

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-002183-MR

CAROLE RENFRO, Administratrix of  
the estate of MARGUERITE SERGESKETTER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE  
ACTION NO. 99-CI-002616

E.P.I. CORPORATION, d/b/a  
SUMMERFIELD MANOR

APPELLEE

OPINION  
AFFIRMING IN PART,  
REVERSING IN PART AND REMANDING

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BEFORE: COMBS, DYCHE, and JOHNSON, Judges.

COMBS, JUDGE. Carole Renfro, as administratrix of her mother's estate, appeals from a judgment of the Jefferson Circuit Court in favor of the appellee, E.P.I. Corporation, the owner and operator of Summerfield Manor Nursing Home (Summerfield). The judgment was entered following a jury trial on Renfro's claim that the nursing home was negligent in its care of her late mother, Marguerite Sergesketter.

Renfro argues that the trial court erred in excluding evidence of two surveys prepared by the Kentucky Cabinet for Health Services detailing a pattern of deficiencies in the care of patients at Summerfield. She further contends that the court erred in failing to submit an instruction on gross negligence. She finally argues that the court erroneously directed a verdict against her as to claims based on fraud and an alleged violation of KRS<sup>1</sup> 216.515(6). After a review of the record, we affirm in part and reverse in part and remand.

Mrs. Sergesketter suffered from Alzheimer's disease and a variety of other ailments. She spent most of the last year of her life as a resident of Summerfield. She was admitted to the nursing home in June 1997 and remained there until May 1998. At the time of her admission to Summerfield, Sergesketter had no decubitus ulcers -- commonly known as pressure sores or bedsores. However, after fracturing her hip in September 1997, she began to develop several bedsores. These sores became so aggravated that she was admitted to a hospital in January, again in March, and then in May of 1998 for surgical debridement (removal of dead tissue).

After the third debridement, Renfro did not return her mother to Summerfield but admitted her to Briarwood, another long-term care facility also owned by E.P.I. Mrs. Sergesketter

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<sup>1</sup> Kentucky Revised Statutes.

died in June 1998 from the complications of hypoglycemia and diabetes. The Certificate of Death listed "multiple decubiti" as a "significant condition" and a contributing factor (but not the cause) of her death.

In her complaint and amended complaint, Renfro alleged that Summerfield and two physicians, Dr. Manuel Brown and Dr. Dean Hack, were negligent in their care of her mother and that their negligence caused the development and the progression of bedsores. She sought damages for the considerable emotional and physical pain suffered by her mother as a consequence of their negligence. She also claimed that Summerfield violated KRS 216.515(6), a statute regulating care of residents of long-term nursing facilities. Finally, she also asserted a fraud claim, alleging that agents of the nursing home made "false, misleading and deceptive" statements about the level of care that Summerfield could provide to her mother.

Renfro settled her claims against the doctors prior to trial. The trial court dismissed that portion of Renfro's claim based on gross negligence prior to trial because she failed to provide any expert testimony before the discovery deadline in support of her claim of gross negligence. The remaining claims against Summerfield went to trial in October 2002.

Both Renfro and Summerfield presented the testimony of multiple expert witnesses on the issue of whether Summerfield breached the standard of care it owed to Sergesketter thereby resulting in the formation of bedsores. At the close of Renfro's proof, the trial court denied Summerfield's motions for a directed verdict. However, at the close of all the proof, it granted Summerfield's motion for a directed verdict on the fraud and statutory claims. It also denied Renfro's renewed motion for an instruction on gross negligence. The jury then returned a verdict in favor of Summerfield. A final judgment in favor of Summerfield was entered on October 11, 2002. This appeal followed.

Renfro first argues that the trial court erred in excluding evidence consisting of reports prepared by a state regulatory agency documenting the existence of problems in the care that Summerfield provided its patients. The surveys were conducted in 1997 and 1998 and reflected conditions at Summerfield both before and during the residency of Mrs. Sergesketter. The reports concluded that some residents (though not as yet Sergesketter) had developed "avoidable pressure sores" and that the facility "did not consistently provide routine preventative care including turning and positioning." Renfro contends that the trial court erred in excluding this evidence as follows:

There can be no clearer evidence of a breach of the standard of care than a governmental entity citing [Summerfield] for the very same injury claimed by [Renfro] that had been incurred in the very same manner by other similarly situated residents of the nursing home (*i.e.* bedsores developing on residents of the nursing home due to improper care after fracturing a hip).

(Appellant's brief, p. 6.)

Observing that the jury was not unanimous in its verdict in favor of Summerfield, Renfro argues that it may have been persuaded by credible evidence from a neutral regulatory agency bolstering the testimony of her expert witnesses. Renfro contends that the evidence that the nursing home had been cited by a state agency for similar deficiencies constituted relevant evidence as defined by KRE<sup>2</sup>401:

evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The surveys undoubtedly contained disturbing evidence of negligence supporting an inference that Summerfield may have been negligent in its care of Sergesketter. According to Renfro, the surveys demonstrated that Summerfield was on notice that it had problems with respect to bedsores and that, therefore, it should have foreseen likelihood of the same harm befalling her mother.

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<sup>2</sup> Kentucky Rules of Evidence.

The decision to admit or to exclude evidence is one committed to the sound discretion of the trial court. Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996). Absent a clear abuse of that discretion, we are required to defer to its evidentiary rulings. Id.

Relevance was not the only criterion for the court to consider on this ruling. Also at issue was KRE 404(b), which Renfro acknowledges as excluding evidence of other wrongs or acts. Such evidence generally is not admissible to prove that a third party (e.g., Summerfield) acted negligently.

[E]vidence of other acts, even of a similar nature, of the party whose own act or conduct. . . is in question. . . is not competent to prove the commission of a particular act charged against him, unless the acts are connected in some special way, indicating a relevancy beyond mere similarity in certain particulars.

Massie v. Salmon, Ky., 277 S.W.2d 49, 51 (1955)(quoting 20 Am.Jur., Evidence § 302).

The trial court also apparently relied upon KRE 403 in finding that the evidence was highly prejudicial and confusing and that its admission would unduly prolong the trial with the necessity for rebuttal evidence. That rule provides as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the

jury, or by considerations of undue delay, or needless presentation of cumulative evidence. KRE 403.

This case involves a close call as to the competing demand of our deference to the trial court in evidentiary matters *versus* a necessity of reversal upon a finding of abuse of discretion. Kentucky case law is silent on the issue of admissibility of such surveys. The appellant has cited us to highly similar scenarios in both Alabama (Montgomery Health Care Facility, Inc. v. Ballard, 585 S.2d 221 (Ala 1990)) and Texas (Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887 (Tex. 2000)). In both of those cases, the Supreme Courts of each state allowed state-conducted surveys to be admitted into evidence solely to demonstrate that a nursing home was on notice of conditions giving rise to bedsores, utilizing a carefully tailored limiting instruction as to the existence of notice of the alleged negligence.

As noted above, the court relied on KRE 401 and KRE 403 in rejecting Renfro's motion to utilize the surveys. We believe, however, that it failed to accord proper weight or consideration to KRE 404(2)(b), which provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:  
(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge,

- identity, or absence of mistake or accident; or
- (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.  
(Emphases added).

Under the circumstances of this case, we hold that it was indeed an abuse of discretion for the trial court to refuse to allow the appellant to utilize the surveys under the knowledge/notice exception. They were "so inextricably intertwined with other evidence essential to the case" as to render the exclusion reversible error even under the highly deferential standard governing our review. Any possible prejudice was mitigated -- if not wholly dispelled -- by the fact that the surveys were compiled by a non-party, a state regulatory agency, and that they were not prepared by an expert in anticipation of this litigation. We cannot agree that their inclusion would unduly burden the trial court as to time required for rebuttal evidence. The quest for truth in a trial demands that all necessary time be allotted for proper consideration of all relevant evidence. Therefore, we reverse the ruling of the trial court on this evidentiary issue.

Renfro next argues that the trial court erred in summarily dismissing her claim of gross negligence prior to trial. The court reasoned that expert testimony was necessary



in order to present the issue of medical negligence to the jury and that, therefore, expert evidence was also required to support a jury finding of gross negligence. Renfro contends that whether Summerfield's negligence rose to the level of gross negligence was an issue for the jury and that there is no requirement that she support her claim of gross negligence with expert testimony. We agree that Renfro was entitled to present this issue to the jury and that the trial court erred in its premature dismissal of this issue -- especially in light of our previous ruling on the admissibility of the state surveys.

Renfro also argues that the trial court erred in directing a verdict on her claims that Summerfield fraudulently misrepresented its ability to care for her mother in the first instance, essentially misrepresenting its ability to treat her many medical problems from the initial instance of her admission. This issue is governed by the standard of sufficiency of the evidence rather than the standard of abuse of discretion. Therefore, we must consider whether the court correctly determined that there was insufficient evidence to allow the jury to render a verdict on the issue of fraud.

When faced with a motion for a directed verdict, the trial court must consider the evidence in its strongest light in favor of the party against whom the motion was made and must give him the advantage of every fair and reasonable intendment that the evidence can justify.

Lovins v. Napier, Ky., 814 S.W.2d 583 (1968). In general, a trial court may not enter a directed verdict unless there is a complete absence of proof on a material issue. On appeal, it is the function of this Court to consider the evidence in the same light. Id.

In Kentucky, there are six elements of fraud that must be established by clear and convincing evidence. UPS v. Rickert, Ky., 996 S.W.2d 464, 468 (1999). Renfro does not cite this Court to any specific testimony in the record in support of her fraud claim. After reviewing the videotapes of the entire trial, we have not discovered any basis to challenge the ruling of the trial court as to Summerfield's motion for a directed verdict. Thus, we find no error in the court's dismissal of this claim.

Renfro last argues that the court erred in directing a verdict on her claim that Summerfield violated KRS 216.515(6). This statute regulates the right to adequate care to be safeguarded for residents of a long-term care facility and provides in pertinent part that they:

shall be free from mental and physical abuse, and 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.

In considering the statutory language, the trial court relied on the Legislature's definition of *abuse* as meaning the "infliction of physical pain, mental injury, or injury of an adult." KRS 209.020(7). We agree with the court's interpretation of the statute as providing civil remedies to those who prove intentional or grossly negligent abuse in the statutory sense rather than to those who may have suffered the results of common law negligence. We find no error on this issue.

The judgment of the Jefferson Circuit Court is affirmed in part and vacated in part and remanded for a new trial consistent with this opinion.

DYCHE, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT.

BRIEF AND ORAL ARGUMENT FOR  
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