RENDERED: MARCH 16, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001197-MR

DIVERSICARE LEASING CORP., D/B/A WEST LIBERTY NURSING & REHABILITATION CENTER; DIVERSICARE HEALTHCARE SERVICES, INC., F/K/A ADVOCAT, INC.; DIVERSICARE MANAGEMENT SERVICES CO.; OMEGA HEALTHCARE INVESTORS, INC; AND PAMELA BURTON, IN HER CAPACITY AS ADMINISTRATOR OF WEST LIBERTY NURSING & REHABILITATION CENTER — APPELLANTS

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 12-CI-00034

MICHAEL STEVENS, ADMINISTRATOR OF THE ESTATE OF VIOLA STEVENS, DECEASED — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CLAYTON, AND J. LAMBERT, JUDGES.

CLAYTON, JUDGE: This is an interlocutory appeal taken pursuant to Kentucky Revised Statutes (KRS) 417.220[1] seeking review of the Morgan Circuit Court's order denying a motion to enforce an arbitration agreement in a proceeding against a nursing home facility. Because the circuit court's findings of fact were supported by substantial evidence of record, we affirm.

Viola Stevens became a resident at West Liberty Nursing & Rehabilitation Center ("West Liberty") in West Liberty, Kentucky, on September 26, 2005, where she remained until she was transferred to Morgan County Appalachian Regional Hospital in November 2010. She passed away at the hospital about a month later, on December 27, 2010, at the age of 83. While a resident at West Liberty, her health and physical condition deteriorated, including developing pressure ulcers, lesions and open wounds, dehydration, malnutrition, weight loss, and multiple infections. She also experienced multiple falls and fractured her elbow.

Following Ms. Stevens' death, her son Michael Stevens was named as the administrator of her estate and, in that capacity, he filed a complaint in Morgan Circuit Court on February 28, 2012, seeking damages for the estate and for the wrongful death beneficiaries. As defendants, Stevens named Diversicare Leasing

[1] KRS 417.220(1)(a) permits a party to take an appeal from "[a]n order denying an application to compel arbitration made under KRS 417.060[.]"

Corp. d/b/a West Liberty Nursing & Rehabilitation Center, the licensee of the nursing home facility; Omega Healthcare Investors, Inc., a company that wholly owns Diversicare; Advocat, Inc., a company that wholly owns Omega Healthcare; Diversicare Management Services Company; and Pamela Burton, the Administrator of West Liberty (collectively, "Diversicare"). Against the nursing home defendants, Stevens alleged causes of action for negligence for failure to deliver care, services, and supervision; negligence *per se*; medical negligence; corporate negligence; and violations of a long-term care resident's rights pursuant to KRS 216.515. Against Burton, Stevens alleged a cause of action for negligence for failure to supervise and hire sufficient nurses and nurses' aides, and for failure to administer West Liberty in compliance with the applicable laws and regulations. Against all the defendants, Stevens alleged a claim for wrongful death. As a result, Stevens sought damages for compensatory and punitive damages as well as a trial by jury. Each defendant filed a separate answer to the complaint, in which several defenses were raised, including that Stevens' claims were subject to a binding arbitration agreement necessitating dismissal of the complaint.

Diversicare moved the circuit court to enforce the arbitration agreement and stay the Stevens' lawsuit. When Ms. Stevens was admitted to West Liberty in September 2005, her daughter and power of attorney, Mona Stamper, signed the admission documents on her mother's behalf. These documents

included an optional arbitration agreement. The arbitration agreement is three pages long and provides that "any legal dispute, controversy, demand, or claim" arising out of Stevens' stay at West Liberty and involving an amount in controversy in excess of $15,000.00 was subject to binding arbitration and could not be brought in a court of law before a judge or jury. Stamper signed the arbitration agreement and noted her legal designation as "DOP." Diversicare argued that the arbitration agreement signed by Stamper was valid and enforceable under Kentucky's Uniform Arbitration Act ("KUAA"), KRS Chapter 417.045 *et seq.*

In his response, Stevens argued that Diversicare had failed to offer any *prima facie* evidence of an enforceable arbitration agreement because it was not signed by Ms. Stevens and there was no evidence that Stamper had a guardianship or her power of attorney. He also argued that the arbitration agreement was unconscionable, violated Kentucky's jural rights doctrine, and was against public policy as set forth in KRS 216.515. He further argued that the arbitration agreement had no effect on the wrongful death action because that was an independent cause of action.

In its reply, Diversicare disputed the arguments Stevens raised in his response and provided a copy of Stamper's power of attorney. The power of

attorney, dated August 29, 2002, and recorded by the Morgan County Clerk the next day, provided as follows:

> POWER OF ATTORNEY
>
> KNOW ALL MEN BY THESE PRESENTS
>
> That I, Viola Stevens residing at [address omitted], do hereby make, constitute and appoint, Mona Stamper my true and lawful attorney, for me and in my name, place and stead, hereby giving my said attorney full and complete power and authority:
>
> To make, execute and deliver for me and in my name, any and all deeds, documents, writings, checks, drafts and notes, of all kinds and descriptions,
>
> To generally do and perform any and all acts and things whatsoever in and about my estate, property and affairs, in all respects and as fully as I could do if personally present,
>
> Hereby ratifying and confirming each and every act or thing which my said attorney shall do or cause to be done by virtue hereof.

Diversicare argued that the power of attorney gave Stamper the authority to sign the arbitration agreement for her mother.

Stevens filed a subsequent response to Diversicare's reply, arguing that Stamper did not have the actual authority to bind Ms. Stevens to the arbitration agreement by virtue of their parent/child relationship and Ms. Stevens had not given Stamper the specific power to sign an arbitration agreement for her. He also argued that the power of attorney was not durable based on the absence of

language providing that it would continue beyond disability or incapacity, and it therefore became void when Ms. Stevens became incapacitated. Stevens stated that Ms. Stevens had been suffering from Alzheimer's disease when she was admitted to West Liberty based on her medical records and would not have been able to understand or appreciate what it meant to allow her daughter to sign the arbitration agreement. Furthermore, Stamper was aware that her mother was incapacitated at the time she was admitted to West Liberty, noting that she was confused about where she was, asked about relatives who had passed away, and did not always recognize her children or remember their names. And even if she had not been incapacitated, the power of attorney was limited and did not provide sufficient authority for Stamper to sign the arbitration agreement. Stevens included an affidavit from Stamper with the response.

In a supplemental reply, Diversicare argued that Ms. Stevens had not been incapacitated for purposes of the power of attorney statute when she was admitted to West Liberty, and if she had been, West Liberty did not have any notice that she was incapacitated. It argued that Ms. Stevens' records established that she could understand others, be understood by others, and talk with others, and that none of the cognitive impairments Stevens pointed out rose to the level of incapacity necessary to end the power of attorney. The admission nursing assessment, completed September 26, 2005, established that Ms. Stevens could

communicate clearly; could eat independently; was alert, friendly, and cooperative; answered questions readily; was quick to comprehend; and was oriented.[2] And no physician had ever deemed Ms. Stevens to be incapacitated. Because Ms. Stevens had never been adjudged to be legally incompetent, Stamper's power of attorney remained effective. Diversicare went on to argue that the terms of the power of attorney provided Stamper with the authority to bind Ms. Stevens to the arbitration agreement.

The court heard arguments on Diversicare's motion on June 25, 2012, and held the matter in abeyance to permit the parties to take limited discovery on the issues addressed in the motion.

Later that year, Stevens moved the court for a status conference and filed a supplemental response to Diversicare's motion to compel arbitration, this time citing the recently rendered opinion in *Ping v. Beverly Enterprises, Inc*., 376 S.W.3d 581 (Ky. 2012). However, neither the *Ping* case nor subsequent cases which analyze the language of a power of attorney are controlling in the case at bar because the trial court in this matter did not make any findings regarding the language of the power of attorney. The issue before us is whether Ms. Stevens' power of attorney was still effective at the time of her admission to West Liberty

[2] However, the Minimum Data Set (MDS) full assessment form, completed a few days after her admission, indicated that Ms. Stevens had Alzheimer's disease, along with several other diseases, including diabetes, cardiac dysrhythmias, congestive heart failure, deep vein thrombosis, and had experienced a stroke.

Nursing and Rehabilitation Center. There is no dispute between the parties that the power of attorney was not durable in nature, *see* KRS 386.093, and therefore the power of attorney would have terminated when Ms. Stevens became incapacitated.

The evidence before the court as it relates to Ms. Stevens' competency was based upon affidavits, and deposition testimony from Stamper, Stamper's expert, Dr. Daniel Lively, whose practice is in internal medicine and geriatrics; and Diversicare's expert, Dr. David Shraberg, whose area of practice is in psychiatry and neurology.

Stamper testified that her mother lived in her own home before being admitted to West Liberty in 2005. Her father, and Ms. Stevens' husband, had passed away in 2003, prior to her admission to the facility. Stamper was her mother's primary caregiver after her father passed away; she had taken care of both parents beginning around 1998. Stamper helped her mother bathe and cook, grocery shopped, and paid the bills. Stamper became a joint signer on her mother's bank account after her father passed away. Stamper testified about the power of attorney dated August 29, 2002, and said both of her parents completed one so that she could pay their bills. Once Ms. Stevens entered West Liberty, Stamper continued to visit her multiple times per day.

Stamper and her siblings chose West Liberty due to its proximity to them. They collectively agreed that it was time for Ms. Stevens to go to a nursing

home because she had gotten to the point that Stamper could no longer care for her. Ms. Stevens was bedridden, could not walk, and required more medical attention than Stamper could give her. Ms. Stevens had a catheter, was confused at times, and could not bathe herself. Regarding the admission process, Stamper said she completed the admission forms while the nursing home staff were getting Ms. Stevens settled in upstairs. She was told by West Liberty employee Tonya Coffey that any of her siblings could have completed the forms. Her siblings thought she should sign the forms because she had power of attorney.

Stamper explained that most days were the same with respect to Ms. Stevens' level of confusion. "You could tell her something and five minutes later, she would forget it. And she would ask where my dad was. Even though he had passed, she would ask where he was." Ms. Stevens sometimes did not recognize Stamper. Stamper learned of her mother's early dementia diagnosis from a doctor at Morehead prior to her father's passing. Ms. Stevens was never declared legally incompetent nor had a guardian ever been appointed. With respect to the nursing assessment completed on the day of her admission to West Liberty, Stamper disagreed that her mother was alert, friendly, cooperative, readily answered questions, oriented, and had quick comprehension.

Ms. Stevens had not revoked the power of attorney at the time of her admission, but Stamper did not know if she still had that power. She then testified

that she believed the power of attorney was still in force in 2005. When she was signing the various admission documents, Stamper included "POA" (Power of Attorney) along with her signature on several of them. Stamper said her mother was not capable of signing the admission documents, so she did it for her. She "tried to explain [that she was being admitted to a nursing home] to her, but she still thought she was at home most of the time or in the hospital, that she went to the hospital again. No, she didn't thoroughly understand where she was." That day, Stamper did not believe her mother could handle her own affairs. Ms. Stevens was confused, she sometimes did not know who Stamper was, she would forget who her other children were, and she would have difficulty understanding things.

Stevens filed his brief on April 17, 2014, in which he argued that the power of attorney was invalid at the time of Ms. Stevens' admission because she was incapacitated. He cited to West Liberty's medical records and Stamper's knowledge that her mother had been suffering from Alzheimer's disease when she was admitted to West Liberty. A nurse's notation on a document entitled "RAP Worksheet" dated September 29, 2005, indicated that Ms. Stevens had Alzheimer's disease and had short- and long-term memory deficits. She was not able to repeat three words and could not name all her children when asked. Therefore, Stevens argued that Ms. Stevens was incapacitated at the time she was admitted to West

Liberty and that, therefore, Stamper did not have the authority to sign the admission documents as her attorney-in-fact.

Not surprisingly, the two experts disagreed with the conclusion reached by the other. However, the disagreement was not whether Ms. Stevens had dementia, but the severity of the dementia. Ms. Steven's expert, Dr. Lively, testified that he believed that Ms. Stevens had moderate dementia which resulted in her being incompetent when she was admitted to the nursing home. He based his opinion on the description of her condition by her daughter, the atrophy of Ms. Stevens' brain as reflected on the MRI, a medical consultant note in December 2004 that Ms. Stevens had multiple medical problems combined with some dementia, and a hospital follow-up note made December 6, 2004, which describes the patient as having

> multiple medical problems: Ischemic heart disease, diabetes poorly controlled, hypertension, inability to ambulate, osteoarthritis, and dementia. Under the heading of dementia, the patient is noted to be incontinent, having a mini-mental status examination of 16 of 30, and atrophy of brain MRI, and an EEG readout as normal. These findings indicate moderate to severe Alzheimer's type …and/or vascular dementia.

Dr. Lively testified that subsequent documentation by Ms. Stevens' cardiologist reflects that Ms. Stevens had dementia and the need for extensive care in the nursing home. There was also an additional cardiologist note of October 10, 2005,

made after her admission to the nursing home, which also denoted dementia. Dr. Lively had not seen the records from Morgan County ARH Hospital in August 2005 which assessed Ms. Stevens as expressing complex ideas, and clearly expressing her needs without any observable impairment. When asked if he would have any reason to disagree with opinions of the Morgan County ARH staff, he stated that, "Well, potentially, they saw Mrs. Stevens in a period of relative lucidity…one of the markers of Alzheimers'-type dementia is that many times patients are able to utilize their social skills to evade a diagnosis of dementia." Dr. Lively also stated that after review of the medical records provided to him, that he would be surprised that Ms. Stevens was functioning competently as described by the staff at the nursing home. He testified that the records reflected a long-term decline in function dating back to at least 2002 through 2003 as well as Stamper's deposition which described physical, medical, and neuropsychiatric decline over several years.

Dr. Shraberg, testifying for Diversicare, believed that Ms. Stevens probably had a mild cognitive disorder. However, that would not result in Ms. Stevens being incompetent or being unable to understand the concept of power of attorney or that her daughter would look out for her best interest. His record review included documents from the nursing home, Morgan County ARH, and the

primary care physician. He also reviewed the deposition of Dr. Lively. Dr. Shraberg noted that

> I didn't see any medical diagnosis of-and again, certainly best to see it through the physician. It doesn't have to be a neurologist or psychiatrist, just a physician- that she had a moderate or severe dementia. There were mentions of cognitive impairment, yes, I think references to it early on.

If she had moderate/severe dementia, then Dr. Shraberg believed that it would have changed the course of her stay at the nursing home, and her life expectancy would usually be about a maximum of a year or two. Dr. Shraberg also noted that MRI scans and CT scans are not diagnostic of a specific dementia. He further testified that "You can have-people have advanced dementia that have relatively normal CT or in-or even in a library of scans, and other people have dementia have relatively mild changes and shrinkage." Regarding the mini-mental status exam (or its generic equivalent), Dr. Shraberg said it was a "crude instrument" and that there were better tests. However, he opined that a score of below 20 on the mini mental status exam may indicate that a patient has a moderate cognitive impairment; and if they score under 20 out of 30, "I'd have some concern."[3] Dr. Shraberg also noted that a person with mild dementia could forget names of the family members but that loss of memory may be intermittent. Additionally, he testified that he believed

[3] A review of the record reflects a hospital follow-up note of December 6, 2004, reporting that Ms. Stevens scored 16 out of 30.

that her cognitive decline was progressing rather slowly, and that 5 years later, Ms. Stevens was "pretty significantly demented." This deterioration could have been markedly accelerated by the stroke Ms. Stevens had near the end of her life.

In March 2015, Diversicare filed a renewed motion to enforce the arbitration agreement to which Stevens objected.

On July 13, 2015, the circuit court entered an order ruling on the pending motion. The court described Dr. Shraberg's testimony as follows:

> The Defendants' expert, Dr. David Shraberg, practices in the areas of neurology and psychiatry. While Dr. Shraberg testified that Mrs. Stevens showed signs of cognitive changes, he disagreed with Dr. Lively regarding the severity of Mrs. Stevens' cognitive loss. Without question, Dr. Shraberg is an expert in his field. However, in this case, his testimony was primarily couched in terms of generalities. Moreover, when specific facts were addressed, the responses given by Dr. Shraberg appeared to this Court to be inconsistent with his expressed opinion regarding severity.

The court ultimately found the testimony of Stamper to be credible and Dr. Lively's testimony to be persuasive and consistent with Stamper's testimony as well as with some of the documentation and assessments conducted at West Liberty. The court concluded that Ms. Stevens did not have the ability to understand or appreciate the consequences of the power of attorney or the arbitration agreement when the agreement was signed and was incapacitated at that time. Because the power of attorney was not durable, and Stamper had notice of

her mother's incapacity, the agency relationship created in the non-durable power of attorney terminated upon the incapacity of the principal. The court also concluded that West Liberty was aware of Ms. Stevens' condition. The court questioned whether Stamper's status as attorney-in-fact was considered when the arbitration agreement was signed, noting that this designation was not noted on the form. Stamper's description of her relationship was "DOP," which the court believed stood for "daughter of patient," and Stamper's testimony that the facility did not choose her to sign the forms based upon her status as attorney-in-fact. The court also rejected Diversicare's alternate theory that the arbitration agreement should be enforced based upon apparent authority. Therefore, the court denied Diversicare's motion to enforce the arbitration agreement, and this appeal now follows.

We recognize that KRS 417.050 of the KUAA provides as follows: "A written agreement to submit any existing controversy to arbitration or a provision in written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract." KRS 417.060(1), in turn, provides:

> On application of a party showing an agreement described in KRS 417.050, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration. If the opposing party denies the

> existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised. The court shall order arbitration if found for the moving party; otherwise, the application shall be denied.

"[T]he party seeking to enforce an agreement has the burden of establishing its existence, but once prima facie evidence of the agreement has been presented, the burden shifts to the party seeking to avoid the agreement. The party seeking to avoid the arbitration agreement has a heavy burden." *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 857 (Ky. 2004), *citing Valley Constr. Co., Inc. v. Perry Host Management Co., Inc.*, 796 S.W.2d 365, 368 (Ky. App. 1990).

Our standard of review "of a trial court's ruling in a KRS 417.060 proceeding is according to usual appellate standards. That is, we defer to the trial court's factual findings, upsetting them only if clearly erroneous or if unsupported by substantial evidence, but we review without deference the trial court's identification and application of legal principles." *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001). In *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003), the Supreme Court of Kentucky defined substantial evidence as follows:

> "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, ... has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a

> contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

(Footnotes omitted). Diversicare argues that both the circuit court's factual findings and legal conclusions warrant reversal, and that the trial court erred in "cherry-picking" the evidence which supported Stevens' claims.

Diversicare argues that there is a presumption of competency to contract. However, this case is not about the competency of Ms. Stevens or Ms. Stamper to enter into a contract. This case concerns the lack of capacity or disability of Ms. Stevens which would render the power of attorney invalid and unenforceable. *See* KRS 386.093(4).

Diversicare contends that the circuit court "grossly discounted" Dr. Shraberg's opinions, noting that he is board certified in both psychiatry and neurology and practices as a psychiatrist and clinical professor at the University of Kentucky College of Medicine. However, the judge, as trier of fact, was required to assess the weight and credibility of expert testimony. The judge can properly analyze each expert's assumptions, reasoning, and conclusions. As to Diversicare's argument that the trial court erred in "cherry-picking" the evidence, "the trial court's failure to mention every piece of evidence… does not render the ensuing

order infirm." *Truman v Lillard*, 404 S.W.3d 863, 868 (Ky. 2012). The criticism of Diversicare that Dr. Lively lacked the specialized training in psychiatry and neurology that Dr. Shraberg possessed, does not mean that his testimony was not competent. This Court in *Tapp v. Owensboro Medical Health System, Inc.*, 282 S.W.3d 336, 339 (Ky. App. 2009), confirmed that "'[a]ny lack of specialized training goes only to the weight, not to the competency, of the evidence.'" *Quoting Washington v. Goodman*, 830 S.W.2d 398, 400 (Ky. App. 1992). Also, the trial court's assessment that much of Dr. Shraberg's testimony was primarily couched in terms of generalities is supported by the record.

Further, expert testimony was not the only testimony before the court. Ms. Stamper testified about the condition of her mother that she had observed over several years. She testified to her mother's declining memory and diminishing abilities. The trial court considered all the evidence and the test of substantiality of evidence is "'whether [when] taken alone or in the light of all the evidence' it has sufficient probative value to induce conviction in the minds of reasonable men." *Blankenship v. Lloyd Blankenship Coal Company, Inc.*, 463 S.W.2d 62, 64 (Ky. 1970), *quoting Wadkins' Adm'x v. Chesapeake & O Ry. Co.*, 298 S.W.2d 7, 10 (Ky. 1957) (emphasis omitted).

This Court is not permitted to substitute its judgment for that of the trial court. As held in *Truman*, 404 S.W.3d at 868-69 (Ky. 2012):

> Questions as to the weight and credibility of a witness are purely within the province of the court acting as fact-finder and due regard shall be given to the court's opportunity to judge the witness's credibility. CR 52.01; *Sherfey v. Sherfey* 74 S.W.3d 777 (Ky. App. 2002) (*overruled on other grounds by Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008)). Factual determinations made by the circuit court will not be disturbed on appeal unless clearly erroneous. CR 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence. *Sherfey*, 74 S.W.3d 777. If the testimony before the trial court is conflicting, as in this case, we may not substitute our decision in place of the judgment made by the trial court. *R.C.R. v. Commonwealth Cabinet for Human Resources*, 988 S.W.2d 36 (Ky.App. 1998).

Truman, 404 S.W.3d at 868-69.

It was within the trial court's discretion to find Stevens' evidence to be more persuasive than Diversicare's evidence. The testimony of Dr. Lively and Stamper constituted substantial evidence which supported the trial court's findings that Ms. Stevens was incapacitated when admitted to West Liberty. Also, we agree with the trial court's holding that there was no apparent authority proven by Diversicare. Therefore, we find no error in the circuit court's finding that Ms. Stevens was incapacitated on September 26, 2005, and therefore the power of attorney had terminated.

Accordingly, we affirm the order of the Morgan Circuit Court denying Diversicare's motion to enforce the arbitration agreement.

ACREE, JUDGE, CONCURS.

LAMBERT, J., JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANTS:

Michael F. Sutton
Sarah E. Tilley
Louisville, Kentucky

REPLY BRIEF FOR APPELLANTS:

Michael F. Sutton
Kathryn Martin
Louisville, Kentucky

BRIEF FOR APPELLEE:

Corey T. Fannin
Robert E. Salyer
Lexington, Kentucky