2002 WL 33946864 (Ala.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Alabama.
Mobile County

Gregory E. PALMER, as Administrator of the Estate of Dolly Palmer, Deceased, Plaintiff,
v.
BEVERLY HEALTH AND REHABILITATION SERVICES, INC., d/b/
a Beverly Healthcare-Mobile (formerly Bay Manor Health Care), Defendants.

No. CV-00-2775.
April 16, 2002.
March 29, 2002.

Plaintiff's Response to Defendants' Motion for New Trial, or in the Alternative, for Remittitur

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The Plaintiff moves this Court to deny the Defendant's Motion for New Trial, or in the Alternative, for Remittitur, and files this brief and argument in support thereof.

I. Introduction and Applicable Law

The granting or denial of a motion for a new trial rests largely within the discretion of the trial court. *Gold Kist, Inc. v. Tedder*, 580 So. 2d 1321, 1322 (Ala. 1991). The right to trial by jury is a fundamental right guaranteed by the Constitution. Thus, a jury verdict cannot be set aside unless it is flawed. Art. I, Sec. 11, Ala. Const. of 1901. A trial judge may grant a new trial only on the grounds that an error of law occurred at the trial if the issue was properly preserved. Ala. R. Civ. P. 59; Ala. Code Sec. 12-13-13 (1975). The appropriate inquiry is whether the jury verdict, although it is supported by some evidence, would be palpably wrong and manifestly unjust. *Bradford v. Kimbrough*, 485 So. 2d 1114 (Ala. 1986). The Defendant cannot meet this burden, thus, its motion for a new trial is due to be denied.

II. Weight of the Evidence.

The Defendant asserts that the Plaintiff failed to produce legally sufficient evidence to support the essential elements of both the breach of contract and wrongful death counts. The Plaintiff incorporates herein the arguments stated in his response to Defendant's Renewed Motion for Judgment as a Matter of Law. The Plaintiff clearly produced substantial evidence as to each and every element of both counts upon which the jury verdict was entered.

III. Testimony of Lola Walker Cook.

The Defendant argues that the testimony of Lola Walker Cook and the State Department of Public Health report prepared by her were improperly admitted into evidence. Ms. Cook was an investigator with the Department of Public Health, and she investigated the events surrounding Dolly Palmer's death.

First, the Defendant asserts that Ms. Cook's testimony was “improper expert testimony”. The Defendant interestingly fails to cite which portion of Ms. Cook's testimony it asserts was “expert” testimony. Ms. Cook was simply a “fact” witness. Further, the Defendant appears to indicate that Ms. Cook was a “surprise” witness, when in fact, her position as a potential fact witness has been known to the Defendant since she visited its facility on July 18, 2000. It is interesting to note that the Defendant does not attack the substance of any alleged “opinions” given by Ms. Cook or her qualifications to render an opinion. The Defendant sole basis for the disallowance of Ms. Cook's testimony is the fact that she was a “back door expert”.

Ms. Cook was disclosed on the Plaintiff's witness list. The Plaintiff had not retained Ms. Cook as an expert and was under no duty to disclose her as such. The Defendant deposed Ms. Cook, and its counsel had the opportunity to ask her any question that they wished. Additionally, they had the opportunity to depose her supervisor or any other member of the Alabama Department of Public Health, or call them as witnesses at trial, should they have chosen to do so. The Defendant wants this Court to set aside a valid jury verdict simply because they failed to “do their homework” by determining what this witness would say prior to trial. This is not a valid ground for setting aside the jury's verdict.

Second, the Defendant contends that the report prepared by Ms. Cook in her official capacity as a representative of the Department of Public Health was inadmissible. Alabama Rules of Evidence, Rule 803(8) provides:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, when offered against the defendant in criminal cases, matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the state or governmental authority in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

This is commonly referred to as the “public record” exception to the hearsay rule. Alabama has long recognized copies of public records as qualifying within an exception to the hearsay rule. See *Gamble's Rules of Evidence* (Author's Statement of Rule 803(8)). This exception to the hearsay rule is found in both the Alabama Rules of Civil Procedure (Ala.R.Civ.P.44) and statute (Ala.Code Sec. 12-21-35, (1975). This subdivision recognizes the admissibility of records, reports, statements, or data compilations setting forth the “activities of the office or agency.” Such admissibility has long been recognized at common law. See *Chesapeake & Del. Canal Co. v. United States*, 250 U.S. 123 (1919); *Ballew v. United States*, 160 U.S. 187 (1895). Matters observed by a public official, set forth in a public record or report, are admissible if the official was under a duty to report such matters. Further, an evaluative report is not rendered inadmissible just because it contains opinions or conclusions. Ala.R.Evid. 803(c) (Advisory Committee's Notes).

The report which was introduced into evidence was clearly a report setting forth Ms. Cook's activities as an employee of the Department of Public Health. R. 64-65. Further, Ms. Cook made her observations pursuant to her duty to investigate the incident involving Dolly Palmer. R.65. The very basis for the admission of this report was established by this Court in its independent voir dire of the witness. R. 65. Additionally, as noted by this Court during argument concerning the admissibility of the report, the report is clearly admissible pursuant to the holding in *Montgomery Health Care Facility, Inc. v. Ballard*, 565 So.2d 221 (Ala.1990).

The Defendant takes the further position that Ms. Cook's report “lacked trustworthiness” due to the lapse of time between the incident and her investigation. While admissibility is assumed if the requirements of Rule 803(8)(C) are met, the trial judge is vested with discretion to exclude factual findings if “the sources of information or other circumstances indicate lack of trustworthiness.” To support this contention, the Defendant has offered no evidence other than its bare assertion that the “lapse of time” between the incident and the investigation somehow make the report not trustworthy. The lapse of time no more affects the trustworthiness of the report than it did the testimony of the witnesses at trial. As a matter of fact, the witnesses' memories were probably fresher at the time of Ms. Cook's investigation than they were well over a year later at the trial.

Finally, the Defendant states that Ms. Cook's report contains "hearsay within hearsay". Alabama Rules of Evidence Rule 801(d)(2) provides that:
(d) Statements That Are Not Hearsay. A statement is not hearsay if--

(2) Admission by Party Opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or ***(C) a statement by a person authorized by the party to make a statement concerning the subject***, or ***(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship***, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy, (emphasis added).

The Defendant fails to state which portions of the report are "hearsay within hearsay". However, the report only contains statements made to Ms. Cook by employees/agents of the Defendant. These statements are not hearsay because they clearly fall within two of the aforementioned categories of "non-hearsay" statements: 1) the employees were authorized by Defendant Beverly to make the statements, and 2) the employees gave the statements concerning a subject matter with the scope of their agency/employment. See Alabama Rules of Evidence Rule 801(d)(2). Therefore, these statements were "non-hearsay statements".

The testimony of Lola Walker Cook and her report prepared in her official capacity as an employee of the Alabama Department of Public Health were clearly admissible. The Defendant has offered no argument or evidence which would justify a new trial based upon the admission of the testimony or the report.

III. Remittitur.

A. *Compensatory Damages*.

The Defendant asks this Court to order a new trial or remittitur of the compensatory damages award based upon the jury's assessment of liability on the breach of contract count. As previously stated in Plaintiff's response to the Defendant's Renewed Motion for Judgment as a Matter of Law, the breach of contract claim arises from the Defendant's failure to provide "routine nursing care" as stated in the parties' agreement. In their motion for remittitur, the Defendant focuses on only two (2) aspects of the damages suffered by the Plaintiff, i.e. a 1-inch cut to Dolly Palmer's forehead and a bruise to her forehead. However, the damages resulting to Dolly Palmer from the Defendant's failure to provide routine nursing care go far beyond these two injuries.

The Defendant's failure to provide routine nursing care resulted in the following damages and/or injuries to Dolly Palmer:
• Palmer fell six (6) times on her first night in the facility (R-119; R-167);

• Palmer was deprived of food on several occasions (R-139);

• Palmer went several days at a time without a bath (R-140);

• Palmer suffered a hematoma on her head the size of an egg as a result of the final fall (R-182).

These insults when visited upon anyone, especially an 89 year old lady in poor health, carry significant pain, suffering and mental distress in addition to the physical damage. Based upon these damages, a substantial compensatory verdict was justified.

Alabama has long recognized that pain and suffering naturally flows from a personal injury and may be recoverable in a suit for damages. See C. Gamble, *Alabama Law of Damages* § 36-3 (3d. ed. 1994); A.P.J.I. 11.04 (read to the jury). Further, Alabama has long permitted recovery for damages for mental suffering where the suffering is accompanied by some physical injury. See *Macke v. Sufferer*, 141 So. 651 (Ala. 1932). The Alabama Supreme Court has consistently held that "there is no fixed standard or yardstick for the ascertainment of compensatory damages for physical pain, and the assessment of the amount due is left to the sound discretion of the jury". M. Roberts and G. Cusimano, *Alabama Tort Law* (3d ed.); *Alabama Power Co. v. Mosely*, 318 So.2d 260 (1975); *Stringfellow v. Rambo*, 170 So.2d 494 (1965).

The Defendant, without any proof, asserts that the jury somehow "misunderstood the law". There is no basis for this assertion, and the Defendant is merely seeking to substitute its reasoning for that of the jury. The Defendant further asserts that the compensatory award is excessive. The Court's role in addressing an argument that a compensatory damage award is excessive has been stated as follows:

> When a court is assessing whether compensatory damages are excessive, the focus is on the plaintiff. A court reviewing a verdict awarding compensatory damages must determine what amount a jury, in its discretion, may award, viewing the evidence from the plaintiffs perspective. There is no fixed standard for ascertaining what are adequate compensatory damages for mental anguish. A determination of how much to award is left to the sound discretion of the jury, subject only to correction by the court if the jury clearly **abused** its discretion or was improperly influenced by passion or bias. ***When there is no evidence before the court of any misconduct, bias, passion, prejudice, corruption, or improper motive on the part of the jury, or when there is no indication that the jury's verdict is not consistent with the truth and the facts, there is no statutory authority to invade the province of the jury in awarding compensatory damages.***

Pitt v. Century II, Inc., 631 So.2d 235 (Ala.1993); *Prudential Ballard Realty Co. v. Weatherly*, 792 So.2d 1045 (Ala.2000) (emphasis added). There has been no such evidence offered in this case, other than the speculation of the Defendant.

The Defendant cites several cases in comparison to support their assertion that the compensatory damage award is excessive. While Plaintiffs counsel feels that such a comparison provides little instruction and guidance on this issue, counsel will cite the following cases involving compensatory awards:

• *Pacifico v. Jackson*, 562 So. 2d 174 (Ala. 1990) ($1,650,000 medical malpractice verdict not remitted);

• *Williston v. Ard*, 611 So. 2d 274 (Ala. 1992) ($4,500,000 verdict for brain damaged, blind child not remitted; $1,000,000 verdict for child's mother remitted to $409,866.78);

• *Precise Eng'g, Inc. v. LaCombe*, 624 So. 2d 1339 (Ala. 1993) ($2,700,000 award for injuries not remitted);

• *Ledbetter v. United Ins. Co. of Am.*, 845 F. Supp. 844 (M.D. Ala. 1994) ($751,117.12 verdict for defamation and conversion not remitted);

• *Torsch v. McLeod*, 665 So. 2d 934 (Ala. 1995) *($3 million non-jury award for operating on the wrong eye remitted to $2 million)*.

Quite simply, the damages suffered by Dolly Palmer were such as cannot be stated on a "balance sheet", and that is the precise reason the jury system was developed. The jury in this case heard competent evidence and used its collective wisdom to render a verdict according to that evidence. That compensatory award should not be disturbed.

B. *Punitive Award.*

The Defendant argues that it is entitled to a new trial or a remittitur of the punitive damages award because the award is excessive and against the great weight of the evidence. In its brief, the Defendant states that the "maximum" punishment it should receive is $250,000.00. This value placed on the life of a dependent, **elderly** woman by the Defendant, accurately reflects the insignificant value this Defendant placed on providing proper care and supervision for Dolly Palmer. Under Alabama law, the Plaintiff was only entitled to an award of punitive damages on his wrongful death claim. The intent of Alabama's wrongful death statute is to preserve human life, deter future conduct and punish the defendants for their wrongful conduct. See *Ex parte Cincinnati Ins. Co.*, 689 So. 2d 47, 50 (Ala. 1997). The jury's verdict in this case will further those stated purposes.

The Defendant seeks a remittitur of the jury's verdict arguing the excessiveness of the verdict. In *Cherokee Elec. Coop. v. Cochran*, 706 So.2d 1188 (Ala.1997) the Alabama Supreme Court, set out the method of conducting an analysis of a wrongful death punitive damages award. In Cherokee Electric, the Court applied the three *BMW v. Gore* "guideposts", as well as the guidelines set out in *Hammond v. City of Gadsden* and *Green Oil v. Hornsby*. The *Hammond/Green Oil/Gore* analysis set out below does not support a remittitur of the verdict in this case.

1. The Degree of Reprehensibility of the Defendants' Conduct (BMW v. Gore).

The Defendant asserts that if it is guilty of any wrongful conduct, it is mere negligence. However, the evidence in this case indicates otherwise. The evidence presented in this case clearly shows that the Defendant was guilty of wanton conduct.

Implicit in wantonness is an intention to act, or a ***conscious omission of duty with knowledge of the circumstances*** and with reckless disregard of the consequences. M. Roberts and G. Cusimano, *Alabama Tort Law* (3d ed.). Wantonness may exist even where a design or purpose to injure is absent, and the injury inadvertent, if the act is done in reckless disregard of its probably consequences. M. Roberts and G. Cusimano, *Alabama Tort Law* (3d ed.). In the present case, Dolly Palmer entered the Defendant's facility as a known fall risk. R. 78, R. 134. The Defendant knew from the hospital records, the transfer form and the nursing admission note that Dolly Palmer was at a high risk for falls. R. 78. Further, evidence presented at trial indicated that the Defendant violated its own policies and procedures by failing to document all of the falls suffered by Ms. Palmer on her first night of admission.

Even though it was armed with knowledge of Ms. Palmer's condition, the Defendant made no notation on the nurses' aide flow sheet concerning any interventions to be taken with Ms. Palmer. R. 81. In addition, the Defendant failed to take the following preventive measures:

• No side-rail padding was used. R. 91;

• No mattresses were placed around the complete floor area of Ms. Palmer's bed. R. 94;

• The Defendant did not move Ms. Palmer's bed closer to the nurses' station. R. 91; and

• No bed alarm was used to monitor Ms. Palmer. R. 94

The Defendant failed to develop an additional care plan to prevent Ms. Palmer from falling. R. 63. Additionally, the Defendant failed to reassess and change the interventions established for Ms. Palmer after having found her on the floor two times. R. 61. The Defendant was aware of the risk of Ms. Palmer falling upon her admission to the facility, and this risk became more apparent after she fell six times during the first evening she was in the facility. After the fall that ultimately led to Ms. Palmer's death, the Defendant concealed the fact that Ms. Palmer fell immediately prior to her death and suffered an egg-shaped hematoma on her head.

Based on the evidence presented at trial, there is no question that the Defendant was aware that Dolly Palmer was at a high risk for falls. The Defendant either failed to establish a plan of intervention or failed to follow any plan that was established. The Defendant clearly knew the resulting consequences from their failure to plan for and meet the needs of Dolly Palmer. As a result, the very consequence which Ms. Palmer's family sought to avoid by placing her in the Defendant's care occurred and resulted in her death. Therefore, the reprehensibility of the Defendant's conduct supports the jury's verdict in this matter. Because of the large number of nursing home residents vulnerable to the type of neglect found in this case, this verdict furthers the goal of punitive damages of discouraging others from similar conduct in the future. See *Montgomery Health Care v. Ballard*, 565 So. 2d 221 (Ala.1990)

2. Ratio of Punitive Damages to Compensatory Damages (BMW v. Gore).

The Plaintiffs death claim was brought under the Alabama Wrongful Death Statute which provides only for punitive damages. Therefore this factor is not applicable to this case.

3. ***Sanctions for Comparable Misconduct and Punitive Awards in Comparable Cases (BMW v. Gore).***

The Alabama Supreme Court has affirmed numerous wrongful death awards in the range of the jury's verdict in this case: *Lance v. Ramanauskas*, 731 So. 2d 1204 (Ala. 1999) (affirming wrongful death verdict for $4,000,000); *Montgomery Health Care Facility, Inc. v. Ballard*, 565 So.2d 221 (Ala.1990)($2,000,000 verdict in nursing home case not remitted); *Burlington Northern v. Witt*, 575 So.2d 1011 (Ala.1990)(approving trial court's remittitur of $15,000,000 verdict to $5,000,000); *Schulte v. Smith*, 708 So. 2d 138 (Ala. 1997) (affirming wrongful death verdict for $2,500,000 in medical malpractice case); *Cherokee Elec. Co-op v. Cochran*, 706 So. 2d 1188 (Ala. 1997) (affirming wrongful death verdict for $3,000,000); *Lemond Const. Co. v. Wheeler*, 669 So. 2d 855 (Ala. 1995) (affirming wrongful death verdict for $3,500,000); *Campbell v. Williams*, 638 So. 2d 804 (Ala. 1994) (affirming wrongful death verdict for $4,000,000 in medical malpractice action); Sears *v. Roebuck & Co. v. Harris*, 630 So. 2d 1018 (Ala. 1993) (affirming, conditionally, wrongful death verdict for $6,851,000); *GMC v. Johnston*, 592 So. 2d 1054 (Ala. 1992) (affirming wrongful death verdict for $7,500,000); *Killough v. Jahandarfard*, 578 So. 2d 1041 (Ala. 1991) (affirming wrongful death verdict for $2,500,000); *Alabama Power Co. v. Turner*, 575 So. 2d 551 (Ala. 1991) (affirming wrongful death verdict for $3,500,000); *Clardy v. Sanders*, 551 So. 2d 1057 (Ala. 1989) (affirming wrongful death verdict for $2,750,000); *Industrial Chemical & Fiberglass Corp. v. Chandler*, 547 So. 2d 812 (Ala. 1988) (affirming wrongful death verdict for $5,000,000); *Black Belt Wood Co. v. Sessions*, 514 So. 2d 1249 (Ala. 1987) (affirming wrongful death verdict for $3,500,000).

4. The Punitive Damages Award and the Actual or Likely Harm Caused (Hammond/Green Oil).

“Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.” *Green Oil*, 539 So.2d at 223 (quoting *Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050, 1062 (Ala. 1987). In this case the actual harm caused was “death”. This is an extremely grievous result. This result is even more shocking considering the fact that the Defendant is in the business of and was in charge of providing health care services to **elderly** individuals. It was the Defendant's failure to deliver these services in an acceptable manner which led to Dolly Palmer's death. The Defendant's failure to adhere to accepted standards could lead to further injuries and deaths of dependant, **elderly** individuals. The resulting harm in this case justifies a substantial award, and this fact is further sanctioned by this jury's verdict.

5. ***The Reprehensibility of the Defendant's Conduct (Hammond/Green Oil).***

This issue was previously addressed regarding the *BMW v. Gore* factors.

6. ***The Defendant's Profit from the Misconduct (Hammond/Green Oil).***

The Defendant charged Dolly Palmer substantial sums of money in exchange for skilled nursing care that was to be rendered. The Defendant accepted substantial amounts from Medicare for these services, and it failed to deliver many of the services it was required to render. Therefore, the Defendant has profited from its conduct by receiving funds for which no services were delivered to Dolly Palmer.

7. The Defendant's Financial Position (Hammond/Green Oil).

The Alabama Supreme Court has stated that a punitive damages award should sting, but should not destroy a defendant. *Green Oil*, 539 So.2d at 222 (quoting *Ridout's-Brown Service, Inc. v. Holloway*, 397 So.2d 125, 127-28 (Ala.1981)). The verdict in this case will not even be felt by the Defendant. Quite simply, this verdict will have absolutely no financial impact upon the Defendant because there is sufficient insurance coverage to satisfy the judgment.

Post-trial discovery in this matter has revealed that the Defendant has $27 million in liability insurance coverage to pay the verdict rendered in this case. The Defendant has the following insurance coverage for this verdict:
• $1 million - Beverly Indemnity, Inc.

• $1 million - Royal Surplus Lines

• $25 million - National Union (excess coverage)

The post-trial discovery has also revealed that any deductible, if any, will be paid by Beverly Enterprises, Inc. (the parent company of this Defendant). Further, all premium payments for these policies were made by Beverly Enterprises, Inc., and all future premium payments for liability insurance policies covering this Defendant will be paid by Beverly Enterprises, Inc.

Further, the Defendant's financial position does not weigh in favor of remittitur. Post-trial discovery seems to indicate that the Defendant ceased to own this facility in the year 2000 and does not presently have any assets. Assuming that the Defendant Corporation has no assets and is no longer affiliated with the facility, there can be no adverse effect to the Defendant. See *Montgomery Health Care Facility, Inc. v. Ballard*, 565 So.2d 221 (Ala.1990).

8. ***Costs of Litigation (Hammond/Green Oil).***

In a *Hammond/Green Oil* review, the court must consider whether the punitive-damages award was sufficient to reward the plaintiffs counsel for assuming the risk of bringing the lawsuit and to encourage other victims of wrongdoing to come forward. Green Oil, 539 So.2d at 223. To date, Plaintiff's counsel has incurred litigation expenses in excess of $80,000. (Plaintiff's counsel is prepared to provide the Court with an itemization of these expenses if requested). This action, being in the nature of a medical malpractice action, involved complicated legal and medical issues which required extensive time and effort to develop, while at the same time carrying a disproportionate amount of risk. The significant amount of time and expenses incurred in the pre-trial, trial and post-trial proceedings weigh against remittitur of the verdict.

9. Criminal Sanctions (Hammond/Green Oil).

This factor is not applicable to this case.

10. Other Civil Sanctions (Hammond/Green Oil).

This factor is not applicable to this case.

IV. Conclusion.

Defendants have failed to put forth any meritorious reasons in favor of their motions. The jury's decision should not be disturbed. As a result, the Defendant's motion is due to be denied.

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