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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000128-MR

JAMES MEDICAL EQUIPMENT, INC.
AND DON JAMES

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 99-CI-01715

LOYIE ALLEN; BREATHE EASY, L.L.C. AND
MADISON HOME HEALTH, L.L.C.; SHARON
MORRISON COPELAND; REX ALLEN;
FRANKIE DOBSON AND RON HALL

APPELLEES

AND

NO. 2005-CA-000272-MR

LOYIE ALLEN AND
BREATHE EASY

CROSS-APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 99-CI-01715

JAMES MEDICAL/FOR YOUR HEALTH, LTD.
AND DON JAMES

CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND HENRY, JUDGES.

COMBS, CHIEF JUDGE: In this appeal, James Medical Equipment (JME) seeks to reinstate a judgment of the Jefferson Circuit Court that was set aside by subsequent orders of the court. The original judgment had awarded damages to JME for breach of fiduciary duty and for conspiracy to damage its business relationships. There is also a cross-appeal in which Loyie Allen and Breathe Easy contend that there was insufficient evidence of a conspiracy and that proof of damages was too speculative. After our review of the complex issues asserted by the numerous parties, we affirm the trial court.

JME is a medical equipment company founded in 1979 by Don James (James) and owned solely by him. JME's primary business was to provide home oxygen equipment to patients receiving Medicare benefits. In addition, James owned other affiliated medical companies in Taylor County -- e.g., DJ's Leasing and Sleep Labs. In 1993, James placed JME into an irrevocable trust, naming himself as the sole beneficiary. He remained actively involved in running the company, and he selected the initial trustees. After disagreements arose between James and those initial trustees, he appointed his nephew, Thomas James (a Washington, D.C., attorney), as the Trustee (Trustee) for JME.

The Trustee hired Sharon Morrison Copeland (Copeland) as chief executive officer of JME on July 14, 1997. The company

was experiencing serious financial problems in 1997-98. It was also undergoing an investigation for possible Medicare fraud due to transactions between and among companies owned by James. In January 1998, James began an active campaign to regain control of JME after the Trustee refused to pay him a substantial sum of money from the company's cash-strapped coffers. When he threatened to transfer JME's home oxygen clients to one of his other companies, the Trustee wrote him a letter advising that such a decision would have a negative effect on the Medicare investigation. James then filed suit against JME in the Taylor Circuit Court and asked that the trust be dissolved.

In August 1998, the Taylor Circuit Court decided that the trust should be dissolved and that control of the company would be returned to James. That transfer of control occurred on October 13, 1998. During the interval between August and October of 1998, Copeland was still acting as CEO of JME and was simultaneously meeting with Rex Allen, a JME employee, and his father, Loyie Allen, regarding their plans to start a competing home oxygen company to be named "Breathe Easy." Upon regaining control of JME, James discovered that all but one of his employees were working for Breathe Easy -- despite having signed non-compete agreements. These employees included Frankie Dobson and Ronnie Hall (Dobson and Hall). In addition, Quentin Madison (Madison), who had formerly serviced JME as an independent

contractor, had also started a competing business called Madison Home Health Services (Madison Home Health). JME had lost approximately one hundred home oxygen clients to Breathe Easy.

On March 24, 1999, James filed suit on behalf of himself and JME in the Jefferson Circuit Court. He named as defendants: Breathe Easy, Loyie and Rex Allen, Dobson and Hall, Madison and Madison Home Health, and Copeland and her husband. He alleged that the other defendants had conspired with Copeland to breach her fiduciary duty to JME and to interfere with the company's business relationships.

After granting several requests by the defendants to continue the matter due to various health problems, the court first tried the case on July 15, 2003. Seeking her third continuance at this point, Copeland alleged an upcoming spinal surgery as a basis for her inability to attend. Two previous continuances had been granted -- later found to have been based on misrepresentations by Copeland concerning her husband's health. Copeland was not present during this trial, and Copeland, the Allens, and Breathe Easy were not represented by counsel. Except for Dobson and Hall, the jury found all of the defendants liable and awarded approximately \$1.5 million. The trial court entered judgment consistent with the jury verdict on August 11, 2003. The complaints as to Dobson and Hall were dismissed.

The remaining defendants filed a motion to set aside the judgment. They argued that the trial court should have granted their request for a continuance due to Copeland's need for a surgery that prevented her from attending the trial. The court held a hearing on the motion at which Loyie Allen and Breathe Easy, Copeland, and Rex Allen were all represented by attorneys. Following that hearing, the court set aside its previous judgment on November 6, 2003, and ordered a new trial.

That order was followed by a second order, dated December 31, 2003, which included factual findings in support of the court's decision to set aside the original judgment. This second order also dismissed with prejudice all complaints against Copeland's husband and denied Rex Allen's motion for judgment notwithstanding the verdict. Six months later, JME requested a hearing on the status of defendants Dobson and Hall. The trial court found that after it dismissed the complaints against them in August 2003, it had lost jurisdiction over them. It declared that they were no longer parties.

The second trial took place from September 24 through October 7, 2004. Breathe Easy and Loyie Allen, Madison and Madison Home Health, Copeland, and Rex Allen were all present and were all represented by counsel. The jury found that Copeland had breached her fiduciary duty toward JME, that Copeland and Loyie Allen had interfered with JME's prospective

business relationships, and that they had participated in a conspiracy. Madison and Madison Home Health, Breathe Easy, and Rex Allen were all found not to have been involved in the wrongful conduct of Copeland and Loyie Allen. The jury determined that JME suffered \$101,288.00 in lost business profits and allocated the fault among the parties as follows: Copeland-50%, Loyie-30%, and James-20%. No punitive damages were awarded. The trial court entered judgment reflecting the jury verdict on November 1, 2004, and this appeal and cross-appeal followed.

On appeal, JME and James contend that the trial court erred in setting aside the first judgment, in upholding the portion of the first judgment that dismissed Dobson and Hall as defendants, in admitting prejudicial evidence regarding a Medicare fraud investigation in the second trial, and in instructing the second jury to apportion damages among the parties.

Dobson and Hall filed a brief defending the court's decision to dismiss all complaints against them. Rex Allen filed a brief contending that the trial court acted properly in setting aside the first judgment and in admitting the evidence relating to possible Medicare fraud. Breathe Easy and Loyie Allen filed a cross-appeal in which they presented numerous issues regarding the first trial. They argued that the trial

court should have granted their request for a directed verdict at the second trial and that damages were not sufficiently proven. Madison and Madison Home Health did not file a brief; nor did Copeland.

Whether the trial court erred in dismissing Dobson and Hall

JME argues that Dobson and Hall should have been re-tried at the second trial. The trial court originally dismissed with prejudice all complaints against them in its judgment of August 11, 2003, after the jury found in their favor. That judgment was set aside on November 6, 2003. JME argues that the order setting aside the original judgment left Dobson and Hall in the same position and amenable to liability just as if no trial had taken place. United State v. Ayres, 76 U.S. 608, 19 L.Ed. 625 (1869). We disagree. They had been dismissed in a final judgment. Kentucky Rule of Civil Procedure (CR) 59.05 provides that a motion to alter or amend a judgment shall be filed no later than ten days after entry of final judgment. CR 73.02 sets forth a thirty-day time limit on filing a notice of appeal. Neither rule had been invoked to keep them in the case.

The judgment dismissing Dobson and Hall was entered on August 11, 2003. JME never challenged this order of dismissal by appeal or by a CR 59.05 motion. It was not challenged until June 2004 when JME filed a motion to clarify the status of

defendants Dobson and Hall. Meanwhile, the other defendants had already filed a timely motion to set aside this judgment and to grant a new trial due to Copeland's allegedly unavoidable absence at the first trial. The subsequent orders did not mention Dobson and Hall; their counsel during the first trial did not receive copies of the orders from the court.

The court's order of June 24, 2004, held that the defendants' motion to set aside the first judgment was not a motion with regard to that portion of the order that had dismissed Dobson and Hall. The trial court correctly found that it had lost jurisdiction over them ten days after entry of the order of August 11, 2003. Their status was not timely addressed in a proper post-trial motion pursuant to CR 59.05. Additionally, since JME never sought to appeal from that judgment, the order dismissing the complaints against Dobson and Hall with prejudice is no longer appealable pursuant to CR 73.20(2). They literally slipped through the cracks and out of the litigation.

Whether the trial court erred in granting a second trial

JME contends that because of the language in its order of November 6, 2003, setting aside the judgment from the first trial, the trial court erroneously believed that it had to grant the defendants' motion for a new trial. This case had

previously been set for trial on two separate dates in 2002 -- both of which were rescheduled due to Copeland's requests for a continuance. Prior to the third scheduled trial date, Copeland had again asked the trial court for a continuance. By this time, she had moved to Texas with her husband. She claimed that he was in extremely poor health and that she needed back surgery in order to be able to travel to Louisville to attend the trial.

The trial court wrote a letter dated May 6, 2003, to Copeland's physician and requested detailed information regarding the date on which she would have her surgery and when she would be sufficiently recovered to attend trial. This letter, which was copied to Rex Allen as well as to the attorneys for JME and Dobson and Hall, stated in part as follows:

Your letters indicate to me that Ms. Copeland is in need of one and possibly two surgeries but give no indication when these surgeries will take place. I understand that one had to be postponed because of cardiac concerns.

I would appreciate it if you would advise me at your earliest convenience as to when one or both of these surgeries are scheduled and the possible recovery period so that I may work with counsel **to schedule a trial date when Ms. Copeland may appear.**

(Emphasis added.) No further letters from Copeland's doctor were forthcoming prior to the trial date of July 15, 2003.

Accordingly, the trial court denied the request by the remaining

defendants to postpone the trial. The case proceeded to trial with the key player in the alleged conspiracy absent and with several of the defendants not represented by counsel.

The jury found against all of the defendants (except Dobson and Hall) and awarded more than one million dollars in damages. As noted earlier, after entering a judgment reflecting the jury verdict, the court granted a hearing on November 3, 2003, on the defendants' motion to set aside the judgment and to grant a new trial. By this time, Breathe Easy and Loyie Allen, Rex Allen, and Copeland had each retained an attorney to represent their interests. The trial court granted the defendants' request to set aside its prior judgment and ordered a new trial.

In support of its position on appeal, JME relies on the following language in the court's order:

The Court advised counsel that it had read their written arguments before the hearing and the Court considered the oral arguments of counsel. Having done so, the Court concludes that it has no choice but to set aside its prior judgment and to schedule this matter for a new trial. The Court believes that its failure to do so will only result in the matter coming back after review by an Appellate Court.

The decision as to whether to grant a continuance lies within the sound discretion of the trial court. Therefore, JME argues that the order setting aside the prior judgment was based on the

court's erroneous belief that its failure to grant a continuance had constituted reversible error. In support of its argument, JME cites numerous cases dealing with a court's decision to grant or to deny a request for a continuance. This argument ignores the procedural reality of this case.

If the trial court had refused to set aside the judgment, the defendants could have appealed and argued that it was an abuse of discretion to deny their request for a continuance on July 15, 2003. However, that is not the procedural sequence of events in this case. After considering the evidence presented and the arguments of the several attorneys in support of the motion for a new trial, the court determined that justice required that the motion be granted. It so ordered on November 3, 2003. CR 59.01 allows the trial court to grant a new trial for any of the following reasons:

- (a) Irregularity in the proceedings of the court, jury or prevailing party, or an order of the court, or abuse of discretion, by which the party was prevented from having a fair trial.
- (b) Misconduct of the jury, of the prevailing party, or of his attorney.
- (c) Accident or surprise which ordinary prudence could not have guarded against.
- (d) Excessive or inadequate damages, appearing to have been given under the influence of passion or

prejudice or in disregard of the evidence or the instructions of the court.

- (e) Error in the assessment of the amount of recovery whether too large or too small.
- (f) That the verdict is not sustained by sufficient evidence, or is contrary to law.
- (g) Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.
- (h) Errors of law occurring at the trial and objected to by the party under the provisions of these rules.

The court entered a second order on December 31, 2003, in response to a request from the parties for findings of fact supporting its November 3, 2003, order to schedule a new trial. In its second order, the court indicated that it was uncertain as to whether Copeland's absence from the first trial had been unavoidable when it refused to continue the trial on July 15, 2003. The court was aware that Copeland was not represented by counsel and that she claimed that a scheduled back surgery would prevent her from attending the trial. However, it noted that there was no evidence before it at that time that Copeland had in fact had back surgery.

After entering the original judgment against Copeland and the other defendants, the trial court received information verifying the date of Copeland's surgery. Thus, it made a finding that "Copeland, through no fault of her own, was unable to attend the July 15, 2003, trial, [and] . . . that justice requires that she be granted a new trial."

We are governed by an abuse-of-discretion standard in reviewing a decision of a court as to whether to grant a new trial pursuant to CR 59.01. Shortridge v. Rice, 929 S.W.2d 194 (Ky.App. 1996). JME has not established that the trial court abused its discretion in deciding to grant the motion for a new trial after it discovered that the key defendant was unavoidably absent from the July 15 trial and that she was unrepresented by counsel as well.

Whether the court erred in admitting prejudicial evidence of a Medicare investigation of JME for fraud

JME argues that the trial court erred in allowing the defendants to present evidence and to make allegations that James was committing Medicare fraud. He contends that the investigation had been closed without any penalties having been assessed against James or JME. Therefore, he contends that evidence of the investigation was unduly prejudicial.

Kentucky Rules of Evidence (KRE) 401-403 provide for the admissibility of all relevant evidence as long as its

probative value outweighs the danger of prejudicing, confusing, or misleading the jury. In response to a pre-trial motion *in limine*, the trial court ruled that evidence of Medicare fraud would be restricted. The defendants were allowed to cross-examine James as to whether his motive in placing JME in trust had been for the purpose of evading Medicare laws prohibiting referrals of business between or among companies with common ownership. Nevertheless, despite that clear limitation, numerous allegations that James had committed Medicare fraud were made during the trial.

Loyie Allen notes in his brief that James testified on direct examination that the Trustee wrongfully refused to pay money from JME's funds to two of his other companies. James claimed that the Trustee's refusal to pay him resulted in his children's need to resort to welfare benefits because he was unable to meet his child support obligations. In his direct testimony, James attempted to depict the Trustee as part of the conspiracy against JME and him. Thus, Loyie Allen argues that since James opened the door to the Medicare issue, the defendants were entitled to present evidence concerning the Trustee's real reasons for refusing to pay other companies owned by James from JME funds and for discouraging James from diverting home oxygen clients from JME to another of the companies that he owned.

In order to prove that this evidence was improperly admitted, James must show that it was prejudicial to JME and to him and that its prejudicial impact outweighed its probative value. Despite repeated allegations that James was defrauding Medicare, the jury still found Copeland and Loyie Allen liable for conspiracy and interference with JME's business relationships. "The balancing of the probative value of such evidence against the danger of undue prejudice is a task properly reserved for the sound discretion of the trial judge." Comm. v. English, 993 S.W.2d 941 (Ky. 1999). We cannot conclude that JME has shown that the trial court abused its discretion in admitting evidence relating to a Medicare fraud investigation of JME and James. We find no error.

Whether the court incorrectly instructed the jury to apportion fault among the parties

JME claims that the law requires joint and several liability for parties engaged in a conspiracy. Thus, it argues the court's instructions allowing the jury to apportion liability among the defendants and to find contributory fault on the part of the plaintiffs were incorrect. Kentucky Revised Statute (KRS) 411.182(1), which governs the allocation of fault in tort actions, provides as follows:

- (1) In all tort actions, including products liability actions, involving fault of

more than one (1) party to the action, including third-party defendants and persons who have been released under subsection (4) of this section, the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating:

- (a) The amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and
- (b) **The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under subsection (4) of this section.** (Emphasis added.)

In support of its argument that KRS 411.182(1) should not apply in this case, JME cites to language in the case of James v. Wilson, 95 S.W.3d 875 (Ky. 2002), indicating that liability for tortfeasors who act in concert is joint and several. However, JME fails to mention that this language is found within the **dissent** and that it does not in any way represent the actual holding of the case. In light of the clear and unambiguous language of the statute governing apportionment of liability, we hold that the trial court's instructions to the jury were correct.

Issues presented on cross-appeal by Breathe Easy and Loyie Allen

Breathe Easy and Loyie Allen filed a cross-appeal from the court's judgment entered after the second jury trial. They

raise numerous issues pertaining to the conduct and the outcome of the first jury trial. However, since the judgment relating to the July 15, 2003, trial was subsequently set aside, all issues raised by these defendants regarding that trial are moot.

With regard to the second trial, Breathe Easy argues that the trial court erred in denying the motion for a directed verdict with regard to Loyie Allen and that the plaintiffs' proof of damages was based solely on speculation. We will first address the issue of whether there was sufficient evidence presented at the second trial to find that Loyie Allen conspired with Copeland to interfere with JME's business relationships.

We have held that it is proper for a trial court to deny a motion for a directed verdict where there is a genuine issue as to a material fact. Reece v. Dixie Warehouse and Cartage Co., 188 S.W.3d 440 (Ky.App. 2006). The evidence at trial established that Copeland and Loyie Allen had been friends for many years and that Rex Allen was employed at JME during the time that Copeland was its CEO. It was Rex who initially incorporated Breathe Easy in August 1998 with the intention of starting a durable medical supply company in Louisville. Neither Rex nor his father, Loyie, had any experience operating such a company nor did they have any significant ties with Taylor County. Nevertheless, after Rex decided that such an enterprise would not be viable, Loyie decided to open a company

to compete with JME, claiming that James had a bad reputation in the community.

Sometime in August 1998, Copeland learned that the Taylor Circuit Court planned to dissolve the trust holding JME and to return control of the company to James. In September, she met with Loyie and Rex to discuss their plan to start a new company. There was evidence of multiple meetings among the defendants related to their plans to start up a new company to compete with JME. Copeland notarized the document transferring Breathe Easy from Rex to Loyie and faxed the company's articles of incorporation while she was still employed as CEO of JME.

By September 14, 1998, Breathe Easy had a bank account which listed the address of Copeland's apartment as its business address. Testimony from the landlord indicated that he was not notified of a change in tenancy, that Copeland had paid the rent on the apartment through the middle of October, and that Breathe Easy began paying the rent on October 15. Between the interval of Copeland's realization that JME would be returned to James's control and the actual dissolution of the trust, ten of the eleven of JME's employees had begun to work for Breathe Easy. James returned on October 13, 1998, to find his staff gone -- along with about one hundred of his home oxygen clients. Over time, some of each category returned to JME. Of eight employees

testifying during the second trial, five testified for the plaintiffs.

These employees testified that while Copeland was still employed by JME, she conducted Breathe Easy's business both at JME's office and at the office of the new company. Several of the employees also testified that during the time they were working for JME, Copeland told them that James would fire them upon his return, that James was going to end up in jail, and that Breathe Easy had jobs for them.

James testified that although most of these employees had signed non-complete agreements, all of these documents had vanished from their files before his return. Two juries rejected Loyie's contentions that all of his dealings with Copeland were above board and that he did not participate in any scheme to derail both staff and customers from JME. Nevertheless, Loyie has failed to prove that the court erred in allowing the jury to determine whether he was liable for conspiracy and interference with JME's business relationships.

The final issue raised by Breathe Easy's cross-appeal is whether the proof of JME's damages was too speculative to support an award. JME presented expert testimony from Brian Willis, a CPA who had handled JME's accounting needs since 1988 as an employee of Stuedle & Spears accounting firm. Breathe Easy claims that Willis was unqualified to testify as an expert

because he had never done so before. It also argues that Willis's method of arriving at a figure for lost profits did not meet the standards required by Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575 (Ky. 2000).

In order to arrive at a figure representing JME's lost profits, Willis determined how many customers had been switched from JME to Breathe Easy and how many had either died or returned to the company within the following five-year period. He next calculated the amount paid by Medicare for home oxygen equipment. From this expected revenue, he deducted service costs to JME. Willis testified that he deducted only variable costs -- and not fixed costs -- from the expected revenue in arriving at his figure of \$599,336.26 in lost profits.

When damages sought in a civil case consist of lost profits, the test for determining damages is whether lost profits may be ascertained with reasonable certainty. Pauline's Chicken Villa, Inc. v. KFC Corp., 701 S.W.2d 399 (Ky. 1985). The defense strongly contested the credibility of the figure proposed by Willis, but it declined to introduce expert testimony on its own behalf. The jury awarded damages of approximately one-sixth of the amount calculated by Willis as lost profits. We cannot agree that Willis's testimony as to the

amount of lost profits suffered by JME was purely speculative. Thus, the court properly awarded damages to JME in accordance with the jury's verdict.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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