RENDERED: AUGUST 15, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001814-MR

BOBBIE HILL-FERDINANDO, INDIVIDUALLY
AND AS ADMINISTRATRIX OF THE ESTATE
OF DUDLEY JOHN MICHAEL FERDINANDO, III
AND WAYNE D. FERDINANDO — APPELLANTS

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE KEVIN M. HORNE, SENIOR JUDGE
ACTION NO. 02-CI-01612

EMERGENCY CARE PHYSICIANS OF
NORTHERN KENTUCKY, P.S.C. AND
TIMOTHY LOVE — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: FORMTEXT CLAYTON AND TAYLOR, JUDGES; HENRY,[1]

SENIOR JUDGE.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

TAYLOR, JUDGE: Bobbie Hill-Ferninando, individually and as Administratrix of the Estate of Dudley John Michael Ferdinando, III and Wayne D. Ferdinando bring this appeal from a May 29, 2007, judgment of the Boone Circuit Court apportioning liability for the wrongful death of Bobbie and Wayne's child. We affirm in part, reverse in part, and remand.

On the evening of November 13, 2001, twenty-three month old Dudley John Michael Ferdinando, III (Johnny) arrived by ambulance at St. Luke Hospital West at approximately 8:30 p.m. Johnny was accompanied by his mother, Bobbie. Bobbie reported to emergency personnel that Johnny had apparently ingested three to four 20 mg OxyContin pills between 7:30 p.m. and 8:00 p.m. Bobbie believed Johnny took the pills after she went upstairs in her home to take a nap with her twin girls while Johnny's father, Wayne, was answering a sales call at the front door.

Approximately twenty minutes after Johnny's arrival at the hospital, and less than one hour after the suspected ingestion, Dr. Timothy Love examined Johnny. Johnny's medical record reveals Love ordered Johnny be given charcoal, his vital signs be taken every hour, and his urine be collected for a drug screen. Johnny was given the charcoal and vomited thereafter. His vital signs remained stable. No urine was collected. After being informed that Johnny would be discharged, Bobbie woke Johnny to dress him; thereafter, Johnny immediately fell back to sleep. Bobbie and Johnny left St. Luke Hospital around midnight. Upon arriving home from the hospital, Johnny slept with Bobbie and Wayne.

The next morning on November 14, 2001, Bobbie awoke around 7:30 a.m., and Johnny appeared to be sleeping. She did not attempt to wake him. After taking the twins to school, Bobbie returned home and went back to bed with Johnny and Wayne. When the twins arrived home from preschool around 11:30 a.m., they asked to see Johnny.[2] When Wayne attempted to wake Johnny, he discovered that Johnny was lifeless and his eyes were rolled back in his head. Bobbie immediately took Johnny back to St. Luke's emergency room.

Upon Johnny's arrival at the hospital, the emergency room doctor administered Narcan and attempted to stabilize Johnny by intubating him. Johnny was resuscitated and placed on a ventilator. Johnny passed away four days later on November 18, 2001, when the ventilator was removed.

Bobbie Hill-Ferdinando, individually and as Administratrix of the Estate of Dudley John Michael Ferdinando, III and Wayne D. Ferdinando (collectively referred to as appellants) subsequently filed a complaint in 2002 in the Boone Circuit Court against, *inter alios*, Dr. Timothy Love, alleging medical negligence. Following a jury trial in 2007 that lasted nine days, a verdict was returned finding that Love had been negligent in the care and treatment of Johnny and that such negligence was a substantial factor in causing Johnny's death. The jury also found that Bobbie and Wayne had been comparatively negligent and failed to exercise ordinary care for the safety and protection of Johnny. The jury

[2] It was not unusual for Dudley John Michael Ferdinando, III (Johnny) to still be sleeping when the twins arrived home from preschool around 11:30 a.m., as Johnny normally slept with his father Wayne D. Ferdinando as late as noon each day.

assigned comparative fault as follows: 20% to Love, 50% to Bobbie, and 30% to Wayne. The jury ultimately awarded the following: $33,047.09 in medical expenses, $1,000 in funeral expenses, $150,000 for Bobbie's loss of affection and companionship, $150,000 for Wayne's loss of affection and companionship, and "0" for the destruction of Johnny's earning capacity.[3]

Appellants timely filed a motion pursuant to Kentucky Rules of Civil Procedure (CR) 50.02 for judgment notwithstanding the verdict and a motion pursuant to CR 59.01 for a new trial citing as error the jury's award of "0" dollars for destruction of Johnny's earning capacity. The circuit court denied both motions. This appeal follows.

Appellants first contend that the circuit court erred by failing to grant their motion for a new trial on the issue of the jury's verdict of "0" dollars for destruction of Johnny's earning capacity. Our review of the circuit court's denial of the motion for a new trial based upon inadequacy of damages is limited to whether the denial was clearly erroneous. *Bayless v. Boyer*, 180 S.W.3d 439 (Ky. 2005). Specifically, appellants assert that the jury's award of "0" dollars for destruction of Johnny's earning capacity was contrary to the Supreme Court's holding in *Turfway Park Racing Association v. Griffin*, 834 S.W.2d 667 (Ky. 1992) and that a new trial upon damages is mandated. We view *Turfway* as dispositive. *Id.*

[3] The judgment of $334,047.09 was reduced by application of comparative fault, and appellants were ultimately awarded $66,809.41.

In *Turfway*, the Court was faced with facts very similar to those now presented. *See id.* A four-year-old child fell from a stairway at Turfway Park and subsequently died. The administratrix of the child's estate and his parents brought suit against Turfway. The jury ultimately awarded damages for medical expenses, funeral expenses, and pain and suffering. However, the jury returned a verdict of "0" dollars for destruction of decedent's power to earn money. The Supreme Court ultimately concluded that damages naturally flow from wrongful death and "unless there is evidence from which the jury could reasonably believe that the decedent possessed no power to earn money" an award of "0" dollars is improper. *Id.* at 671. The *Turfway* Court ultimately held that a new trial upon damages was necessary. *Id.* The Court directed that upon retrial the jury shall only be instructed upon the destruction of decedent's power to earn money and shall also be informed of the other damage awards.

In the case *sub judice*, the jury awarded appellants damages for medical expenses, funeral expenses, and loss of affection and companionship. However, the jury awarded "0" dollars for the destruction of Johnny's earning capacity. Although such a verdict would seem contrary to the holding of *Turfway*, appellees argue that the verdict of "0" dollars for destruction of Johnny's earning capacity was proper under *Turfway*. *See id.* Appellees contend that under *Turfway* an award of "0" dollars for decedent's power to earn money is proper if there existed "evidence from which the jury could reasonably believe that the decedent possessed no power to earn money." *Id.* at 671. Appellees maintain that there was

evidence introduced at trial from which the jury could have reasonably found that Johnny possessed no power to earn money. Appellees point to Johnny's medical history and specifically to a seizure disorder, a nonspecific lung disorder, and asthma. Appellees also submit that Bobbie and Wayne's negligence prompted this jury to question "whether this child would be sufficiently protected by them for the remainder of his minority so as to arrive at an age where he might begin to earn a living." Appellees' Brief at 11. As such, appellees believe that the jury verdict of "0" dollars for Johnny's loss of earning power was authorized under *Turfway*; thus, appellees argue that the circuit court's denial of the motion for a new trial was proper. *See id.*

There was certainly evidence presented in this case regarding Johnny's medical history prior to his ingestion of the OxyContin. Johnny's pediatrician, Dr. Michael Fiedler, testified that Johnny had a possible seizure disorder and a nonspecific lung disorder, which had resolved. Fiedler also testified, that Johnny had not had a seizure during the nine months he had been treating Johnny and that Johnny was no longer on any medication for seizure disorder. Feidler further testified that Johnny had asthma and was on medication for its treatment. Fiedler testified that he had recently seen Johnny for treatment of a viral illness, allergic rash, ear infection, sore throat and croup. However, what was clearly absent from the evidence presented was evidence from which the jury could reasonably believe that Johnny possessed no power to earn money or that Johnny possessed a disability so profound as to render him incapable of earning

money upon reaching adulthood. In the absence of such evidence, an award of "0" dollars for destruction of Johnny's earning capacity was simply error under *Turfway*. *See id.* As such, we conclude that the circuit court's denial of appellants' motion for a new trial upon the damage award for destruction of earning capacity was error. Upon remand, the court shall conduct a retrial in conformity with the mandates of *Turfway*. *See id.* Both parties shall be allowed to present evidence as to the destruction of Johnny's earning capacity. The jury shall be instructed upon the destruction of Johnny's earning power and shall be informed of the other damage awards in the case.

Appellants next contend that the circuit court erred by denying their CR 50.01 motion for a directed verdict on the issue of comparative fault. A directed verdict is proper when drawing all inferences in favor of the nonmoving party, a reasonable juror could only conclude that the moving party was entitled to a verdict. CR 50.01; *Morrison v. Trailmobile Trailers, Inc.*, 526 S.W.2d 822 (Ky. 1975).

Specifically, appellants claim that their conduct was not the proximate cause of Johnny's death and, thus, they were not negligent as a matter of law. Appellants contend that Love's negligence was unforeseeable and was a superseding act which relieved them of "any liability associated with the negligent event of allowing Johnny access to the OxyContin . . . ." Appellants' Brief at 24. As such, appellants assert they were entitled to a directed verdict upon comparative fault. We disagree.

In this Commonwealth, it has been recognized that medical negligence can be reasonably anticipated as an intervening act which is a natural consequence of the primary wrongdoer's act and, thus, does not constitute a superseding act that would relieve the original negligent actor of liability. *City of Covington v. Keal*, 133 S.W.2d 49 (Ky. 1939); *Brown Motel Co. v. Marx*, 411 S.W.2d 911 (Ky. 1967). *See also* 22 Am. Jur. 2d *Damages* § 243, 246 (2003). Thus, appellants' argument that Love's negligence was a superseding act is clearly without merit. As such, the circuit court properly denied appellants' motion for directed verdict upon comparative fault.

Appellants finally contend the circuit court erred by reducing their "bill of costs" by eighty percent. Appellants' entire argument consists of three sentences and is as follows:

> The Trial Court should not have reduced the costs pursuant to C.R. 54.04 and KRS 453.040. Love would not admit negligence and Appellees were required to spend money, a rather substantial sum, in prosecuting their medical malpractice claims and were successful. Therefore, it is only equitable that they be awarded their full recoverable costs.

Appellants' Brief at 25.

Under CR 54.04 and Kentucky Revised Statutes 453.040, costs are usually awarded to the prevailing or successful party. CR 54.04(1) specifically provides that "[i]n the event of a partial judgment or a judgment in which neither party prevails entirely against the other costs shall be borne as directed by the trial court." And, the award of costs generally lies within the sound discretion of the

trial court. *Trimble Co. Fiscal Ct. v. Trimble Co. Bd. of Health*, 587 S.W.2d 276 (Ky.App. 1979).

In this case, appellants did not entirely prevail at trial, as the jury apportioned eighty percent of fault directly to them. Thus, we think the circuit court properly utilized its discretion under CR 54.04(1) by reducing appellants' award of costs by eighty percent, which represented their respective apportionment of fault. *See Owensboro Mercy Health Systems v. Payne*, 24 S.W.3d 675 (Ky.App. 2000). There being no supporting authority presented for appellants' argument, we find no error in the circuit court's ruling on this issue.

For the foregoing reasons, the judgment of the Boone Circuit Court is affirmed in part, reversed in part, and this case is remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

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ORAL ARGUMENT FOR APPELLANTS:

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