

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

BETTY JO MYRES, individually and as)
the Administrator of the Estate of Eva)
Pearl Cole, Deceased; CATHERINE)
IMOGENE LAYER, Individually,)
MARY DELORES HERNANDEZ,)
Individually, and GLENDA RUTH)
BURKLIN, Individually,)

Plaintiffs/Appellants,)

vs.)

GLENPOOL HEALTH SERVICES,)
L.L.C., an Oklahoma Limited Liability)
Company; GLENPOOL HEALTH)
CARE CENTER, INC., et al.,)

Defendants/Appellees.)

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

MAY 17 2011

MICHAEL S. RICHIE
CLERK

Case No. 107,664

APPEAL FROM THE DISTRICT COURT OF
TULSA COUNTY, OKLAHOMA

HONORABLE LINDA G. MORRISSEY, TRIAL JUDGE

AFFIRMED

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Mary Quinn Cooper
Michael F. Smith
Jessica L. Dickerson
ELDRIDGE COOPER STEICHEN
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For Plaintiffs/Appellants

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For Defendants/Appellees

OPINION BY KEITH RAPP, JUDGE:

Trial court plaintiffs, Betty Jo Myres, individually and as the Administrator of the Estate of Eva Pearl Cole, Deceased; Catherine Imogene Layer, individually, Mary Delores Hernandez, individually, and Glenda Ruth Burklin, individually, (Plaintiffs) appeal the trial court's denial of Plaintiffs' Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial, and Brief in Support filed after the trial court entered a Journal Entry of Judgment on the jury verdict in favor of Defendants, Glenpool Health Services, L.L.C., an Oklahoma Limited Liability Company; Glenpool Health Care Center, Inc., an Oklahoma Corporation; John Does II and III or Jane Does I, II, and III, (Defendants).

BACKGROUND

This case arises out of the care and treatment of Eva Pearl Cole, who was a resident of Glenpool Health Care Center (Nursing Home) from October 6, 2003,

until her death on March 23, 2004. Cole entered Nursing Home after having colon surgery.

Plaintiffs, Cole's children, filed their Petition on November 29, 2007,¹ and their First Amended Petition on February 15, 2008, alleging causes of action for wrongful death, negligence *per se*, assault and battery/loss of chance, negligence, *res ipsa loquitur*, and corporate negligence. Plaintiffs sought punitive damages, alleging that "Defendants' conduct was willful, wanton and in reckless disregard for Eva Pearl Cole's care and well being causing her to endure severe physical and mental pain and suffering, an untimely death." The First Amended Petition made demand for a jury trial.

The trial court conducted a jury trial over several days. At the conclusion of Plaintiffs' case-in-chief, Plaintiffs moved for a directed verdict as to liability. The trial court denied Plaintiffs' motion. The trial court also denied Plaintiffs' renewed directed verdict motion at the conclusion of all the evidence and Plaintiffs' post-trial motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial.

¹Plaintiff, Betty Jo Myres, as administrator of the estate of Eva Pearl Cole, originally sued defendants, Glenpool Health Services, L.L.C. and Glenpool Health Care Center, Inc., on March 21, 2005, but voluntarily dismissed that action without prejudice on September 4, 2007.

Plaintiffs appeal the trial court's denial of their motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial as it relates to Plaintiffs' negligence and negligence per se causes of action. Plaintiffs argue that both the director of nursing for Nursing Home, Sydney Theiss, R. N., (Ms. Theiss), and the President of defendant Glenpool Health Care Center, Inc., Edwin Martin, (Mr. Martin) admitted at trial that the care and treatment Ms. Cole received at the nursing home fell below the applicable standard of care. Plaintiffs contend that these admissions constituted judicial admissions of substandard care and the trial court erred in not treating these judicial admissions as an admission of negligence. Plaintiffs argue the trial court erred in failing to direct a verdict on liability and in refusing to grant Plaintiffs' motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial.

STANDARD OF REVIEW

This Court employs the same test in reviewing a motion for judgment notwithstanding the verdict as used for a directed verdict. *First National Bank in Durant v. Honey Creek Entertainment Corp.*, 2002 OK 11, ¶ 8, 54 P.3d 100, 103. This Court must consider as true all evidence favorable to the non-moving party, and inferences drawn therefrom, and disregard all evidence favorable to the moving party. *Franklin v. Toal*, 2000 OK 79, ¶ 13, 19 P.3d 834, 837. "A motion

for JNOV should not be granted unless there is an entire absence of proof on a material issue.” *First National Bank in Durant*, 2002 OK 11 at ¶ 8, 54 P.3d at 103.

ANALYSIS

On appeal, Plaintiffs argue that the trial court erred in denying their Motion for Judgment Notwithstanding the Verdict or, in the alternative, Motion for New Trial. Plaintiffs allege that Defendants admitted that Nursing Home’s care and treatment of Ms. Cole fell below the standard of care Nursing Home owed to Ms. Cole, and the trial court should have directed a verdict, as a matter of law, on the negligence claim and submitted the case to the jury to determine damages only.

Generally, negligence is a question for the jury. *Franklin v. Toal*, 2000 OK 79 at ¶ 14, 19 P.3d at 837. However, if only one inference can reasonably be made from the evidence, the issue of negligence is a question for the trial court. *Id.*

The elements in a negligence action are: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of the duty; (3) causation; and (4) injury. *Thompson v. Presbyterian Hosp., Inc.*, 1982 OK 87, ¶ 7, 652 P.2d 260, 263. In other words, the plaintiff must prove that the defendant breached a duty owed the plaintiff that caused injury to the plaintiff. *Jennings v. Badgett*, 2010 OK 7, ¶ 12, 230 P.3d 861, 865.

This court must first examine whether Nursing Home owed a duty of care to Ms. Cole. A nursing home has a “duty to provide care at a reasonable standard, taking into consideration the resident’s known mental and physical condition.” *Harder v. F. C. Clinton, Inc.*, 1997 OK 137, ¶ 11, 948 P.2d 298, 304. This duty of care is similar to the duty a hospital owes its patients. *Id.*

On appeal, Plaintiffs argue that Sydney Theiss, the director of nursing for Nursing Home at the time Ms. Cole was a resident, and Edwin Martin, the president of Glenpool Health Care Center, Inc., admitted that Nursing Home’s acts or failure to act fell below the standard of care imposed on a nursing home to its resident and constituted a judicial admission of negligence. Plaintiffs argue that these admissions established Defendants’ negligent care and treatment and left the question of negligence for the trial court because only one inference could reasonably be drawn from the evidence. Thus, Plaintiffs argue the trial court erred in denying Plaintiffs’ motions for directed verdict and judgment notwithstanding the verdict.

“A judicial admission is a formal, deliberate declaration that a party or his or her attorney makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or of facts about which there is no real dispute.” *Rojhani v. Meagher*, 22 P.3d 554, 558 (Colo. 2000). The alleged admission must be

unequivocal and not be merely personal opinion. *Id.* “When a party testifying at trial or during a deposition admits a fact which is adverse to his claim or defense, it is generally preferable to treat that testimony as solely an evidentiary admission,” which may be controverted by the party. *Keller v. U.S.*, 58 F.3d 1194, 1199 n.8 (7th Cir. 1995). A party testifying at his or her trial should not have to testify at the peril of having every statement considered conclusively as true, but should be considered in conjunction with the remainder of his or her testimony. *Security Nat’l Bank of Duncan v. Johnson*, 1944 OK 358, ¶ 33, 155 P.2d 249, 253. “It is the province of the jury to observe the witness, note his manner of speech, and consider his testimony as a whole in connection with the other evidence, and it is for it to determine therefrom whether he stated the facts as he intended and understood them to be, or whether he unintentionally used words not expressing his real meaning in any particular utterances he may have made.” *Id.*

In determining whether a statement is a judicial admission, the trial court must consider the context in which the statement was made. *Lebeck v. Lebeck*, 881 P.2d 727, 732 (N.M. Ct. App. 1994). Furthermore, whether a statement should be treated as a judicial admission is within the trial court’s discretion. *Fletcher v. Eagle River Mem’l Hosp., Inc.*, 456 N.W.2d 788, 794 (Wis. 1990) (citations omitted).

Plaintiffs rely on *Franklin v. Toal*, 2000 OK 79, 19 P.3d 834, in support of their proposition that a party's admission at trial establishing the elements of the opponent's claims require the trial court enter a directed verdict. However, the present case is distinguishable from *Franklin*.

In *Franklin*, the defendant doctor admitted that he had the duty to remove the foreign object from the plaintiff's body and failed to do so. The doctor did not introduce any evidence to dispute this fact. Here, both Ms. Theiss and Mr. Martin provided testimony contrary to their statements that Defendants' conduct fell below the requisite standard of care. Both Ms. Theiss and Mr. Martin testified that Defendants provided good care and treatment to Ms. Cole. In addition, Ms. Theiss testified that Ms. Cole's health and strength improved and her fall rate went to zero (0) for approximately 3 months before her death while she was a resident of Nursing Home. Thus, their testimony did not unequivocally show that Defendants' provided negligent care and treatment to Ms. Cole. Considering the totality of their testimony, and the basis of the deceased's admissions, there remained a question of fact for the jury to consider.

When construed in the context of the entire testimony, this Court finds the statements made by Ms. Theiss and Mr. Martin did not constitute judicial admissions from which the trial court could direct a verdict in favor of Plaintiffs.

After considering the evidence and the inferences drawn therefrom in the light most favorable to Defendants, the non-moving party, this Court cannot say there is an entire absence of proof on a material issue. Thus, the trial court did not err in denying Plaintiffs' motions for directed verdict and judgment notwithstanding the verdict.

Plaintiffs next argue the trial court erred in denying their Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict as to Plaintiffs' negligence *per se* claim. Again, Plaintiffs allege that Defendants' statements at trial were judicial admissions and established their cause of action for negligence *per se*.

As previously discussed, the testimony of Ms. Theiss and Mr. Martin were not judicial admissions. Their testimony was but a part of Defendants' evidentiary whole considered by the jury in reaching its verdict. The conflicting testimony presented a question for determination by the jury. *See Southwestern Bell Telephone Co. v. Martin*, 1962 OK 59, 370 P.2d 840.

This Court will not disturb a jury verdict if there is any competent evidence reasonably tending to support the verdict. *Franklin v. Toal*, 2000 OK 79 at ¶ 12, 19 P.3d at 837 (citations omitted).

After considering all evidence favorable to the non-movant, Defendants here, and all inferences reasonably drawn therefore and disregarding all conflicting evidence favorable to the movants, Plaintiffs in the present case, this Court finds the trial court did not err in denying Plaintiffs' Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict. Thus, the trial court's Order denying Plaintiffs' Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial, is affirmed.

CONCLUSION

This Court finds the trial court did not err in denying Plaintiffs' Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial. The trial court's Order denying these motions is affirmed.

AFFIRMED.

GOODMAN, P.J., concurs, FISCHER, V.C.J., (sitting by designation), not participating.

May 17, 2011