

Cite as 2009 Ark. 431

SUPREME COURT OF ARKANSAS

No. 08-834

BEVERLY ENTERPRISES, INC., ET AL.
APPELLANTS,

VS.

VALERIE KEATON, INDIVIDUALLY
AND AS ADMINISTRATRIX OF THE
ESTATE OF HERMAN JOHNSON
APPELLEE,**Opinion Delivered** September 24, 2009APPEAL FROM THE OUACHITA
COUNTY CIRCUIT COURT, SIXTH
DIVISIONNO. CV2005-282-6,
HON. DAVID F. GUTHRIE, JUDGE,DISMISSED WITHOUT PREJUDICE.**ANNABELLE CLINTON IMBER, Associate Justice**

Appellants Beverly Enterprises, Inc., Beverly Health and Rehabilitation Services, Inc., and Beverly Enterprises Arkansas, Inc., d/b/a Beverly Healthcare-Camden, appeal a judgment of the Ouachita County Circuit Court awarding Appellee Valerie Keaton, Individually and as Administratrix of the estate of Herman Johnson, Deceased, compensatory damages for negligence and punitive damages. Appellants allege in this appeal that the verdicts were excessive and the judgment for punitive damages violates Appellants' due process rights. They also claim that the circuit court erred in declaring unconstitutional the Civil Justice Reform Act's limitation on punitive damages, codified at Ark. Code Ann. § 16-55-208 (2003). Because the judgment does not adjudicate or dismiss all named defendants or claims, we must dismiss this appeal.

Appellee Valerie Keaton, individually and as administratrix of the estate of Herman

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Johnson, deceased, and on behalf of the wrongful death beneficiaries of Herman B. Johnson, filed an action against Appellants Beverly Enterprises, Inc., Beverly Health and Rehabilitation Services, Inc., and Beverly Enterprises Arkansas, Inc., d/b/a Beverly Healthcare-Camden. In her original complaint, Appellee alleged five claims: (1) Appellants violated the duty of care owed to Herman Johnson, a resident in one of Appellants' nursing home facilities, under the Arkansas Medical Malpractice Act, Ark. Code Ann. § 16-114-201 *et seq.* (2003); (2) Appellants violated their general duty to provide adequate and appropriate custodial care and supervision to Herman Johnson; (3) The inadequate care provided by Appellants violated Herman Johnson's rights under the Arkansas Long Term Care Resident's Rights Statute, Ark. Code Ann. § 20-10-1201 *et seq.* (1999); (4) Appellants deceived Appellee by representing that they would be able to properly care for Herman Johnson; and (5) Appellants violated the Arkansas Deceptive Trade Practices Act, Ark. Code Ann. § 4-88-101 *et seq.* (1995), in failing to inform Appellee that their facilities were deficient.

Appellee amended her complaint to add a breach-of-fiduciary claim against the three original Beverly defendants, as well as Beverly Indemnity, Ltd., and Beverly executives William R. Floyd, Douglas J. Babb, David R. Devereaux, Jeffrey P. Freimark, Cindy H. Susienka, Patrice K. Acosta, James M. Griffith, Patricia C. Killing, and Richard Skelly, Jr. Appellee also alleged that all of the above defendants, as well as Rubin Schron, Fillmore Capital Partners, LLC, Fillmore Strategic Investors, LLC, Pearl Senior Care, Inc., PSC Sub, Inc., and Geary Property Holdings, LLC, violated the Uniform Fraudulent Transfer Act, Ark.

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Code Ann. § 4-59-201 *et seq.* (1997).

On November 30, 2006, Appellee filed a motion for voluntary dismissal without prejudice of all claims asserted against Rubin Schron. The record does not reflect the entry of an order granting this motion. At a pretrial hearing on August 29, 2007, Appellee's attorney acknowledged that no wrongful-death claim had ever been alleged against any of the defendants. The parties also informed the circuit court that they had reached an agreement whereby Appellee would nonsuit all claims against all defendants with the exception of the claims alleged against the three Beverly defendants named in the original complaint.

On the first day of trial, September 4, 2007, the circuit court entered an order dismissing with prejudice Appellee's wrongful-death claim. Following the presentation of evidence and arguments, the case was submitted to the jury on interrogatories. As a result of the jury's responses to those interrogatories, judgment was entered against Appellants on November 2, 2007. The judgment reflects an award in favor of Appellee for compensatory damages on the negligence claims against all three original Beverly defendants, and an award of punitive damages against Beverly Enterprises, Inc. and Beverly Health and Rehabilitation Services, Inc. The circuit court also entered a separate order on November 2, 2007, declaring the Civil Justice Reform Act's limitation on punitive damages unconstitutional. However, the judgment on appeal does not adjudicate or dismiss the other named defendants or claims.

We therefore are unable to reach the merits of Appellants' arguments because the judgment is not final and appealable. An appeal to the Arkansas Supreme Court may only be

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taken from a final judgment or decree entered by the trial court. Ark. R. App. P.–Civ. 2(a)(1) (2009). The question of whether a judgment is final and subject to appeal is a jurisdictional question that this court will raise *sua sponte*. See *Schubert v. Target Stores, Inc.*, 2009 Ark. 89, at 3, --- S.W.3d ---. Arkansas Rule of Civil Procedure 54(b) provides in relevant part:

Absent the executed certificate required by paragraph (1) of this subdivision, any judgment, order, or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the judgment, order, or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all of the parties.

Ark. R. Civ. P. 54(b)(2) (2009). Thus, a judgment is not final if it has not adjudicated all the claims against all the parties. *Schubert*, 2009 Ark 89, at 3, --- S.W.3d ---. In the instant case, there is neither a final judgment as to all the parties and claims, nor is there a Rule 54(b) certification.

The voluntary dismissal of parties or claims in an action is governed by Ark. R. Civ. P. 41(a). It reads:

Subject to the provisions of Rule 23(e) and Rule 66, an action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court. Although such a dismissal is a matter of right, it is effective only upon entry of a court order dismissing the action.

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Ark. R. Civ. P. 41(a)(1) (2009). While this court has long held that a party has an absolute right to a nonsuit prior to submission of the case to the jury or the court, Rule 41(a) clearly indicates that nonsuits are not effective unless there is a court order dismissing the claim. This court has held that “a court order is necessary to grant a nonsuit and that the judgment or decree must be entered to be effective.” *Blaylock v. Shearson Lehman Brothers, Inc.*, 339 Ark. 620, 624, 954 S.W.2d 939, 941 (1997).

In the instant case, Appellee made a motion to nonsuit defendant Rubin Schron and declared in a pretrial conference that she was nonsuiting all claims against every defendant except for the three original Beverly defendants. However, the record on appeal does not reflect that the circuit court ever entered an order to this effect. The court’s September 4, 2007 order only dismissed Appellee’s claims in her capacity as a representative of the wrongful-death beneficiaries. Likewise, the judgment only resolved Appellee’s negligence claims with respect to Beverly Enterprises, Inc., Beverly Health and Rehabilitation Services, Inc., and Beverly Enterprises Arkansas, Inc., d/b/a Beverly Healthcare–Camden. The other claims Appellee alleged in her complaints have yet to be adjudicated or properly dismissed with respect to all named defendants.

Appeal dismissed without prejudice.

WILLS, E., not participating.

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