

RENDERED: SEPTEMBER 26, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001289-MR

AND

NO. 2007-CA-001406-MR

JAN L. PEDDICORD AND
LARRY J. ELSWICK

APPELLANT/CROSS-APPELLEE

APPEALS FROM FAYETTE CIRCUIT COURT
v. HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 02-CI-04994

BLUEGRASS REGIONAL
PSYCHIATRIC SERVICES

APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

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BEFORE: ACREE AND CAPERTON, JUDGES; ROSENBLUM,¹ SPECIAL JUDGE.

ACREE, JUDGE: Jan L. Peddicord and Larry Elswick appeal from a judgment of the Fayette Circuit Court based upon a jury verdict in favor of Bluegrass Regional

¹ Retired Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Psychiatric Services (Bluegrass) that Bluegrass was not liable for injuries suffered by Peddicord and Elswick after being attacked by Derek Works, an escaped patient committed to Eastern State Hospital (Eastern State)². We affirm.

On June 9, 2002, Works was arrested in Russell Springs, Kentucky. After his arrest and appearance in Adair Circuit Court, Works was ordered by the court to be committed to Eastern State for a 72-hour hold to assess whether further treatment was necessary.

Upon arrival at Eastern State, Works was evaluated by a psychiatrist and placed on Level-1 precautions, the highest security level available at the hospital. Works was billeted in the Gragg 3 unit of the hospital. Level-1 precautions require the staff to check on a patient every 15 minutes at night and every 30 minutes during the day. It also restricts the patient to the unit in which he or she is billeted. However, because Works was not psychotic, agitated or creating a disturbance on the unit, he was not isolated or restrained. Although Works was restricted to Gragg 3, some other patients residing there were permitted to leave.

Sara Birk, a mental health assistant at Eastern State, was working in Gragg 3 during Works' commitment. On the afternoon of June 11, 2002, two patients, with permission to leave the unit to smoke, asked Birk to open the exit door. Birk retrieved the patients' cigarettes and proceeded to open the door. As she did, Birk felt someone put his hands on her waist and say "excuse me." It was Works. He physically moved Birk aside and escaped the unit. Several staff

² Eastern State Hospital is a state contracted in-patient mental health facility in Lexington, Kentucky. Pursuant to a state contract, Bluegrass operates and manages Eastern State.

members gave chase but were unable to overtake Works before he had crossed the parking lot and climbed over a fence, leaving hospital property and landing in the parking lot of the adjacent Hope Center.

Peddicord was behind the wheel of her car in the Hope Center parking lot when Works approached her and instructed her to get out of the vehicle. Works violently fought with Peddicord until he was able to gain control of her car. Elswick, a resident of the Hope Center, observed Works attack Peddicord. He ran to her to help, but Works used the vehicle to pin Elswick between it and a bus. Thereafter, police arrived and took control of the situation.

Peddicord and Elswick filed separate claims, each against both Bluegrass and Works, seeking damages as a result of the attack. The actions were consolidated by the trial court. Shortly before a jury trial commenced, Peddicord and Elswick voluntarily dismissed their claims against Works. A jury trial proceeded against Bluegrass only.

At the end of the Plaintiffs' evidence and again at the close of all evidence, Peddicord and Elswick moved for a directed verdict. The motions were denied. The jury found in favor of Bluegrass on all claims. Peddicord and Elswick moved for a new trial pursuant to Kentucky Rules of Civil Procedure (CR) 50.02 and, alternatively, for a judgment notwithstanding the verdict. Both motions were denied. This appeal followed.³

³ Bluegrass has filed a protective cross-appeal, Case No. 2007-CA-001406-MR, which, based upon our disposition of the principal appeal, is made moot and is not addressed on the merits.

The Appellants first argue that the trial court erred when it denied their motions for a directed verdict and for a judgment notwithstanding the verdict. They contend that there was no question of fact for the jury to determine with respect to whether Birk was negligent in allowing Works to escape. And Birk's negligence, they argued, was attributable to her employer, Bluegrass.

We use the same standard of review when reviewing a denial of a motion for a directed verdict as for a denial of a motion for a judgment notwithstanding the verdict. *Pichard v. Bank Josephine*, 723 S.W.2d 883, 885 (Ky.App. 1987). Kentucky law is clear that a directed verdict is appropriate when, drawing all inferences in favor of the non-moving party, a reasonable jury could only conclude that the moving party was entitled to a verdict. *Buccholtz v. Dugan*, 977 S.W.2d 24, 26 (Ky.App. 1998). When ruling on a motion for directed verdict, a court must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998). A reviewing court may not disturb a trial court's decision on a motion for directed verdict unless that decision is clearly erroneous. *Id.* at 18.

Birk testified that at the time she opened the door through which Works escaped, she was allowing two patients with off unit privileges to take a smoke break. Birk surveyed the area, but did not detect Works anywhere in the area until he was behind her.

Michael Sweeney, a registered nurse employed by Eastern State, was present at Gragg 3 when Works escaped. Sweeney testified that Works was not

lurking about the door when Birk was opening it. Sweeney recalled that as he was writing a note, he noticed something in his peripheral vision. He looked up and saw Works running toward the door. He attempted to get Birk's attention, but by the time he could yell out to her, Works was already out the door.

Eastern State's Director of Nursing, Janet Warren, next testified that following the incident, the hospital conducted an investigation and determined that its staff had followed policy and procedure and executed their roles appropriately. This was confirmed as well by an expert testifying for Bluegrass.

Birk had a duty to be aware of her surroundings, to look before opening the door, and to open and shut the door as quickly as possible. Taking into consideration all of the evidence, the trial court correctly ruled that a question of fact existed as to whether Birk complied with her duty of care. Applying the proper standard, we believe a reasonable jury could conclude that Birk was not negligent. We affirm the trial court's decision to overrule the Appellants' motions for directed verdict and for a judgment notwithstanding the verdict.

Next, Appellants ask us to review statements made during Bluegrass's closing argument and deemed prejudicial by appellants. The statements, essentially summarizing some of Peddicord's testimony, were that Works was the real party to blame for the appellants' injuries, that Works originally had been a party to the lawsuit, but that he had been dismissed shortly before trial. Peddicord and Elswick argue that these statements would indicate to any reasonable juror that

Works paid money to settle the appellants' claims against him. They argue such statements insinuating a monetary settlement are grounds for a new trial.

Appellants' first problem is that they did not object to Bluegrass's statements during closing. Therefore this issue is unpreserved and not properly before this court. *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky.App. 1985).

Nevertheless, Peddicord and Elswick argue that we should address the issue of error under the palpable error rule of Kentucky Rules of Civil Procedure (CR) 61.02. “[T]he task of the appellate court in review under CR 61.02 is to determine if (1) the substantial rights of a party have been affected; (2) such action has resulted in a manifest injustice; and (3) such palpable error is the result of action taken by the court.” *Childers Oil Co., Inc. v. Adkins*, 256 S.W.3d 19, 27 (Ky.2008). “Fundamentally, a palpable error determination turns on whether the court believes there is a ‘substantial possibility’ that the result would have been different without the error.” *Hibdon v. Hibdon*, 247 S.W.3d 915, 918 (Ky.App. 2007).

Palpable error as it has been defined did not occur in this case. Appellants do not even assert that the jury would have reached a different result if the statements had not been made. *See Marsh v. Kentucky Farmers Bank*, 714 S.W.2d 502, 503 (Ky.App. 1986)(“appellant makes no showing whatsoever that the result would have been different . . . Therefore, the error, if any, would not be prejudicial.”). The objection is simply that the statements were prejudicial.

More importantly, we do not believe these statements changed the outcome of the case. Opening and closing arguments are not evidence and counsel is allowed great latitude in both. *Stopher v. Commonwealth*, 57 S.W.3d 787, 805 (Ky. 2001), *cert. denied*, 535 U.S. 1059, 122 S.Ct. 1921, 152 L.Ed.2d 829 (2002). Our Supreme Court has long held the opinion that closing arguments should always be considered “as a whole” and that wide latitude be allowed parties during closing arguments. *Young v. Commonwealth*, 25 S.W.3d 66 (Ky. 2000).

We find no manifest injustice in the use of these statements in the context of the closing argument in this case. Obviously the jury was aware that Works carried out the actual assault on the appellants. When Peddicord was cross-examined, she acknowledged that Works was once a defendant and that he was dismissed from the case on the Friday before trial. This answered whatever natural curiosity the jurors may have had as to why he was not present as a defendant in the courtroom. The summary of that evidence in closing argument was not the equivalent of saying that “the attacker paid for the attack” as the appellants suggest. No reference was made to any settlement and, in fact, we find no indication in the record at all that Works was dismissed as a result of settlement. Consequently, we find no palpable error.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed. Bluegrass’s protective cross-appeal is dismissed as moot.

ALL CONCUR.

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