To the Clerk: THIS IS A FINAL APPEALABLE ORDER.
Please serve upon all parties not in default for failure to appear; Notice of the Judgment and its date or entry upon the Journal

FILED
LORAIN COUNTY
2023 SEP 29 P 1:44
COURT OF COMMON PLEAS

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date Sept. 29, 2023 Case No. 20CV201448

ESTATE OF KESTER SAMPLES
Plaintiff

William B. Eadie
Plaintiff's Attorney

VS

LaGRANGE NURSING & REHAB, *et al.*
Defendants

Ernest W. Auciello
Defendants' Attorney

This matter is before the Court on the following motion and final issue pending; the Court rules as follows:

Defendants' Motion for Judgment Notwithstanding the Verdict, filed December 29, 2022 - **GRANTED.**

Accordingly, judgment is hereby entered in favor of Plaintiff and against Defendants in the total, final amount of $250,000.00 plus court costs and statutory interest from August 11, 2022.

IT IS SO ORDERED. See Judgment Entry. No Record.

JUDGE D. CHRIS COOK

cc: Eadie, Esq.
Auciello, Esq.

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JUDGMENT ENTRY
Hon. D. Chris Cook, Judge

Date Sept. 29, 2023 Case No. 20CV201448

ESTATE OF KESTER SAMPLES
Plaintiff

William B. Eadie
Plaintiff's Attorney

VS

LaGRANGE NURSING & REHAB, *et al.*
Defendants

Ernest W. Auciello
Defendants' Attorney

I. INTRODUCTION

This matter is before the Court on Defendants'[1] Motion for JNOV. Plaintiff has timely responded in opposition; Defendants filed a reply brief.

II) PROCEDURAL HISTORY

On July 10, 2020, Plaintiff, The Estate of Kester Samples ("Samples"), filed its complaint alleging nursing home malpractice and wrongful death against Defendant, LaGrange Nursing & Rehabilitation Center ("LaGrange"), and three other Defendants, hereinafter collectively referred to as LaGrange Nursing.

On July 25, 2022, pursuant to Civ. R. 53(C)(1)(c), the parties consented to the Court's Civil Magistrate, David Muhek ("Magistrate Muhek"), preside over the jury trial. On the same day, Samples moved to apply the higher damages caps contained in R.C. 2323.43.[2] The motion was denied, thus, Samples' damages for non-economic loss are limited to $250,000.00. R.C. 2323.43(A)(2).

On August 11, 2022, after a seven-day jury trial, Magistrate Muhek filed an entry noting jury verdicts in the amount of $500,000.00 in favor of Samples and against LaGrange on the survivorship claim, plus $250,000.00 in punitive damages.

Thereafter, subsequent to a series of evidentiary hearings, Magistrate Muhek awarded Samples the sum of $319,570.00 in attorneys fees and $1,319.24 in litigation expenses. Magistrate Muhek filed an entry noting these awards on December 1, 2022.

---

[1] Resolution of this final, outstanding motion constitutes a final order.
[2] LaGrange Nursing filed a cross-motion to enforce the lower caps.

On January 3, 2023, both parties filed direct appeals with the Ninth District Court of Appeals.[3]

On April 5, 2023, the Ninth District dismissed the appeals as this Court had not issued a final order or judgment.

The case was remanded to this Court and the outstanding motion ("JNOV") is now ripe for determination, as this Court recently entered judgment, pursuant to Civ. R. 53(C)(2), consistent with the Magistrate's journalized entries.[4]

It should also be noted of record that Magistrate Muhek retired on December 31, 2022. As such, this Court will proceed to rule on the pending motion JNOV.

III) LAW AND ANALYSIS

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The final issue ripe for determination is LaGrange's motion for JNOV. As discussed *infra,* the motion for JNOV is well-taken.

STANDARD OF REVIEW - JNOV

Decades ago, the Ohio Supreme Court enunciated the standard of review for evaluation of a Civ. R. 50(B) motion JNOV. That standard is still good law today.

> The test to be applied by a trial court in ruling on a motion for judgment notwithstanding the verdict is the same test to be applied on a motion for a directed verdict. The evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon either of the above motions. McNees v. Cincinnati Street Ry. Co. (1949), 152 Ohio St. 269; Ayers v. Woodard (1957), 166 Ohio St. 138, 140 N.E.2d 401; Civ.R. 50(A) and (B).

Posin v. A.B.C. Motor Court Hotel, 45 Ohio St.2d 271, 275, (1976).

---

[3] See: Consolidated Case Nos. 23CA011934/23CA011935.

[4] That Order was journalized on September 11, 2023.

In a recent decision, following that precedent, the Ninth District stated,

> The standard for granting a motion for judgment notwithstanding the verdict pursuant to Civ.R. 50(B) is the same as that for granting a motion for a directed verdict pursuant to Civ.R. 50(A). *Wagner v. Roche Laboratories*, 77 Ohio St.3d 116, 121 (1996), fn. 2, citing *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 318-319 (1996); and *Posin v. A.B.C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271, 275 (1976). Civ.R. 50(A)(4) states:
>
> > When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.
>
> Indeed, because both motions for directed verdict and judgment notwithstanding the verdict test the legal sufficiency of the evidence, this Court reviews them de novo, with no deference to the trial court's decision. *See Oster v. Lorain*, 28 Ohio St.3d 345, 347 (1986); *see also Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, ¶ 4.

Given v. Whirlaway Corp. 9th Dist. Lorain No. 19CV199160, 2022-Ohio-2251, at ¶ 17.

STANDARD OF REVIEW – PUNITIVE DAMAGES

An analysis of the propriety of an award of punitive damages naturally begins with an examination of the statute implicated, to wit: R.C. 2315.21, "Punitive or exemplary damages."

The pertinent subsections follow,

> (C) Subject to division (E) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:
>
> > (1) The actions or omissions of that defendant **demonstrate malice or aggravated or egregious fraud**, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

* * *

R.C. 2315.21(C)(1)&(2), emphasis added.

And,

> In a tort action, the burden of proof shall be upon a plaintiff in question, **by clear and convincing evidence**, to establish that the plaintiff is entitled to recover punitive or exemplary damages.

R.C. 2315.21(D)(4), emphasis added.

The takeaway from these two statutory subsections is that in order to support the award of punitive damages against LaGrange, Samples had to posit evidence that 1) LaGrange acted with malice or aggravated or egregious fraud; and, 2) that such evidence was demonstrated by clear and convincing evidence.

In a relatively recent decision by the Ninth District Court of Appeals that this Court is quite familiar with, the Ninth District discussed at length the standard of review when examining a punitive damages award.

> In Ohio, punitive damages may be awarded in tort actions involving fraud, malice, or insult. *Preston v. Murty*, 32 Ohio St.3d 334, 334, (1987). *See* R.C. 2315.21(C)(1) (requiring that the "actions or omissions of [the] defendant demonstrate malice or aggravated or egregious fraud" to recover punitive damages). In this case, there is no allegation of fraud or insult. Therefore, a punitive damages award in this case must be based on malice.

Gibbons v. Shalodi, 9th Dist. No. 19CA011586, 2019-Ohio-1910, at ¶ 52.

Similarly, in the case at bar, there is no evidence in the record that LaGrange engaged in any fraud or insult. As such, the punitive damages award is, like *Gibbons*, based on malice.

Regarding malice, in reliance upon Ohio Supreme Court precedent, the Ninth District noted,

> In *Preston*, the Ohio Supreme Court held that actual malice, a requisite component for a claim of punitive damages, is "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." (Emphasis omitted.) *Id.* at syllabus.

Gibbons, at ¶ 53.

The Ninth District, in reliance upon *Preston,* further defined malice as having a component of "deliberate or intentional" conduct.

> In conjunction with the various definitions of malice, *Preston* also considered the two policy reasons for awarding punitive damages: 1) to punish the defendant, and 2) to deter others from similar conduct. *Id.* at 335. *Preston* concluded that because punitive damages serve to punish the defendant and not to compensate the plaintiff, there must be "a positive element of conscious wrongdoing." *Id.* "This element has been termed conscious, deliberate or intentional. It requires the party to possess knowledge of the harm that might be caused by his behavior. *Id.*

Gibbons, at ¶ 55.

Finally, the Ninth District was clear in stating that conduct greater than simple negligence was required to sustain an award of punitive damages.

> In addition to defining the requisite mental state, *Preston* also held that misconduct greater than mere negligence is required. *Id.* at 335. "This concept is reflected in the use of such terms as 'outrageous,' 'flagrant,' and 'criminal.' " *Id.* at 335-336. There must be a "finding that the probability of harm occurring is great and that the harm will be substantial." *Id.* at 336. A possibility or probability of harm occurring is merely negligence, which does not give rise to malice. *Id.*

Gibbons, at ¶ 56.

ANALYSIS

At the outset, it should be noted that LaGrange does not challenge in its motion JNOV the (reduced) $250,000.00 verdict on Samples' survivorship claim, but only the verdict for punitive damages and by extension, the awards of attorneys' fees and litigation expenses. Accordingly, this Court's discussion will be confined to the issue of punitive damages, as without them there can be no award of attorneys' fees or litigation expenses.

The seminal question then becomes, was there *sufficient evidence*, when viewed in a light most favorable to Samples, to allow the claim of punitive damages to go to the jury.

This Court says no.

Determination of the issue turns on a circumspect review of the facts produced at trial, not a review of the probative value or weight of the evidence, and not on the credibility of the witnesses. Instead, the Court's focus is on whether Samples posited sufficiently clear and convincing evidence of actual malicious conduct during LaGrange's care and treatment of Kester Samples to justify the punitive damages claim going to the jury.

A detailed recitation of the facts is well-presented by LaGrange in its motion JNOV. The most important of those facts include the following: LaGrange provided nursing home care and treatment for Samples from December, 2015, through April, 2016. Samples passed on May 11, 2016.[5]

When Samples presented at LaGrange's facility, he was suffering from dementia caused by Alzheimer's disease. He was 85 years old, had impaired mobility, urinary retention secondary to bladder cancer, frequent urinary tract infections ("UTI"), hypertension, and coronary artery disease.

He required "around the clock" care and the implementation of several "Care Plans" to manage his multiple conditions including a Falls Care Plan, a Skin Breakdown Care Plan, and a Nutritional Care Plan.

Shortly after his admission to LaGrange, Samples contracted a UTI and began to lose weight. In February, 2016, he developed a pressure injury, which later healed and was treated pursuant to the Skin Breakdown Care Plan. This plan revealed that Samples was susceptible to skin breakdown as a result of a number of his physical maladies, including his impaired mobility, bowel incontinence, renal disease, cardiac disease, and bladder cancer. Numerous treatment modalities were implemented by LaGrange in order to minimize or treat these injuries.

At the same time, LaGrange was attempting to manage Samples' reduced appetite. Pursuant to his Nutritional Care Plan, LaGrange took steps to offer him fortified meals, nutritional supplements, and provided him with his favorite foods. Importantly, relative to this issue, LaGrange discussed with Samples' family placing a feeding tube to assist with his nutritional needs, but his family decided against this measure.

In March, 2016, Samples developed another pressure injury that required hospitalization. LaGrange conceded that there was a delay in identifying this injury, which ostensibly contributed to the jury verdict on his survivorship claim. He also suffered from another UTI and pneumonia and was hospitalized for ten days.

---

[5] References to the record are omitted herein as they are cited with clarity by both parties in their respective briefs.

Samples returned to LaGrange, but his condition deteriorated; he developed multiple infections, was not eating or drinking, and passed on May 11, 2016. The official cause of Samples' death was "Dementia, Alzheimer's Type."

THE MOTION FOR DIRECTED VERDICT

At the close of the case (Phase One – Liability/Damages), the trial court (Magistrate Muhek) reluctantly denied LaGrange's motion for directed verdict on Samples' punitive damages claim.

It should have been granted.

In its motion JNOV, LaGrange goes to some length to demonstrate that Samples "incorrectly" read Civ. R. 50(A) by reading an "*any evidence*" standard into the rule. In his response, Samples makes the rather strange argument, at first, that he did not need to produce "additional evidence" in order to survive directed verdict on his punitive damages claim. This argument is legally accurate, but inapplicable. The statute and case law regarding punitive damages is correctly discussed by Samples. If the evidence that he produced in Phase One of the trial was sufficient to overcome a directed verdict, so be it.

At no place in LaGrange's motion JNOV, however, does it make the argument that *because* Samples did not produce additional evidence in Phase Two of the trial, the claim fails. Instead, LaGrange argues that the evidence produced *in toto* by Samples, regardless of when produced, is insufficient as a matter of law.[6]

Samples next argues that because the parties agreed to bifurcate the damages phase from the punitive phase, LaGrange cannot now argue that the procedure they agreed to is improper. Again, this is a correct analysis of the law, but of no accord. At no time in its motion JNOV does LaGrange argue that there was some procedural defect or abnormality relative to the trial process. LaGrange's motion focuses on the sufficiency of the evidence as it relates to Samples' punitive damages claim, not how or in what manner that evidence was produced.

[6] LaGrange does observe at Page 12, Item 3, of its brief that Samples did not produce additional evidence in Phase II of the trial, but LaGrange does not argue that this fact alone is fatal to Samples' punitive damages claim.

LaGRANGE IS LIABLE FOR NEGLIGENCE ON SAMPLES' SURVIVORSHIP CLAIM BUT NOT LIABLE FOR HIS WRONGFUL DEATH

The jury verdicts in this case, and in particular, the specific jury finding of negligence, is important. Recall that the jury found in favor of Samples on his survivorship claim. In a jury interrogatory, it was determined that LaGrange was negligent because it failed to timely identify a skin wound. This led to the jury award of $500,000.00 (reduced to $250,000.00) for this negligence.

The jury did not, however, find that LaGrange's negligence was the cause of Samples' death, thus, they found in favor of LaGrange on Samples' wrongful death claim.

To that end, it appears that LaGrange's sole act of negligence that caused Samples to suffer during his life, but that did not cause his death, was LaGrange's untimely diagnosis of the skin wound. This single violation of the standard of care, when considered in harmony with all the evidence, does not demonstrate malice.

LaGrange took many steps, and provided substantial treatment modalities to Samples, to address his numerous infirmities. They had multiple "Care Plans" in place, got him to the hospital on at least two occasions, considered placing a feeding tube (which Samples' family rejected), and took great pains to address his nutrition.

When considering all of this evidence, even in a light most favorable to Samples, reasonable minds could not conclude, particularly based upon a heightened standard of clear and convincing evidence, that LaGrange acted with a state of mind characterized by, "hatred, ill-will, or a spirit of revenge." *Gibbons,* at ¶ 53.

The only remaining possibility upon which punitive damages liability could be based is a, "conscious disregard for the rights and safety of other persons . . ." *Id.*

But again, how can it be said that LaGrange displayed a "*conscious disregard*" for Samples' care? *Id.,* emphasis added. Negligent in failing to timely discover Samples' skin wound, absolutely, but "a positive element of conscious wrongdoing," that was "deliberate or intentional," no. *Gibbons,* at ¶ 55.

Moreover, consider what type of evidence the Ninth District requires to sustain an award of punitive damages.

> This concept is reflected in the use of such terms as '**outrageous**,' '**flagrant**,' and '**criminal**.' " *Id.* at 335-336. * * * A possibility or probability of harm occurring **is merely negligence, which does not give rise to malice**. *Id.*

Gibbons, at ¶ 56, emphasis added.

One final thought on the evidence that mitigates LaGrange's negligence and cuts in favor of directing out the punitive damages claim. Recall that the evidence quite clearly shows the following, as discussed *supra*.

> "When Samples presented at LaGrange's facility, he was suffering from dementia caused by Alzheimer's disease. He was 85 years old, had impaired mobility, urinary retention secondary to bladder cancer, frequent urinary tract infections ("UTI"), hypertension, and coronary artery disease.
>
> He required "around the clock" care and the implementation of several 'care plans' to manage his multiple conditions including a Falls Care Plan, a Skin Breakdown Care Plan, and a Nutritional Care Plan."

Given Samples' medical challenges when he presented to LaGrange, his multiple hospitalizations, his continuously declining condition, and, his ultimate inability to eat or fight off infections, it is no surprise that his care and treatment was challenging. Clearly, LaGrange's negligence caused Samples some amount of pain and suffering as he dealt with the untimely diagnosed skin wound – but this breach of care did not cause his death and the jury properly compensated Samples for that injury.

IMPLIED CONSCIOUS DISREGARD

At Pages 4-5, Section "C," of his Brief, Samples urges that conscious disregard can be inferred and that, ". . . the jury was allowed to, and did in fact infer, the Defendants' consciously disregard[ed] Mr. Samples' rights and safety." This assertion may or may not be accurate, but it is irrelevant because the issue should not have been presented to the jury in the first place. Put another way, if a jury addresses an issue that should not have been before it, how it arrived at its decision is of no accord.

Samples also urges that the failure of LaGrange to timely provide a wound vac and enough employees to care for him demonstrates malice. These facts certainly demonstrate negligence and no doubt contributed to Samples' pain and suffering, but they are subsumed by the negligence claim – independently, they do not raise to the level of malice.

THE "FALSE CHARTING" ALLEGATION

This Court does concede one argument in Samples' Brief that, if accurate, the Court finds troubling, to wit: the allegation of "false charting."[7] In support of this prong of his argument, Samples cites to "Joeng Trial Dep. Tr. At 92-93; 94." This is the Videoconference Trial Testimony of Mike Jeong, M.D., subject to cross, taken on July 8, 2022. *Contra* Samples' citation to the record, however, there does not appear to be any allegation, discussion, or accusation of false charting. There is testimony about the wound vac, MRSA infection, and the placement of a PEG tube, but nowhere is there any discussion or evidence of fraudulent or deceptive behavior by LaGrange.

Samples also cites the Court to "Trial Tr. Day 03 July 20, 2022, at 570-572." But this testimony is equally devoid of any *actual evidence* of false charting. True, the witness, Lisa Harris, on cross was asked about hypotheticals involving false charting, but there are no questions, allegations, or accusations, or for that matter, any evidence that there was in fact false charting. For instance, the following exchanges took place:

> Q And you do that, because **if staff is falsely charting** in records, that would be a breach of care?
>
> * * *
>
> Q And if you don't, **if you falsely chart** something has been done that wasn't done, or an assessment, you say something has been done that wasn't done, that would be false charting, fair?

Trial Tr. Day 03, July 20, 2022, pg. 570, lines 5-6; pg. 571, lines 4-7, emphasis added.

In fact, Samples' counsel conceded to the Court after an objection that this line of questions involved hypotheticals:

> Mr. Eadie: **It's a hypothetical** . . .

Trial Tr. Day 03, July 20, 2022, pg. 571, line 8, emphasis added.

[7] Plaintiff's Brief in Opposition, Pg. 6, Para 1.

Similarly:

> Q The reason you believe that is because **if people put things down in the records** that didn't happen . . .

Trial Tr. Day 03, July 20, 2022, pg. 571, lines 13-14, emphasis added.

And finally:

> Q **If a nurse** at Keystone Pointe documents care being provided that wasn't * * * **that would be false charting,** fair?

Trial Tr. Day 03, July 20, 2022, pg. 572, lines 1-5, emphasis added.

It goes without saying that this Court is not impressed with Samples' misrepresentation of the record relative to this consequential allegation. A charge of false charting of patient care is a serious matter that absolutely could demonstrate malice, particularly if the false charting was the proximate cause of an injury.

But here, the first citation to the record does not involve any discussion of false charting at all and the second deals only in hypotheticals. To that end, there is no actual evidence of false charting, and for Samples to distort the record before this Court in this manner is unfortunate and inapposite.[8]

In its Reply Brief, LaGrange addresses what it designates as, "Plaintiff's counsel misstates the record and, in doing so, misleads the Court."[9] LaGrange mentions the allegation of false charting along with other (alleged) instances of misrepresentation of the evidence not supported by the record, to wit: failure to follow treatment orders, expert evidence of violation of the standard of care, inadequate assistance, and neglect due to short staffing.

This Court declines to address the propriety of LaGrange's allegations of misrepresentation of the evidence of record regarding the last four examples because none of them, even considered *in pari materia*, demonstrate outrageous, flagrant, or criminal conduct sufficient to show actual malice. Conversely, intentionally falsifying medical records could indicate malicious behavior.

---

[8] Samples writes in his Brief in Opposition, "The jury heard evidence of many instances where Keystone staff . . . and false charting." Pg. 6, para 1. The record cited by Samples, however, is devoid of even a single instance or evidentiary reference to actual (as opposed to hypothetical) false charting.

[9] Defendants' Reply Brief, pg. 4, Item III.

Regardless, when considering the evidence as a whole, particularly when coupled with LaGrange's efforts to provide Samples care, despite the negligent failure to timely identify his skin wound, there is simply insufficient evidence, as a matter of law, even when considered in a light most favorable to Samples, that LaGrange exhibited malice in providing him treatment and care during his time at its facility.

One final observation.

Recall that Magistrate Muhek struggled to rule on LaGrange's motion for directed verdict and was, at least initially, inclined to grant it, before ultimately allowing the punitive damages claim go to the jury. Whether that is so because he was swayed by Samples' impassioned argument, or he misapplied the law, or he chose to submit what was obviously a close-call to the jury,[10] really doesn't matter. What does matter is that the decision not to direct out the punitive damages claim was a difficult one for Magistrate Muhek, and it is a difficult decision for this Court.

Nevertheless, the facts of this case as applied to the vast body of law on the issue compel this result.

IV. CONCLUSION

Based upon the foregoing, this Court finds that LaGrange's motion for judgment notwithstanding the verdict is apposite and should be granted. In short, Samples' punitive damages claim should not have gone to the jury. And had it not, there would have been no award of attorneys' fees or litigation expenses.

Still, this Court is painfully cognizant of the substantial impact its decision has on the outcome of the case. In reducing the original total award of $1,070,889.24 to $250,000.00, a more than 75% reduction, this Court has clearly and significantly invaded the province of the jury relative to the punitive damages verdict and consequent award by the Court of attorney's fees and litigation expenses.[11]

---

[10] It is a common practice of trial judges to submit to the jury an issue that is close. Better to allow the jury to decide in the first instance. Any errors can thereafter be corrected by the trial court or court of appeals, as opposed to facing a remanded case because an issue should have gone to the jury.

[11] Of course, the law mandated that the Court reduce the survivorship award from $500,000.00 to $250,000.00.

But harsh as this result is, the Ohio Rules of Civil Procedure, for better or worse, provide the vehicle (in this case, JNOV) to rectify the trial court's error in allowing the punitive damages claim to proceed and go to the jury. Given the facts and applicable law at issue, this Court is compelled to act accordingly.

The motion for judgment notwithstanding the verdict is well-taken and hereby GRANTED.

Accordingly, judgment is hereby entered in favor of Plaintiff and against Defendants in the total, final amount of $250,000.00 plus court costs and statutory interest from August 11, 2022.

IT IS SO ORDERED.

JUDGE D. CHRIS COOK

THIS IS A FINAL APPEALABLE ORDER