

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON

Debbie Bannister, individually and as Personal Representative of the Estate of Hazel L. Clark,

2017-CP-04-00432
2017-CP-04-00431

Plaintiff,

v.

Mary Sims Touchton; Faith, Hope and Charity Retirement, LLC; and The Resting Place, LLC,

RECEIVED ORDER

AUG 02 2019

Defendants.

SC Court of Appeals

This matter is before the Court upon the motion of the Defendants Mary Sims Touchton, Faith Hope and Charity Retirement, LLC, and the Resting Place, LLC, for Dismissal of the entities Faith, Hope and Charity Retirement, LLC and The Resting Place, LLC, a judgment notwithstanding the verdict, a new trial absolute, and *Remittitur* of the jury's award of punitive damages.¹ This Court heard oral arguments of the parties and offered each party the opportunity to brief the matters before the Court. After considering carefully the arguments of counsel and the pleadings submitted to this Court, the Defendants' motions are hereby DENIED.

I. Motion for Dismissal Faith, Hope and Charity Retirement, LLC; and The Resting Place, LLC

Defendants argue that they are entitled to a dismissal of the two Limited Liability Corporation, (hereafter "LLC"), entities because they were not in existence at the time of Mrs. Clark's residency. Additionally, Defendants argue that because the entities are so entangled, that a dismissal of those entities would require a new trial. This Court disagrees.

As an initial matter, the Defendants raised the issue of the LLC entities being improper parties at the

¹ The Plaintiff's Motion for *Nisi Additur* was withdrawn.

conclusion of the case.² The date of the creation of these entities was known to the Defendants at all times since their creation. Plaintiff should not be prejudiced by the Defendants failure to disclose the information known to them at all times.

Mrs. Touchton testified that she operates the two facilities as a sole proprietorship and the only function of the LLC was to hold the DHEC license. The ownership of the buildings, the receipt of revenues from both facilities, the purchase of supplies, the payment of wages to employees, and every other operation is performed by Defendant Touchton in her individual capacity. Furthermore, because Mrs. Touchton is the sole member of both of the LLC's in this case, there is no prejudice in allowing the verdict and caption to stand with the named parties.

South Carolina has established that successor entities will be liable for the obligations of their predecessor entities in four situations:

- (1) When an agreement exists regarding assumption of debts;
- (2) Circumstances of the transaction equate to a consolidation or merger of the two entities;
- (3) The successor is a mere continuation of its predecessor (evidence of continuity of ownership *Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc. No. 2016-UP-168, 2016 S.C. App. Unpub. LEXIS 204 (Ct. App. Apr. 6, 2016)* ; or
- (4) The transaction was fraudulent or intended to wrongfully defeat the creditors' claims.

See Simmons v. Mark Lift Indus., Inc. 366 S.C. 308, 622 S.E.2d 213 (2005).

The evidence presented at the trial of this case shows clearly that exceptions, 2, 3, and 4 exist here. This Court finds that Faith, Hope and Charity Retirement, LLC, and The Resting Place, LLC, are the successor entities of the previous d/b/a or sole proprietorship of Defendant Touchton and are liable for the obligations of the

² Plaintiff pled that "at the time of the incidents giving rise to the Plaintiff's Complaints" Faith Hope and Charity Retirement, LLC and The Resting Place, LLC (collectively referred to as "Facility") were the entities to which Mrs. Clark was admitted and lived until her hospitalization. These allegations were admitted by the Defendants.

same. Therefore, this Court declines to dismiss the LLC entities or grant a new trial on this basis.

II. Motion for Judgment Not Withstanding the Verdict

Defendants argue that they are entitled to a judgment notwithstanding the verdict, (hereafter "JNOV"), a new trial *nisi remittitur*, or new trial absolute based on the excessiveness of the jury's verdict. This Court disagrees.

"In ruling on motions for directed verdict or JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. See *Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 187-89, 617 S.E.2d 125, 129-30 (Ct. App. 2005). The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Steinke v. South Carolina Dep't of Labor, Licensing & Reg.*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should have been denied. See *Jinks v. Richland County*, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003); *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). A motion for directed verdict may be granted only when the evidence raises no issue for the jury as to liability. See *Carolina Home Builders, Inc. v. Armstrong Furnace Co.*, 259 S.C. 346, 358, 191 S.E.2d 774, 779 (1972). In deciding whether to grant or deny a directed verdict motion, this Court is concerned only with the existence or nonexistence of evidence. See *Pond Place Partners, Inc.*, 351 S.C. at 15, 567 S.E.2d at 888.

In considering the evidence in a light most favorable to the Plaintiff, there was ample evidence presented at trial on each of the Plaintiff's claims on the issues of both liability, causation, and damages. The Defendants' Motion for JNOV is denied.

III. Motion for New Trial Absolute and *Nisi Remittitur*

A new trial absolute should be granted only if the verdict is so grossly excessive that it shocks the

conscience of the court and clearly indicates the amount of the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motive. *McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603 (1995); *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993). The jury's determination of damages is entitled to substantial deference. *McCourt, supra; Rush, supra*. "When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." See *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 530–31, 431 S.E.2d 557, 558 (1993) (citing *Easler v. Hejaz Temple*, 285 S.C. 348, 356, 329 S.E.2d 753, 758 (1985)). "When the verdict indicates that the jury was unduly liberal or conservative in its view of the damages, the trial judge alone has the power to [alter] the verdict by the granting of a new trial nisi." *Id.* at 531, 431 S.E.2d at 558 (citing *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993)). "However, when the verdict is so grossly excessive or inadequate that the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence, it becomes the duty of the trial judge and this Court to set aside the verdict absolutely." *Id.* (citing *Easler*, 285 S.C. at 356, 329 S.E.2d at 758). However, to grant such relief, the trial judge must state compelling reasons for invading the province of the jury. *Krepps v. Ausen*, 324 S.C. 597, 607, 479 S.E.2d 290, 295 (Ct. App. 1996). DISCRETION

There was undisputed evidence presented at trial that Mrs. Clark's economic damages were \$134,860.55. The jury awarded the exact amount of Plaintiff's economic damages. There was undisputed evidence introduced at trial regarding Mrs. Clark's suffering including the medical records of Mrs. Clark and the testimony of witnesses including, but not limited to, the Plaintiff, Chrissy Shortridge, Dr. Rajiv Joglekar, and Dr. Brett Woodard.

Recoverable damages in a wrongful death action include pecuniary loss, mental shock and suffering, wounded feelings, grief, sorrow, and loss of society and companionship. See *Ballard v. Ballard*, 314 S.C. 40,

443 S.E.2d 802 (1994). There was undisputed evidence presented at trial that Mrs. Clark's family had suffered grief and sadness at the loss of Mrs. Clark. This Court finds that \$100,000 awarded by the jury for wrongful death damages is not so grossly excessive as to shock the conscience of the court.

Therefore this Court finds that the damages awarded by the jury for the Survival Action and Wrongful Death Action are not grossly excessive, were not based on any improper motive of the jury and were consistent with evidence presented at trial.

The Defendants have argued that the punitive damages awarded by the jury are so grossly excessive as to shock the conscience. This Court has applied the factors set forth in *Gamble v. Stevenson* in considering the appropriateness of the jury's award. 305 S.C. 104, 111-12, 406 S.E.2d 350, 354-55 (1991). This Court has considered the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) "other factors" deemed appropriate. "The amount of damages, actual or punitive, remains largely within the discretion of the jury, as reviewed by the trial judge." *Fennell v. Littlejohn*, 240 S.C. 189, 125 S.E.2d 408 (1962). The *Fennell* court stated that its review was limited. *Id.*

Defendants have argued that the jury's award exceeds their ability to pay. A defendant's inability to pay does not prohibit a jury from awarding punitive damages. "The ability of the defendant to pay the punitive damages awarded is only one of eight factors. "[T]he trial court shall conduct a post-trial review and may consider the following..." *Id.* (emphasis added). *Gamble supra*. The word "may" signifies that the *Gamble* factors are to provide guidance, not "hard and fast" requirements. *Frazier v. Badger*, 361 S.C. 94, 603 S.E.2d 587 (2004). Moreover, the South Carolina Supreme Court has consistently held that an award of punitive damages "will not be overturned because a defendant is unable to pay. While a defendant's wealth is a relevant factor in assessing punitive damages, it is not necessarily controlling." *Hicks v. Herring*, 246 S.C.

429, 144 S.E.2d 151 (1965). There is "no requirement that the defendant be a man of means before the jury is justified in awarding punitive damages." *Norton v. Ewaskio*, 241 S.C. 557, 565, 129 S.E.2d 517, 521 (1963). A jury may consider a defendant's financial worth in determining the amount of punitive damages to award, but a jury is not required to make this consideration before it may award punitive damages. *Rogers, supra*.

The United States Supreme Court has held that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." See *State Farm Mut. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1521 (2003) (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 1598, 134 L. Ed. 2d 809 (1996)). The "economic bankruptcy" of a defendant "is not an absolute bar to the imposition of punitive damages in South Carolina under *Gamble, Hicks, Rogers, Charles, and Norton*. In a proper case, the jury may be instructed to consider "economic bankruptcy" as one factor in awarding punitive damages." *Welch v. Epstein*, 342 S.C. 279, 309, 536 S.E.2d 408, 424 (Ct. App. 2000).

Mrs. Touchton may or may not have the ability to pay a judgment. This Court finds that evidence was submitted to the jury that the Defendants were disingenuous about revenues and/or ability to pay. Moreover, the Defendants have attempted to transfer any meaningful assets in an effort to avoid liability to the Plaintiff.

The clear and convincing evidence presented at a trial of this case regarding the Defendants' conduct included, but is not limited to, the following:

- (1) Negligent hiring of untrained, unsupervised women with drug problems and criminal convictions – making them unsuitable to work around a population of vulnerable adults;
- (2) Failing to provide meaningful training in violation of clear DHEC regulations requiring training to occur annually;
- (3) Blatant and repeated violation of DHEC regulations with repeat offenses for violations regarding adequate staffing and training;

- (4) Blatant refusal to provide staffing consistent with DHEC regulations in an effort to cut costs;
- (5) Payment of wages below that which is required by law in an effort to cut costs and instruction of employees to be deceitful to DHEC inspectors if asked about staffing; and
- (6) Blatant and long-term efforts to minimize expenses at the cost of patient care and safety.

The clear and convincing evidence before the Court supports the modest punitive damage award that was awarded by the jury in this case. This Court finds that the punitive damage award is not grossly excessive, was not based on any improper motive of the jury and is consistent with evidence presented at trial. The Defendants' Motion for a new trial absolute or a new trial *nisi remittitur* is denied.

IV. Conclusion

For the reasons set forth above, this Court DENIES the Defendants' Motions for (1) Dismissal of the entities Faith, Hope and Charity Retirement, LLC and The Resting Place, LLC; (2) a judgment notwithstanding the verdict; (3) a new trial absolute; and (4) a new trial *Nisi Remittitur* of the jury's award of damages.

IT IS SO ORDERED.

R. Lawton McIntosh, Circuit Court Judge

July ____, 2019
Anderson, South Carolina



Anderson Common Pleas

Case Caption: Hazel Clark, Decedent , plaintiff, et al VS Mary Sims Touchton ,
defendant, et al
Case Number: 2017CP0400431
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S/R. LAWTON McINTOSH

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