

RENDERED: NOVEMBER 18, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000742-MR

JOANN NOLES, AS EXECUTRIX
OF THE ESTATE OF WILLIAM NOLES,
DECEASED

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 12-CI-00612

CONSOLIDATED RESOURCES
HEALTH CARE FUND I, L.P.
D/B/A PARKVIEW NURSING
& REHABILITATION CENTER;
LIFE CARE CENTERS OF AMERICA;
AND LORI MOBERLY, IN HER
CAPACITY AS ADMINISTRATOR
OF PARKVIEW NURSING
& REHABILITATION CENTER

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, TAYLOR, AND STUMBO, JUDGES.

TAYLOR, JUDGE: Joann Noles, as Executrix of the Estate of William Noles, brings this appeal from an April 1, 2013, order of the McCracken Circuit Court dismissing appellant's claims against Consolidated Resources Health Care Fund I, L.P. d/b/a Parkview Nursing & Rehabilitation Center, Life Care Centers of America, and Lori Moberly, in her capacity as Administrator of Parkview Nursing & Rehabilitation Center, (collectively referred to as appellees) as time-barred. For the reasons stated, we affirm.

On June 4, 2012, appellant filed a complaint alleging that while William was a resident of Parkview Nursing & Rehabilitation Center (Parkview) from June 29, 2007, through March 14, 2008, appellees violated sundry statutory duties as set forth in Kentucky Revised Statutes (KRS) 216.515. In particular, appellant asserted William suffered from "Stage IV sacrum pressure sore, UTI's, dehydration, malnourishment, poor hygiene, and [development of an] infected sore on the heel of his foot." William eventually passed away on April 17, 2008.

In response to appellant's complaint, appellees filed a motion to dismiss pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f). Therein, appellees argued that appellant's negligence claims were time-barred by operation of the one-year statute of limitations (KRS 413.140(1)(a)) for personal injury actions under the common law. Conversely, appellant argued that the claims were not based upon common-law negligence but rather were based upon statutorily created liability under KRS 216.515. As the claims were based upon statutorily created

liability, appellant argued that the applicable statute of limitations was five years as set forth in KRS 413.120 and that the complaint was filed timely.

By order entered April 1, 2013, the circuit court ultimately agreed with appellee and dismissed appellant's complaint as time-barred under KRS 413.140(1)(a).¹ This appeal follows.

A motion to dismiss under CR 12.02 is proper when it appears that the plaintiff would not be entitled to relief under any set of facts. *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801 (Ky. 1977). When considering a CR 12.02 motion to dismiss, all factual allegations in the complaint must be viewed as true. *Pike v. George*, 434 S.W.2d 626 (Ky. 1968). Our review proceeds accordingly.

Appellant contends that the circuit court erred by dismissing the complaint against appellees as time-barred. Appellant argues that the applicable statute of limitations is five years under KRS 413.120(2) as all the claims were based upon statutorily created liability under KRS 216.515. Appellant points out that William was a resident of Parkview from June 29, 2007, through March 14, 2008, and that the complaint was filed on June 4, 2012. Therefore, appellant argues the complaint was timely filed within the five-year limitation period of KRS 413.120(2).

ANALYSIS

¹ The circuit court actually agreed with appellant's argument that the cause of action was based upon statutory rights created by Kentucky Revised Statutes (KRS) 216.515, and that the five-year limitation period set out in KRS 413.120 was controlling. However, the court concluded that it was bound by an unpublished opinion of the Court of Appeals, based upon similar facts, that held claims asserted under KRS 216.515 were subject to the one-year limitation period of KRS 413.140.

The issue of whether KRS 413.120 or KRS 413.140 is controlling for alleged violations of claims arising from KRS 216.515 was recently decided by the Kentucky Supreme Court in *Overstreet v. Kindred Nursing Centers Limited Partnership*, 479 S.W.3d 69 (Ky. 2016).² *Overstreet* looked to claims similar or virtually identical to those asserted in this case as concerns nursing home patient rights arising under KRS 216.515. In *Overstreet*, the Kentucky Supreme Court held as follows:

Ultimately, we conclude that claims brought under [KRS 216.515\(6\)](#) are subject to the one-year limitation period prescribed by [KRS 413.140](#), to the extent that such actions seek to recover for personal injuries indistinguishable from a common law personal injury action. In contrast, actions brought pursuant to other subsections of [KRS 216.515](#), to the extent they assert liabilities created exclusively by [KRS 216.515](#), are subject to the five-year statute of limitations provided by [KRS 413.120\(2\)](#). We also conclude that actions to recover for personal injury to a nursing home resident, or for injury to the resident's real or personal property, pursuant to [KRS 411.140](#), survive the resident's death and may be brought by the personal representative of an injured resident's estate. In contrast, actions otherwise brought to enforce rights created exclusively by [KRS 216.515](#) must be brought by the “resident or his guardian” pursuant to [KRS 216.515\(26\)](#), and therefore do not survive the resident's death.

Id. at 71.

Based upon the Supreme Court’s holding in *Overstreet*, there is no dispute in this case that any claims asserted in the complaint under KRS 216.515 that seek

² Our case was held in abeyance by order entered August 21, 2014, pending resolution of *Overstreet v. Kindred Nursing Centers Limited Partnership*, 479 S.W.3d 69 (Ky. 2016) by the Kentucky Supreme Court. This case was returned to the active docket by order entered June 29, 2016.

to recover for personal injury are barred by the one-year limitations set forth in KRS 413.140, as William died on April 17, 2008, and this action was not commenced until June 2012. However, the gravamen of appellant's complaint looks to the violation of statutory duties owed to the decedent William, individually while a resident of the nursing home, that arise under KRS 216.515. Specifically, in Count 1, paragraph 20, appellant alleges the following:

20. The violations of the resident's rights of William Noles include, but are not limited to, the following:

- a) Violation of the right to be treated with consideration, respect, and full recognition of his dignity and individuality, including privacy in treatment and in the care for his personal needs;
- b) Violation of the right to be suitably dressed at all times and given assistance when needed in maintaining body hygiene and good grooming;
- 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;
- d) Violation of the right to have an adequate and appropriate resident care plan developed, implemented and updated to meet his needs;
- e) Violation of the right to be free from mental and physical abuse and neglect; and

- f) Violation of the statutory standards and requirement governing licensing and operation of long-term care facilities as set forth by the Cabinet for Health and Family Services, pursuant to provisions of KRS Chapter 216 and 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.

Complaint at 6-7.

As noted, many of the claims asserted in this case are practically identical to those in *Overstreet* and parrot the statutory language of KRS 216.515, including Sections (6), (18), (20), and (22). The claims asserted by appellant look to enforce individual rights of William created exclusively by KRS 216.515. As emphasized by the Supreme Court in *Overstreet*, these claims may only be asserted by the nursing home resident or his guardian, while living and do not survive the resident's death. The Supreme Court thoroughly explained its rationale and application of the statute in *Overstreet* as follows:

This construction of the statutory language is consistent with the apparent purpose of KRS 216.515 to 216.530. For the most part, these legislative provisions are designed to enhance the quality of living conditions for nursing home residents. They authorize court action as needed to compel compliance with statutory protections designed for the benefit and enjoyment of residents during their lifetimes. There is nothing to be gained in a posthumous action, for example, to vindicate the resident's right of access to a telephone or to wear her own clothing. And, in the event that such violations actually resulted in injury to the resident or damage to his

property, then the existing common law causes of action would survive pursuant to KRS 411.140, to redress the grievance on behalf of his estate.

Overstreet, 479 S.W.3d at 78-79.

Accordingly, we do not reach the statute of limitations issues raised in this appeal as the claims in this case, asserted over four years after Williams' death, did not survive his death, and thus are not actionable under KRS 216.515.

For the foregoing reasons, the order of the McCracken Circuit Court dismissing this action is affirmed but for different reasons as set out in this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Carl R. Wilander
Robert E. Salyer
Lexington, Kentucky

BRIEF AND ORAL ARGUMENT
FOR APPELLEES:

John Barry Burgess
Memphis, Tennessee

ORAL ARGUMENT FOR
APPELLANT:

Robert E. Salyer
Lexington, Kentucky