

RENDERED: APRIL 29, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000736-MR

DAVID FOX, AS ADMINISTRATOR OF
THE ESTATE OF LINDA FOX, DECEASED

APPELLANT

v.

APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 12-CI-00283

EXTENDICARE, INC.;
EXTENDICARE HOMES, INC. d/b/a
IRVINE HEALTH AND REHABILITATION CENTER;
EXTENDICARE HEALTH NETWORK, INC.;
EXTENDICARE REIT; EXTENDICARE, L.P.;
EXTENDICARE HOLDINGS, INC.;
EXTENDICARE HEALTH SERVICES, INC.; AND
EXTENDICARE HEALTH FACILITY HOLDINGS, INC.

APPELLEES

OPINION
AFFIRMING IN PART;
REVERSING IN PART AND REMANDING

** ** * * * * *

BEFORE: DIXON, J. LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: Extendicare, Inc.; Extendicare Homes, Inc. d/b/a Irvine Health and Rehabilitation Center; Extendicare Health Network, Inc.; Extendicare REIT; Extendicare, L.P.; Extendicare Holdings, Inc.; Extendicare Health Services, Inc.; and Extendicare Health Facility Holdings, Inc., (collectively “Extendicare”), operate a nursing home in Irvine, Kentucky. Linda Fox resided in that facility—although not continuously—from March 18, 2009, until her death on December 12, 2009, the same day she was admitted to a local hospital.

On December 14, 2012—more than three years after Linda’s death—David Fox, in his capacity as administrator of his late mother’s estate, filed a complaint alleging Extendicare had violated rights guaranteed to his mother by KRS¹ 216.515 *et seq.*, Kentucky’s long-term care resident’s rights statute. In the single-count civil complaint, David alleged:

- a) Violation of the right to be treated with consideration, respect, and full recognition of her dignity and individuality, including privacy in treatment and in care for her personal needs [KRS 216.515(18)];
- b) Violation of the right to be suitably dressed at all times and given assistance when needed in maintaining body hygiene and good grooming [KRS 216.515(20)];
- c) Violation of the right to have a responsible party or family member or guardian notified immediately of any accident, sudden illness, disease, unexplained absence, or anything unusual involving the resident [KRS 216.515(22)];

¹ Kentucky Revised Statutes.

- d) Violation of the right to have an adequate and appropriate resident care plan developed, implemented and updated to meet her needs [this language does not appear within any provision of KRS 216.515];²
- e) Violation of the right to be free from mental and physical abuse [KRS 216.515(6)]; and
- f) Violation of the statutory standards and requirements governing licensing and operation of long-term care facilities as set forth by the Cabinet for Health and Family Services, pursuant to provisions of K.R.S. Chapter 216 and the regulations promulgated thereunder, as well as the applicable federal laws and regulations governing the certification of long-term care facilities under Titles XVIII or XIX of the Social Security Act [we construe this to be an allegation brought under KRS 216.515(26)].

Some of these claims “are not necessarily related to a common law personal injury action.” *Overstreet v. Kindred Nursing Centers Limited Partnership*, --- S.W.3d --- at *4 (Ky. 2015) (Finality Feb. 18, 2016). Rather, they “exist independent of any claim for personal injury.” *Id.*

Extendicare did not file an answer. Instead, on January 15, 2013, it filed two motions. One motion sought dismissal of the KRS 216.515 claim because it was filed outside the one-year statute of limitations contained in KRS 413.140(1)—even if extended to two years by operation of KRS 413.180. The other motion sought partial dismissal of all other aspects of the complaint due to failure to state a claim upon which relief could be granted. Extendicare

² This claim fails to state a ground upon which relief can be granted, was properly dismissed by the trial court, and will be not be addressed further.

characterized David’s complaint as a “scattershot pleading” “nominally describ[ing] a single claim for ‘Violations of Long Term Care Resident’s Rights,’” and acknowledging KRS 216.515 was the only statute or regulation cited that “confers private rights of action.” David maintained the action was governed by a five-year statute of limitations under KRS 216.515.

The trial court ruled Extendicare’s submission of proof had converted the motion to dismiss into a motion for summary judgment under CR³ 12.02. Then, relying on the unpublished case of *Allen v. Extendicare Homes, Inc.*, 2012-CA-000050-MR, 2012 WL 6553823 (Ky. App. 2012), the trial court found KRS 216.515 did not contain a five-year statute of limitations, and, to be timely, the complaint should have been filed by December 12, 2010—the one-year anniversary of Linda’s death—or at the latest, December 12, 2011, two years after her death. The trial court, mentioning it had recently addressed similar issues in another case involving the same attorneys—in which it had entered a lengthy opinion, but offered no names or specifics—dismissed with prejudice the complaint and any other claims that may have been brought apart from the residents’ rights act. It further found the motion for partial dismissal was moot. It is from this order, entered April 2, 2013, that David now appeals.

On our own motion, we placed this appeal in abeyance pending rendition of *Overstreet*—a case that mirrors the case at bar in many respects, including the filing of a single-count complaint with several violations being

³ Kentucky Rules of Civil Procedure.

alleged within that one count. That case having now been rendered and its finality endorsed, we removed this appeal from abeyance, returned it to the active docket, and now apply the *Overstreet* rationale to the facts at hand.

ANALYSIS

We begin with a discussion of appellate practice. Extencicare correctly notes the Brief for Appellant fails to cite to the record as required by CR 76.12(4)(c)(iv)-(v). David argues there is nothing in the record to which he can cite. In point of fact, the record contains 100 pages and includes the complaint, two motions to dismiss, memorandums of law, responses to the motions to dismiss, and the order of dismissal. Noncompliance with the rule may result in dismissal of the appeal, the striking of pleadings, imposition of fines, or other appropriate penalties. CR 73.02. While we are authorized to impose sanctions, we choose not to do so in this case, but caution counsel the Court may not be so generous in the future.

The crux of this appeal is determination of which statute of limitations is applicable to a civil complaint alleging violation of KRS 216.515. This being a purely legal question, our review is *de novo*. *Grange Mutual Insurance Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004). Analyzing identical language in *Overstreet*, the Supreme Court of Kentucky ruled some of the claims had to be filed within one year, while others had to be filed within five years.

Citing KRS 413.120(2), David is partially correct in arguing he had five years in which to file suit. As explained in *Overstreet*, a claim alleging

violation of a right specified in KRS 216.515—that does not merely codify a common law claim for personal injuries—must be filed within five years.

Overstreet, at *3. Thus, three claims alleging violation: of the right to be treated with consideration, respect, dignity and individuality; to be properly dressed and given assistance with hygiene and grooming when needed; and, for a loved one or guardian to be promptly notified in the event of an accident, sudden illness or unusual occurrence must be filed within a five-year window because each is specified within the resident’s rights act. These three claims are new theories of liability created by KRS 216.515 and fall within the five-year statute of limitations stated in KRS 413.140(2). *Overstreet*, at *5. Because these claims were filed just over three years after Linda’s death, they were filed well within the five-year window, are timely, and may, therefore, go forward.

In contrast, and as further explained in *Overstreet*, alleged violation of Linda’s statutory right to be free from mental and physical abuse under KRS 216.515(6)—is *not* a new theory of liability. *Overstreet* at *5. It merely “represents a codification in the nursing home context of the common law personal injury cause of action.” *Overstreet*, at *6. Thus, this claim is subject to the one-year window for personal injury claims. KRS 413.140(1)(a)-(b). Because this claim was asserted more than three years after Linda’s death, it was properly dismissed by the trial court.

There is one remaining claim—alleging violation of “statutory standards and requirements governing licensing and operation of long-term care

facilities” Such a claim, ostensibly based on KRS 216.515(26), was also addressed in *Overstreet*, which concluded such a claim could have been brought either as a common law personal injury cause of action or as a wrongful death claim—either of which would have survived Linda’s death and could have been brought by David on behalf of the Estate within one year of Linda’s death. However, by filing the claim more than three years after Linda’s death, the applicable one-year statute of limitations had expired. “To the extent that the claims are based upon liabilities created by KRS 216.515, and are not simply restatements of the common law personal injury action, KRS 411.140 does not provide for their survival beyond the death of [Linda].”

Therefore, based on *Overstreet*, we hold the circuit court correctly dismissed the claims for relief based on KRS 216.515(6) and (26) because both were filed outside the applicable one-year statute of limitations—thus, we affirm the trial court in regard to those two claims. However, claims brought under KRS 216.515(18), (20) and (22) are subject to a five-year statute of limitations, were timely filed, and were erroneously dismissed by the circuit court. Hence, we affirm in part, reverse in part and remand for further proceedings consistent with this Opinion.

ALL CONCUR.

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