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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001460-MR

JAYNE BROWNING, INDIVIDUALLY AND
AS ADMINISTRATRIX OF THE ESTATE
OF PAUL BROWNING, JR

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 15-CI-00321

STEVE DUFF, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY AS
HARLAN COUNTY SHERIFF; AND
ROGER DEAN HALL, IN HIS OFFICIAL
CAPACITY AS HARLAN COUNTY
DEPUTY SHERIFF

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, D. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Jayne Browning, individually and as administratrix of the estate of Paul Browning, Jr. (the Estate), appeals from the judgment of the Letcher Circuit Court after a jury trial in the wrongful death of Paul Browning, Jr.

Although the jury found Harlan County Deputy Sheriff Roger Dean Hall liable in his official capacity for the wrongful death of Browning and awarded compensatory and punitive damages to the Estate, the Estate claims that trial errors negatively impacted the amount of the damages awarded.

The Estate argues the trial court erred by permitting the jury to hear prejudicial evidence about the victim. Witnesses testified about Browning's 1982 felony conviction for conspiracy to murder and witnesses testified about hidden videotape recordings made of Browning that were not admitted into evidence in which Browning made threats to harm people and engaged in potentially criminal behavior. The Estate also argues the trial court erred in permitting Deputy Hall's individual counsel to participate in the trial where the trial was only held on Deputy Hall in his official capacity.

In 2002, Browning was murdered. He was shot in the head and burned in his truck. Eventually, it was determined that multiple people participated in orchestrating his death and covering it up: Raymond Harris, Dewayne Harris, Johnny Epperson and Deputy Hall. Each of these men were

eventually convicted of various crimes related to Browning's death and drug trafficking.¹ Deputy Hall was the last to be convicted in 2009.

In 2010, the Estate filed a wrongful death suit in Harlan County against Harlan County, Harlan County Sheriff Steve Duff, individually and in his official capacity as Sheriff, and Deputy Hall, individually and in his official capacity as Deputy.² Harlan County was ultimately dismissed as a defendant based on sovereign immunity.³ The suit was later transferred to Letcher County for trial.

The Estate alleged Sheriff Duff was negligent or grossly negligent in the hiring, training and supervision of Deputy Hall and that negligence caused the

¹ In 2004, Epperson pled guilty to facilitation of Browning's murder, third-degree arson and two counts of tampering with physical evidence. In 2008, following a jury trial, Raymond was convicted of murder, complicity to second-degree arson and two counts of complicity to tampering with physical evidence. *Harris v. Commonwealth*, 313 S.W.3d 40, 42 (Ky. 2010). Shortly after Raymond's trial, Dewayne pled guilty to facilitation of Browning's murder and criminal facilitation to commit murder. In 2009, Deputy Hall entered an *Alford* plea to two counts of criminal facilitation to murder and four counts of complicity to trafficking in a controlled substance. *Hall v. Commonwealth*, No. 2015-CA-001315-MR, 2016 WL 1558505, at *1 (Ky.App. Apr. 15, 2016) (unpublished).

² In December 2003, Hall was terminated by Sheriff Duff for wrongdoing. Duff left office in 2006. However, we refer to Hall and Duff based on their titles because they were serving in these roles during the relevant times at issue underlying the wrongful death case.

³ After the defendants moved for summary judgment based on sovereign immunity, the trial court concluded that Kentucky Revised Statutes (KRS) 70.040 waived any sovereign immunity enjoyed by the sheriff and his deputy in their official capacities and denied summary judgment. In an interlocutory appeal before this Court, we held that Sheriff Duff in his official capacity was entitled to sovereign immunity for his own acts, but not the acts of Deputy Hall, and Deputy Hall was not entitled to immunity in his official capacity, but the claims against Harlan County should be dismissed. *Harlan Cty. v. Browning*, No. 2012-CA-000148-MR, 2013 WL 657880, at *4 (Ky.App. Feb. 22, 2013) (unpublished).

wrongful death of Browning. The Estate also alleged that Sheriff Duff wantonly, recklessly or intentionally planned, and directed Deputy Hall to cause the wrongful death of his political opponent Browning and that Deputy Hall wantonly, recklessly or intentionally planned, directed and caused the wrongful death of Browning.⁴

Before proceeding to trial, the claims against Deputy Hall in his individual capacity were bifurcated to be resolved in a later trial because he did not have representation during Dewayne's deposition, which was to be introduced into evidence.⁵ The trial proceeded against Sheriff Duff in his individual capacity and official capacity, and against Deputy Hall in his official capacity.

During the trial, witnesses testified about Sheriff Duff's, Deputy Hall's and Browning's conduct, who was ultimately responsible for Browning's death, how the murder occurred and what the damages could be. Complicating the trial was Browning's personal history. Browning formerly served as Sheriff of Harlan County in the early 1980s. He was convicted in 1982 of two charges of

⁴ Jayne Browning also claimed loss of consortium, but this claim was later dismissed based on being brought more than one year after her discovery of who was responsible for her husband's death.

⁵ Deputy Hall's attorney died by suicide and the GAL appointed to represent him was claiming at that time he had a conflict of interest. During the pretrial conference, the Estate indicated it did not plan to proceed with a trial against Deputy Hall as he was judgment proof due to serving a lengthy prison sentence but did not dismiss its case against him because the defendants claimed the Estate could not bring its suit without Deputy Hall being a party in his individual capacity.

conspiracy to murder a county commissioner and a school official, and after his incarceration was removed from office. Browning later had his civil rights restored by the governor. This allowed him to vote and run for elected office, but his right to possess firearms was not restored.

In 2002, Browning decided to run for sheriff against the incumbent, Sheriff Duff. At that time, Deputy Hall served under Sheriff Duff and investigated drug cases in Harlan County. Deputy Hall used his position to receive money from Dewayne in exchange for facilitating Dewayne's operation as a drug dealer.

During the election season, Browning met with Dewayne on several occasions. Dewayne initially made an audio tape recording of one of their interactions. Then, Deputy Hall arranged for him to make covert videotape recordings with the sheriff department's equipment. After being shown the first videotape recording, Sheriff Duff approved further recordings. These videos showed Browning accepting \$5,000 cash as a campaign contribution from Dewayne, a known drug dealer, and bringing Dewayne morphine patches. Browning also discussed his plans if he was elected: He planned to kill Circuit Judge Ron Johnson (who served as prosecutor during Browning's trial), Sheriff Steve Duff and several other people; he planned to terminate Deputy Hall's employment with the sheriff's office; and he planned to make Dewayne "his man" in the drug business with Browning to receive a 25% share of Dewayne's drug

money. Sheriff Duff presented these recordings to other law enforcement agencies, but no action was taken against Browning before his death.

Witnesses also testified that although these videotapes were at one time stored in the sheriff's office, they were no longer there and, as far as they knew, the videotapes were still possessed by the authorities who used them to prosecute Raymond. The witnesses who testified about the contents of the videotapes did so based on having seen the videotapes rather than having personally observed the events depicted therein.

Some testimony about the videotapes was helpful to the Estate in trying to establish that Sheriff Duff was responsible for Browning's death by taking affirmative action besides merely maintaining Deputy Hall's employment in approving the use of the sheriff department's video recording equipment for this purpose. Other portions of testimony about the videotapes was harmful to the Estate because Browning's conduct on the videotapes implicated Browning in many crimes.

Witnesses testified Browning was murdered after he was lured into an outing with Raymond, Dewayne and Epperson to discuss his campaign and have lunch. He was shot in the head by Raymond at the direction of Deputy Hall, who hired Raymond to commit the murder via Dewayne. Witnesses testified about whether Deputy Hall's action was at the behest of Sheriff Duff seeking to eliminate

a political rival for his office or whether Deputy Hall was acting purely in his own self-interest to secure his own position in providing protection for Dewayne's drug business as a deputy.

The murder weapon was a gun that Browning gave Dewayne. After Browning was shot, Epperson drove Browning's truck to a different location, burned Browning in his truck and, later, disposed of the gun.

Because Browning was receiving social security disability and not working, the Estate tried to establish Browning's future lost income by proving he would have won the election. The Estate was permitted to allow witnesses to testify about whether Browning would have won, and the defendants were allowed to provide evidence that Browning was not a viable candidate based on his criminal history and inability to carry a gun or be bonded.

The state medical examiner, Dr. John Hunsaker, III, testified via deposition. He testified Browning was shot through the occipital lobe. He opined that after Browning was shot, he was likely alive and breathing when his truck was burned because he had a higher than normal level of carbon monoxide in his blood but died from his gunshot wound and not from inhaling carbon monoxide. As to whether Browning could have been conscious after being shot, Dr. Hunsaker opined: "I can't say that he was immediately unconscious after he sustained the gunshot wound of the type I observed given the conditions of the body at autopsy."

He explained that while the occipital lobe is not necessary for consciousness, the fragments and concussive forces of the injury could have rendered Browning immediately unconscious. However, Dr. Hunsaker opined he could not conclusively say that Browning did not have the ability to remain conscious or regain consciousness.

Witnesses involved in Browning's murder testified Browning did not know he was going to be shot. Epperson, who drove his truck with Browning inside after he was shot and burned him in his truck, testified that he did not observe anything which would indicate Browning was alive or conscious.

Ultimately, the trial court granted a directed verdict dismissing the claims against Sheriff Duff in his individual capacity and the jury found that Sheriff Duff did not fail to exercise ordinary care in the supervision, training and retention of Deputy Hall.

The jury found that Browning failed to exercise ordinary care for his own safety and such a failure was a substantial factor in causing his injury.

The jury found that Deputy Hall, in his official capacity, violated his duty to exercise ordinary care for his actions and such failure was a substantial factor in causing injury to Browning. However, the jury did not find that Hall's actions were done in furtherance of the sheriff office's interests.

The jury determined that damages of \$6,080 were appropriate for Browning's burial and funeral expenses but declined to award any damages for destruction of his earning capacity or physical and mental pain and suffering including loss of enjoyment of life up to his death. The jury awarded punitive damages of \$25,000 against Deputy Hall in his official capacity. The jury apportioned fault between Browning and Deputy Hall at 50% each, which halved the \$6,080 awarded in compensatory damages.

The Estate filed a motion for a new trial. After that motion was denied, the Estate appealed.⁶

A new trial may be granted for "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." Kentucky Rules of Civil Procedure (CR) 59.01(d). We review a trial court's decision to deny a motion for a new trial based on inadequate damages with the understanding that this decision:

is a discretionary function assigned to the trial judge who has heard the witnesses firsthand and viewed their demeanor and who has observed the jury throughout the trial. Thus, we will not disturb a trial court's order denying such a motion so long as the order is supported by evidence and thus is not clearly erroneous.

⁶ The appellees did not file a cross-appeal. Therefore, we do not consider their claims of error regarding the award of punitive damages for Deputy Hall's actions taken in his official capacity.

Bledsaw v. Dennis, 197 S.W.3d 115, 117 (Ky.App. 2006) (internal quotations and footnote citations omitted).

We review a trial court's decision to admit testimony and other evidence under the abuse of discretion standard. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007). "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected" and a specific and timely objection or motion to strike was made or a motion *in limine* was made and ruled upon. Kentucky Rules of Evidence (KRE) 103(a)(1) and (d).

We agree with the Estate that normally it would be error for a trial court to admit evidence of a wrongful death victim's thirty-year-old prior conviction, even if technically this issue is not controlled by KRE 609. *See Robey v. Commonwealth*, 943 S.W.2d 616, 618 (Ky. 1997) (excluding evidence of a sixteen-year-old conviction pursuant to KRE 403 as "simply too remote" and "unduly prejudicial" with exclusion being "mandated by the principle of fundamental fairness.") Browning's conviction was relevant to the issue of damages as the Estate sought to prove future lost earnings based on the likelihood that Browning would have won the election and drawn the sheriff's salary. In seeking such damages, the Estate invited the defendants to defend this claim and to establish that Browning's prior conviction, inability to legally carry a firearm and possible issues with becoming bonded would prevent his election and holding of

that office. Nevertheless, despite its impact on damages, this evidence was more prejudicial than probative and should have been excluded under KRE 403 and KRE 404(b).

However, the Estate failed to preserve this error regarding the admission of evidence of Browning's prior conviction. Although the trial court was aware from the pretrial conference that the Estate objected to such evidence being admitted, it made no ruling at that time. Instead, it instructed the Estate to file a motion *in limine* and the Estate neither filed a motion *in limine* nor offered contemporaneous objections when the evidence was offered.⁷ Accordingly, the Estate did not properly preserve its objection on this issue. *See Lanham v. Commonwealth*, 171 S.W.3d 14, 20-22 (Ky. 2005); KRE 103(a)(1) and (d).

Regarding the admission of testimony about what the videotapes contained, although the Estate raised this issue at the pretrial conference, no ruling was made on that issue and, thus, the Estate needed to object at trial but it failed to do so. However, even if preserved, reversal would not be required. The Estate used some testimony about the videotapes to further its claims rather than seeking to exclude all such testimony and other testimony about the videotapes was admissible to show other motivations for the murder than it being committed to

⁷ Although the Estate did properly object to the introduction of the written conviction itself, this could do no harm where the jury was already made well aware of Browning's crime from the extensive testimony of witnesses.

serve Sheriff Duff. KRE 404(b)(1). Additionally, testimony about the videotapes was “so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.” KRE 404(b)(2).

Moreover, even if we review the trial court’s rulings on Browning’s conviction and the videotapes for palpable error, reversal is not warranted because the Estate cannot establish that any error impacted its damages recovery, much less resulted in “manifest injustice” warranting relief pursuant to CR 61.02. Liability was established against Deputy Hall and a full recovery was made on the Estate’s request for funeral expenses (albeit divided by 50% based on the apportionment of fault). The mere fact that the compensatory damages awarded were relatively small and nothing was awarded for future earnings and pain and suffering does not mean that the jury did not recognize that an injury occurred, as the jury chose to award punitive damages as well. *See Commonwealth Dep’t of Agric. v. Vinson*, 30 S.W.3d 162, 166 (Ky. 2000) (explaining that it may be proper to award punitive damages where compensatory damages are nominal or absent because “[t]he fact that there is not a quantifiable monetary damage awarded . . . does not mean injury did not occur.”)

The question is whether there was an appropriate evidentiary basis for the jury to decline to award damages on the Estate's claims for lost wages and pain and suffering. Unfortunately for the Estate, the answer is yes.

It is improper in a wrongful death action to award nothing for the destruction of earning power "unless there is evidence from which the jury could reasonably believe that the decedent possessed no power to earn money." *Turkway Racing Park Ass'n v. Griffin*, 834 S.W.2d 667, 671 (Ky. 1992). Because Browning was receiving social security disability for a total disability, there was no reason to believe Browning still possessed the power to labor and would earn money in the future. *See Aull v. Houston*, 345 S.W.3d 232, 234-37 (Ky.App. 2010). Although the Estate tried to establish Browning would have a salary as sheriff if he had won the election, the jury was free to determine that it could not be established at such an early juncture in the election cycle that he would have won, had he been alive on the date of the election.

If a jury's verdict awarding nothing for pain and suffering is supported by the evidence, the trial court cannot be clearly erroneous in denying a motion for a new trial. *Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001). Where a factual issue is actively contested, with both sides providing probative evidence, it is the jury's role to decide this dispute and so long as there is substantive support

for its verdict the trial court does not err in denying a motion for a new trial. *Id.* at 602-03.

Pain and suffering is not a proper element of damages if a victim was unconscious until death but could be appropriate if the victim was partly conscious or regained consciousness before death. *Vitale v. Henchey*, 24 S.W.3d 651, 659 (Ky. 2000). Whereas, if death is immediate there can be no damages for pain and suffering. *Worldwide Equip., Inc. v. Mullins*, 11 S.W.3d 50, 61 (Ky.App. 1999).

Although the medical examiner's testimony established that Browning was likely alive when burned in his truck after being shot, making it proper to submit the issue of pain and suffering to the jury, this testimony did not establish that Browning was conscious and could feel any pain after he was shot. The medical examiner could not determine whether he was conscious or not. Additionally, the eyewitnesses' testimony was that there was no indication that they observed anything to indicate that he was still alive, much less conscious when burned. Because these witnesses had already been convicted before the civil suit commenced and were not facing any civil penalty, they did not have any motive to lie. We do not agree with the Estate's argument that because setting Browning on fire prevented the medical examiner from analyzing his conscious pain and suffering that it should have been presumed that Browning had

tremendous suffering. The jury properly acted in its purview in determining that given the evidence before it, Browning did not experience any pain and suffering.

Therefore, even if there were trial errors, we determine that they did not affect the jury's decision that damages for loss of earning power and pain and suffering were not warranted based on the evidence before it.

While it was not proper for the attorney representing Deputy Hall in his individual capacity to participate in the trial on his official capacity and this error was properly preserved, the Estate does not explain how it was prejudiced. Without demonstrating any adverse result occurred, reversal is not warranted.

Accordingly, we affirm the judgment of the Letcher Circuit Court based on the jury's verdict.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEES:

Jonathan C. Shaw
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