

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

Nirakar Thakur

Court of Appeals No. L-08-1377

Appellee/Cross-Appellant

Trial Court No. CI06-3767

v.

Health Care and Retirement  
Corporation of America

**DECISION AND JUDGMENT**

Appellant/Cross-Appellee

Decided: June 12, 2009

\* \* \* \* \*

Gerald R. Kowalski, Meredith L. Mercurio, and Sarah K. Skow,  
for appellant/cross-appellee.

Christopher R. Regan and James B. Stoneking, for appellee/  
cross-appellant.

\* \* \* \* \*

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas which granted appellee's Civ.R. 59 motion for a new trial due to its failure to give a jury instruction based upon the Ohio Nursing Home Residents' Bill of Rights ("ONHRBOR"). On cross-appeal, appellee/cross-appellant appeals from a judgment of

the Lucas County Court of Common Pleas which granted appellant's motion in limine excluding the testimony of two witnesses determined to be too remote in time to be relevant. For all of the reasons set forth below, this court affirms the disputed judgments of the trial court.

{¶ 2} Appellant, Health Care and Retirement Corporation of America, d/b/a Heartland Holly Glen ("Heartland"), sets forth the following sole assignment of error:

{¶ 3} "THE TRIAL COURT ERRED BY GRANTING PLAINTIFF'S MOTION FOR NEW TRIAL BECAUSE IT PROPERLY INSTRUCTED THE JURY ON PLAINTIFF'S CLAIMS."

{¶ 4} The following undisputed facts are relevant to the issues raised on appeal and cross-appeal. On May 13, 2005, appellee's decedent was admitted to a Toledo-area Heartland nursing home facility. Decedent required periodic transportation to a VA facility in Michigan for purposes of undergoing kidney dialysis treatment.

{¶ 5} On July 11, 2005, decedent was unattended in a wheelchair at Heartland awaiting transport to the VA hospital for dialysis. Decedent fell from the wheelchair, struck the floor, suffered a subdural hematoma, and died five days later.

{¶ 6} A negligence action was subsequently filed on behalf of decedent. The complaint enumerated a multitude of claims including failure to supervise, failure to protect, failure to adequately staff, failure to meet community standards, and negligence in violating, "applicable state and federal regulations."

{¶ 7} On March 6, 2008, following a jury trial, there was a defense verdict in favor of appellant. In response, appellee filed a Civ.R. 59 motion for a new trial. The fundamental premise of this motion was alleged prejudice resulting from the trial court's refusal to charge the jury with an instruction based upon ONHRBOR despite the complaint alleging negligence, "in violating applicable state and federal regulations." In addition, the ONHRBOR had been admitted into evidence.

{¶ 8} On September 24, 2008, the trial court granted appellee's motion for a new trial. In its judgment, the trial court found that its failure to charge the jury on ONHRBOR was prejudicial, necessitating a new trial. Timely notice of appeal was filed.

{¶ 9} Civ.R. 59(A)(9) establishes that a new trial may be granted based upon an, "[e]rror of law occurring at the trial and brought to the attention of the trial court by the party making the application." It is well-established that our review of such trial court determinations is conducted pursuant to the abuse of discretion standard.

{¶ 10} The decision to grant a motion for new trial pursuant to Civ.R. 59 rests well within the sound discretion of the trial court. *Gerke v. Norwalk Clinic, Inc.*, 6th Dist. No. H-05-009, 2006-Ohio-5621, ¶ 58. Unless the weight of the evidence favors a contradictory finding, appellate courts must defer to the conclusion of the trial court because it is better equipped than the appellate court to view the witnesses, observe their demeanor, gestures, voice inflections, and use these observations in weighing the evidence and tendering judgments. *Seasons Coal Co. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶ 11} Applying the above legal framework governing appellate review of Civ.R. 59 decisions, we must determine whether the trial court abused its discretion in determining that appellee was prevented from receiving a fair trial based upon the rationale stated by the trial court.

{¶ 12} The record shows that appellee's complaint alleged negligence based upon violations of "applicable state and federal regulations." The record shows that the ONHRBOR was admitted into evidence. The record shows that appellee requested a jury instruction concerning the rights of nursing home residents but said instruction was denied and not given by the trial court.

{¶ 13} Under these facts and circumstances, we cannot say that the trial court acted arbitrarily, unreasonably, or unconscionably in determining its failure to charge the jury on nursing home residents' rights to be prejudicial to appellee so as to necessitate a new trial pursuant to Civ.R. 59. We find appellant's sole assignment of error not well-taken.

{¶ 14} On cross-appeal, appellee/cross-appellant claims that the trial court erred in granting appellant's motion in limine excluding the testimony of two witnesses on the basis of their remoteness to the events at issue in this case. Both rejected witnesses had formerly been Heartland employees.

{¶ 15} The fundamental consideration in the court's determination to exclude the testimony of these witnesses centered upon the significant spans of time intervening between the incident and their Heartland employment. The record reflects that one of the desired witnesses discontinued her employment over a year prior to the events which

triggered this case. Similarly, the record reflects that the other excluded witness did not commence employment with Heartland until eight months after the events which triggered this case.

{¶ 16} A motion in limine is a request to limit or exclude evidence or witness testimony at trial. *State v. Winston* (1991), 71 Ohio App.3d 154, 158. The standard of review on appeal of the grant or denial of a motion in limine is whether the trial court abused its discretion. *State v. Graham* (1979), 58 Ohio St. 2d 350. An abuse of discretion requires more than a mere error of law or judgment. It demands a showing that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 17} The record shows that neither of the witnesses excluded by the disputed motion in limine was involved in the decedent's care or worked at Heartland in a time frame in close proximity to the underlying incident.

{¶ 18} As such, we cannot say that the trial court's judgment in excluding these witnesses from testifying due to remoteness in time was arbitrary, unreasonable or unconscionable. We find appellee's assignment of error of on cross-appeal not well-taken.

{¶ 19} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant and appellee are each ordered to pay one-half of the cost of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

Thakur v. Health Care and  
Retirement Corp. of America  
C.A. No. L-08-1377

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, J.  
CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.