen or evaluated by a physician or nurse practitioner. The Willows did notify Kenneth's family of the change in the brand of insulin. But, The Willows did not advise the family regarding the change in dose, nor did it advise that Metformin had been added to his medication regime.

Kenneth experienced episodes of hypoglycemia after the medication changes. Nurse Barrow testified that on January 23, 2014, Kenneth's blood sugar was 51. She did not contact Dr. Richard or Nurse Practitioner Osborne. Instead, Nurse Barrow gave Kenneth orange juice, to no avail, followed by orally-administered glucose. After the glucose was given, Kenneth's blood sugar elevated to a level of 186.

At 2:00 a.m. on January 24, 2014, nurse Karen Barnes at The Willows made a nurse's note.⁴ Kenneth was found to be "[n]oncoherent, verbal stimuli, and sternum rub, did not arouse, eye was pen [sic] point..." Kenneth's blood sugar was 52. Nurse Barnes noted that "glucose was given waited 10 mins retook [finger stick] 48, 5 mins later retook [finger stick] 28..." Expert testimony was that

⁴ Barnes testified that her full name is Sheila Karen Barnes. Her nurse's note is signed as "K. Barnes."

glutose is an orally-administered gel-form of glucose that has the consistency of toothpaste. It is used on patients who are alert with the ability to swallow, not on patients who are unconscious. Despite the contents of her nurse's note, Nurse Barnes testified that she actually gave glucagon, not glutose, to Kenneth. According to expert testimony at trial, glucagon is a form of glucose that is administered intramuscularly through injection and typically produces a rapid elevation in blood glucose levels. Nurse Barnes called 911. Upon arrival, emergency medical personnel administered glucose intravenously. Kenneth was transported to Central Baptist Hospital. He died the next day. This lawsuit followed.

The parties engaged in motion practice for over three years, and a jury trial was held in August 2017. Appellees settled with Bluegrass prior to the trial. However, Bluegrass was ultimately included in the jury instructions solely for the purpose of apportionment of damages. Prior to the trial, The Willows made a motion to dismiss Appellees' claims under KRS 216.515. The circuit court denied the motion. The Willows moved for directed verdict at the close of Appellees' case in chief and again at the close of all evidence. These motions were denied. The Willows objected to jury instructions related to any claims pertaining to KRS 216.515. The circuit court overruled the objection. The Willows also objected to punitive damages instructions. This objection was also overruled by the circuit

court. After the trial, The Willows continued to argue that the claims under KRS 216.515 were improper, and therefore, Appellees were not entitled to attorney's fees under KRS 216.515(26). The circuit court awarded attorneys fees to Appellees in the amount of \$260,984.59 plus interest. This appeal followed. Further facts will be developed as necessary.

ANALYSIS

I. Appellees' claims under KRS 216.515

The Willows argues that the circuit court erred in several respects with regard to Appellees' claims under KRS 216.515, also known as the Residents' Rights statute: (1) the claims should have been dismissed because they do not survive the death of the resident; (2) because the claims should have been dismissed, the circuit court erred by submitting jury instructions regarding any alleged violations of KRS 216.515; (3) the circuit court erred in applying KRS 216.515(26) in its decision to award attorney's fees to Appellees. After careful review, we agree, reverse and remand.

Because only issues of law are involved in interpretation of KRS 216.515, our review is *de novo*. *Overstreet v. Kindred Nursing Centers Limited Partnership*, 479 S.W.3d 69, 73 (Ky. 2015).

Appellees have two claims under KRS 216.515. The first claim, set forth in jury instruction 1B, is pursuant to KRS 216.515(19) which states:

Every resident and the responsible party or his responsible family member or his guardian has the right to be fully informed of the resident's medical condition unless medically contraindicated and documented by a physician in the resident's medical record.

The second claim, set forth in jury instruction 1C, is pursuant to KRS 216.515(22) which states:

The resident's responsible party or family member or his guardian shall be notified immediately of any accident, sudden illness, disease, unexplained absence, or anything unusual involving the resident.

KRS 216.515(26) was not part of the jury instructions but was relied upon by the circuit court in awarding attorney's fees to

Appellees. It states, in relevant part,

Any resident whose rights as specified in this section are deprived or infringed upon shall have a cause of action against any facility responsible for the violation. The action may be brought by the resident or his guardian... Any plaintiff who prevails in such action against the facility may be entitled to recover reasonable attorney's fees, costs of the action, and damages

We note that jury instruction 1A does not fall under KRS 216.515, or any Kentucky statute. The language of this instruction reads:

Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental and psychological well-being, and consistent with the resident's comprehensive assessment and plan of care.

This language appears to be lifted, verbatim, from an outdated version of 42 C.F.R.⁵ §483.25, in effect from October 7, 2005 through November 27, 2016. This section of the Code of Federal Regulations’ scope, as defined in 42 C.F.R. §483.1, contains only “the requirements that an institution must meet in order to qualify to participate as a Skilled Nursing Facility in the Medicaid program. They serve as the basis for survey activities for the purpose of determining whether a facility meets the requirements for participation in Medicare and Medicaid.” Appellees argued to have this language included with jury instructions 1B and 1C, which contain language lifted directly from the Residents’ Rights statute. It is unclear from the record how much, if at all, the circuit court relied on the jury’s finding that The Willows had violated the “right” contained in instruction 1A when awarding attorney’s fees to Appellees.⁶

We review Appellees’ claims under KRS 216.515 in the context of *Overstreet*. In that case, the estate of the deceased resident brought action against the nursing home under KRS 216.515(6), (18), (20), and (22). The Kentucky Supreme Court held that KRS 216.515(6) codified the common law duty to avoid negligently or intentionally injuring another person. *Id.* at 76. The Court further

⁵ Code of Federal Regulations.

⁶ After dismissal of the jury on the third day of the trial, Appellees argued that they had three claims under KRS 216.515. Two of these were KRS 216.515(19) and (22). It is unclear if Appellees were mistakenly referring to the language in jury instruction 1A for the third claim, or if they were perhaps referring to the right to collect attorney’s fees as provided by KRS 216.515(26).

held that, because it was a common law claim, it survived the death of the resident. However, the Court found that the plaintiff's remaining claims, including the claim made under subsection (22), did not survive the death of the resident. The Court held that the various subsections of KRS 216.515 "authorize court action as needed to compel compliance with statutory protections designed for the benefit and enjoyment of residents *during their lifetimes.*" *Id.* at 77 (emphasis added). In the event that violations of the statute actually resulted in injury to the resident or damage to his property, then the existing common law causes of action would survive pursuant to KRS 411.140, to redress the grievance on behalf of his estate. *Id.* at 77-78.

We note that the claims as presented under jury instructions 1A – C and jury questions 1 – 3 were not submitted to the jury for the purpose of awarding damages to Appellees. Indeed, the jury instructions did not allow for an award of damages based on violation of KRS 216.515. The Willows argued that an award of damages under the statute would result in double recovery if the jury also found a violation of the standard duty of care. The circuit court agreed. Compensatory damages were awarded by the jury based on instructions for violation of the standard duty of care.⁷ The circuit court allowed the jury to find that The Willows

⁷ Punitive damages were also awarded after the jury found violation of the standard duty of care and are addressed later in this opinion.

had violated the provisions of KRS 216.515 (or not) only for the purpose of determining whether the court would award attorney's fees under KRS 216.515(26). Under the instructions given, the jury found that The Willows violated KRS 216.515(19). The circuit court cited this finding by the jury in awarding attorney's fees to Appellees after the trial. The record shows that at no time have Appellees argued any authority other than KRS 216.515(26) for the award of attorney's fees.

Overstreet is controlling on this matter. The Kentucky Supreme Court directly addressed Appellees' claim under KRS 216.515(22) in *Overstreet*. The Court held that this claim does not survive the death of the resident. *Id.* at 78. We agree and similarly hold that Appellees' claim under KRS 216.515(19) also does not survive the death of Kenneth because it is not related to injury to Kenneth or his property. Because these claims expired at Kenneth's death, jury instructions regarding the claims were improper. Further, because the claims expired at Kenneth's death, there is no legal authority for an award of attorney's fees under KRS 216.515(26).⁸ There is also no legal authority for awarding attorney's fees under jury instruction 1A and jury question 1, seemingly lifted directly from an outdated federal regulation. Accordingly, we remand the circuit court's order

⁸ The Willows also asserts that the circuit court's award of attorney's fees was arbitrary. However, we need not reach that argument because we hold that the award of attorney's fees was improper under KRS 216.515(26).

awarding attorney's fees to Appellees for proceedings not inconsistent with this opinion.

II. Standing

Appellees argue that most of the arguments in The Willows' brief were waived because The Willows failed to plead lack of statutory standing as an affirmative defense with regard to Appellees' claims made pursuant to KRS 216.515. We disagree.

Although The Willows did not file an Answer to the Complaint, it filed a "Motion to Compel Arbitration Or, In The Alternative, Motion to Dismiss, In Part, For Failure to State a Claim Pursuant to CR^[9] 12." The motion was denied, and The Willows appealed to this Court for interlocutory relief. This Court denied the motion. In its Answer to the First Amended Complaint, The Willows asserted the affirmative defense that Appellees failed to state a cause of action upon which relief could be granted. The Willows moved the circuit court to dismiss the claims brought by Appellees under KRS 216.515 prior to trial and preserved all objections to inclusion of the claims. Further, The Willows moved for directed verdict at the close of Appellees' case in chief and at the close of all evidence again arguing, in part, that all claims under KRS 216.515 were improper

⁹ Kentucky Rules of Civil Procedure.

and expired upon Kenneth's death. The Willows also objected to inclusion of jury instructions for claims under KRS 216.515.

Accordingly, we hold that Appellees' ability to assert claims under KRS 216.515(19) and (22) did not present an issue of standing because the ability to assert the claims at all expired upon Kenneth's death. The Willows properly preserved all objections to inclusion of those claims, and Appellees' argument must fail.

III. Punitive Damages Instruction

The Willows argues that it was improper for the circuit court to give a punitive damages instruction against it for two reasons: (1) there was no evidence presented to the jury that The Willows authorized, ratified, or anticipated alleged conduct by employees to hold The Willows vicariously liable for punitive damages;¹⁰ and (2) there was insufficient evidence to support an award of punitive damages against The Willows. We disagree with both assertions.

The Willows' first assertion is tied to the change in medication order on January 21, 2014. The Willows argues that if one of its nurse employees fraudulently transcribed the order, that nurse was working outside the scope of employment at The Willows. Even if we accept this argument as true, we must still contend with The Willows' second assertion, that there was insufficient

¹⁰ KRS 411.184(3).

evidence to support an award of punitive damages against them. The record supports the finding of the jury that The Willows acted with gross negligence in other aspects unrelated to the medication order. For example, Appellees presented evidence that The Willows was licensed only as a personal care home. Expert testimony regarding Kentucky regulations for nursing homes was that all patients in a personal care home must be able to ambulate on their own and administer their own medication. Kenneth was unable to do either. Kenneth was admitted without a physician's order or assessment. His care plan was not complete and did not address what type of diet he would follow as a diabetic. Although a nursing assessment was initialized by The Willows upon Kenneth's admission, it was incomplete. Appellees' experts testified that the drastic change in insulin medication should have presented a red flag to any prudent nurse, yet it did not alert the on-site nurses who personally attended to Kenneth. Nor did The Willows seek a medical evaluation of Kenneth even though he experienced at least one documented episode of hypoglycemia after the medication change. The Willows failed to notify the family regarding the new dose of insulin that Kenneth would receive under the change in medication order. We note that The Willows has never argued that it should not be held vicariously liable for the actions of Nurse Barnes, who, according to her own nurse's note, administered oral glucose to Kenneth while he was unconscious. Rather, The Willows sought to present evidence that,

despite the contents of the nurse's note, Nurse Barnes actually administered glucose to Ken intramuscularly.

There was no error in presentation of a punitive damages instruction to the jury, as it was predicated upon a finding that The Willows failed to exercise reasonable care. The instruction clearly set forth the standard of proof and instructed that there must be an additional finding of gross negligence, meaning a reckless disregard for the lives, safety, and property of others. The jury found gross negligence on the part of both Bluegrass and The Willows.

Accordingly, we conclude that the jury instructions related to punitive damages were properly submitted to the jury and that there was sufficient evidence to support an award of punitive damages against The Willows.

IV. Punitive Damages Award

The Willows argues that the \$100,000 punitive damages award was excessive and in violation of the Due Process Clause of the Fourteenth Amendment. We disagree.

In considering the constitutionality of an award of punitive damages, this Court is required to conduct a *de novo* review. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431, 121 S.Ct. 1678, 1683, 149 L.Ed.2d 674 (2001). The review is pursuant to *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed. 2d 809 (1996).

There are three criteria used to examine the amount of punitive damages: (1) the degree or reprehensibility of the defendant's conduct; (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages and the civil penalties authorized or imposed in comparable cases. The Willows argues only the degree of reprehensibility. Specifically, The Willows asserts that the jury instructions regarding punitive damages were erroneous because they did not include the four factors for determining reprehensibility as identified by the United States Supreme Court in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L.Ed.2d 585 (2003). These factors are whether: (1) the harm was physical rather than economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the conduct involved repeated actions or was an isolated incident; and (4) the harm resulted from intentional malice, trickery, or deceit, or mere accident. *Id.* at 419, 123 S. Ct. 1513. The Willows' argument misses the mark.

The United States Supreme Court enumerated these "guideposts" to be utilized by a *reviewing court*. *Id.* at 418, 123 S. Ct. 1513 (emphasis added). They are unrelated to jury instructions for punitive damages, which will necessarily vary from state-to-state and are defined by statute. In Kentucky, KRS 411.184 and KRS 411.186 "determine the level of punitive damages that Kentucky

will allow in different classes of cases and in any particular case and they require that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence.” *Ragland v. DiGiuro*, 352 S.W.3d 908, 916 (Ky. App. 2010) (internal citation and quotation omitted). In fact, the jury instruction for punitive damages in the instant action included each of the factors required for the jury's consideration as set forth in KRS 411.186(2).¹¹

The Willows goes on to argue that there “were no allegations of proof presented to the Jury [sic] arising to the reckless, outrageous, malicious or any other conduct qualifying as reprehensible under *State Farm*.” We disagree.

The first factor we must consider upon review of the degree of reprehensibility of The Willows' conduct under *State Farm* is whether the harm was physical rather than economic. The answer, clearly, is yes. The harm suffered by Kenneth was death.

The second factor we must consider is whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others.

The jury answered yes to this question and we are not inclined to disagree.

Kenneth was admitted without a physician's assessment or a physician's order. He

¹¹ These factors are: (a) The likelihood at the relevant time that serious harm would arise from the defendant's misconduct; (b) the degree of the defendant's awareness of that likelihood; (c) the profitability of the misconduct to the defendant; (d) the duration of the misconduct and any concealment of it by the defendant; (e) and any actions by the defendant to remedy the misconduct once it became known to the defendant.

was admitted without clarification of, or insistence upon, an accurate, current, and verified list of medications. He was admitted without certainty as to who was his primary care physician. A drastic change in his insulin medication took place at The Willows less than 24 hours after his admission. This change was made without an evaluation by a physician or nurse practitioner. The record also shows that Kenneth was administered glucose by mouth while unconscious at The Willows. Expert testimony revealed that oral administration of glucose is contraindicated in an unconscious patient. Although expert medical opinion differed somewhat, Appellees' medical expert, Dr. Terrance Baker, testified that he believed the cause of death was aspiration pneumonia, caused by the orally-administered glucose entering Kenneth's lungs.¹² Appellees' other medical expert, Dr. Joel Zonszein, opined that multiple factors contributed to Kenneth's death, including profound and repeated episodes of hypoglycemia over several days as a result of the change in medication.

The next factor is whether The Willows' conduct involved repeated actions or was an isolated incident. From the time of Kenneth's admission, the record shows a series of misconduct on the part of The Willows. Even if Nurse

¹² Central Baptist Hospital included encephalopathy as a diagnosis at the time of Kenneth's death. Dr. Baker testified that this was likely due to profound hypoglycemia (*i.e.*, blood sugar below 50 for an undetermined amount of time while Kenneth was at The Willows prior to arrival of emergency medical personnel).

Practitioner Osborne was untruthful in her testimony and she, in fact, changed Kenneth's medications while on the telephone with Nurse Barrow, The Willows' misconduct continued after the medication order was given.¹³ There was expert testimony regarding the number of missed opportunities by The Willows to correct the drastic over-medication of Kenneth, including more frequent blood glucose monitoring, notifying Dr. Richard and consulting with the VA. The high insulin dosing continued over several days without notification to Dr. Richard or Nurse Practitioner Osborne, despite episodes of hypoglycemia. Appellees also presented evidence that The Willows was previously cited by Kentucky's Office of Inspector General for medication errors.

The final factor is whether the harm resulted from intentional malice, trickery, or deceit, or mere accident. Appellees presented evidence that The Willows promised a level of care for Kenneth that it was neither able nor licensed to provide. Appellees were quoted a rate of \$6000 per month, private pay, for Kenneth to stay at The Willows for "memory care." Yet, Appellees provided evidence that The Willows was licensed as a "personal care home" which requires a much lower level of skilled care under Kentucky regulations. This evidence was unrefuted by The Willows.

¹³ The jury clearly believed that Nurse Practitioner Osborne did give the medication order, based on the apportionment of damages, including punitive damages.

There was substantial evidence presented to the jury that each of the actions taken (or in some instances, not taken) by The Willows played a role in causing Kenneth's death. We conclude that the evidence of the degree of reprehensibility of The Willows was substantial.

Finally, The Willows argues that the award grossly exceeded the permissible constitutional ratio between punitive damages and compensatory damages. We disagree.

The jury awarded \$34,161 in compensatory damages for medical and hospital expenses (15% of that apportioned to The Willows, or \$5124.15).

Although the family still paid Kenneth a modest salary¹⁴ and he received rental income of \$96,000 per year from warehouse property, the jury declined to award compensatory damages for destruction of Kenneth's power to earn money. This is likely due to Kenneth's age and the jury's belief that he no longer had the capacity to earn a living. The jury also declined to award compensatory damages for pain and suffering. The punitive damages award was also apportioned, with \$1,250,000 from Bluegrass and \$100,000 from The Willows. The punitive damages award apportioned to The Willows was roughly nineteen and one-half times the amount of compensatory damages apportioned to them. While The Willows argues that this is impermissibly excessive, there is no mathematical bright line rule for

¹⁴ Kenneth opened numerous grocery stores in Kentucky beginning in 1979, and eventually transferred control of the business to his sons.

comparing punitive and compensatory damages. *Gore*, 517 U.S. at 582, 116 S. Ct. 1589.

The purpose of punitive damages is to punish and deter a defendant's misconduct. Obviously, the jury determined that awarding an amount of punitive damages under \$100,000 would insufficiently punish and not have a deterrent effect on the conduct of The Willows. What may be deemed a "reasonable ratio [of compensatory versus punitive damages] in one instance may frustrate this purpose if a plaintiff's compensatory damages are particularly small." *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 55 (Ky. 2003). "Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." *Gore*, 517 U.S. at 582, 116 S. Ct. 1589.¹⁵ Like *St. Joseph Healthcare, Inc.*, this case presents the very circumstances contemplated in *Campbell* and *Gore* as an exception to the single-digit ratio

¹⁵ See also *Ragland*, 352 S.W.3d at 921 (Ky. App. 2010). "Indirectly, the [United States] Supreme Court is telling us that the ratio analysis, in essence, is a multiplication problem, *i.e.*, punitive damages equals the compensatory award times the ratio written as a fraction, in this case [19.5/1]. Generally speaking, due process will not permit both factors to be 'substantial' because of the enhancing properties of the multiplication process. However, when either the compensatory award or the ratio is relatively low, the resulting product—the punitive award—is markedly reduced and constitutionally palatable The effect of factoring in a multiplication equation is dramatic when both the multiplier [the ratio] and the multiplicand [the compensatory award] are substantial. This is why a higher ratio is constitutionally acceptable when the compensatory award is lower and, as noted below, *vice versa*." In *Ragland*, this Court held that a punitive damage award of \$60 million was excessive where \$3.3 million in compensatory damages were awarded in a wrongful death action against decedent's murderer.

limitation. First, the conduct by The Willows that led to Kenneth's rapid decline and death was offensive, thus justifying in the minds of reasonable jurors a greater award of punitive damages. Second, Kenneth was 87 years old when admitted to The Willows, in very frail health, with little in the way of economic prospects. The compensatory damages that would ordinarily arise from Kenneth's injury would correspondingly be exceedingly small. "It is axiomatic that the amount of punitive damages varies directly with the egregiousness of the offensive conduct." *Saint Joseph Healthcare, Inc*, 487 S.W.3d at 880. The confluence of the circumstances surrounding Kenneth's death inherently sets the stage for high punitive/compensatory damage ratio, well beyond the single-digit range. *Id.* Further, the record shows no indication that the jury's award of punitive damages was "so great as to strike the mind at first blush as being the result of passion and prejudice." *Koch v. Stone*, 332 S.W.2d 529, 532 (Ky. 1960). We hold that the egregious conduct of The Willows--for the brief time that Kenneth was a resident at the facility--combined with the minimal amount of compensatory damages to his estate, support the amount of punitive damages imposed by the jury.

CONCLUSION

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed in part, reversed in part, and remanded.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Edmund J. Benson
Christine Stanley
Lexington, Kentucky

**BRIEF AND ORAL ARGUMENT
FOR APPELLEES:**

Thomas K. Herren
Lexington, Kentucky

**ORAL ARGUMENT FOR
APPELLANTS:**

Edmund J. Benson
Lexington, Kentucky