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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001263-MR

DINAH PUCKETT, AS THE ADMINISTRATRIX
OF THE ESTATE OF BERTHA BLANTON — APPELLANT

v.

APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE KIMBERLY CORNETT CHILDERS, JUDGE
ACTION NO. 09-CI-00071

SALYERSVILLE HEALTHCARE CENTER,
EXTENDICARE HOMES, INC.,
EXTENDICARE HEALTH SERVICES, INC.
AND JASON JONES, DIRECTOR
AND UNKNOWN DEFENDANTS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

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

NICKELL, JUDGE: Dinah Puckett, as Administratrix of the Estate of Bertha Blanton, has appealed from the Magoffin Circuit Court's dismissal of her claims of negligence *per se* against Salyersville Healthcare Center ("Salyersville"),

Extendicare Homes, Inc., Extendicare Health Services, Inc. (collectively "Extendicare"), Jason Jones, Director, and unknown defendants.[1] Following a careful review, we affirm.

Salyersville is a nursing home facility owned and/or operated by Extendicare. Blanton was a resident at Salyersville from May 11, 2007, to May 4, 2008. Jones was the Administrator of Salyersville during at least a portion of Blanton's residency. During her stay, Blanton allegedly suffered from falls, a fractured humerus, skin tears, bruising, malnourishment, dehydration, pneumonia and a liver laceration. On May 4, 2008, Blanton was transported by ambulance to a local hospital where she remained until passing away on May 13, 2008.

On March 12, 2009, Puckett filed the instant action alleging negligence, medical negligence, violations of the Long Term Care Resident's Rights statutes,[2] breach of contract and breach of fiduciary duty against Salyersville, and negligence claims against Jones and the unknown defendants. At issue in this appeal, Puckett further alleged Salyersville violated a sundry of state, federal and/or local laws and regulations related to long-term care facilities, which violations amounted to negligence *per se* pursuant to KRS 446.070.

Pursuant to CR[3] 12.03, the Appellees moved for a judgment on the pleadings and sought an order dismissing Puckett's negligence *per se* claims,

[1] The complaint contained allegations against "Unknown Registered Nurses," "Unknown Nursing Supervisor and/or Administrator" and "Unknown Certified Nursing Assistant."

[2] Kentucky Revised Statutes (KRS) 216.510 *et seq*.

[3] Kentucky Rules of Civil Procedure.

asserting they were improper as a matter of law. They contended Puckett's claims for violations of state and federal certification laws were not independently actionable as negligence *per se* pursuant to the provisions of KRS 446.070 because the specific remedy provision of KRS 216.515(26) foreclosed such claims. Puckett countered by arguing she had not alleged any negligence *per se* claims based on violations of Blanton's rights set forth in KRS 216.515, but rather had advanced such claims for state regulatory violations relating to health facilities. Puckett argued she had certainly not advanced any claims based on violations of the federal regulatory scheme.

On June 17, 2013, the trial court granted the Appellees' motion. In dismissing Puckett's negligence *per se* claims, the trial court stated:

> (1) Plaintiffs' claims for negligence *per se* pursuant to KRS 446.070 for alleged violations of ". . . federal and state regulations governing skilled facilities" are **DISMISSED** with prejudice. Kentucky law precludes any claim for negligence *per se*, under KRS 444.707 (sic) or otherwise, based on alleged violations of federal statutes or regulations. Also, the federal statutes and regulations concerning certification of long-term care facilities, including particularly the Federal Nursing Home Reform Act ("FNHRA") and regulations promulgated thereunder, were not intended to confer enforceable rights or standards of care for the benefit of individual nursing home residents.
>
> (2) Plaintiffs' claims for negligence *per se* pursuant to KRS 446.070 for alleged violations of provisions of Kentucky Revised Statute (sic) Chapter 216 and 216B, and any regulations thereunder, including but not limited to 902 KAR 20:026; 902 KAR 20:048 and 902 KAR 20:300 concerning certification of nursing homes are **DISMISSED** with prejudice. The specific statutory

> remedy provided in KRS 216.515(26) precludes the use of KRS 446.070 to infer additional statutory claims under other provisions of KRS Chapther (sic) 21 (sic) and 216B or its implementing regulations. Also, the statutes and regulations concerning certification of long-term care facilities, including KRS Chapter 216 and 216B and regulations promulgated thereunder, were not intended to confer enforceable rights or standards of care for the benefit of individual nursing home residents.

This appeal followed.

Puckett raises two allegations of error in seeking reversal of the trial court's decision. First, she contends the inclusion of a statutory remedy in KRS 216.215(26) does not preclude her negligence *per se* claims based on the remainder of KRS Chapters 216 and 216B or the various regulations promulgated thereunder, and the trial court's conclusion to the contrary was erroneous. Second, she argues the trial court erred in concluding the federal and state statutes were inadmissible as evidence of the standard of care in a common law negligence claim.

The Appellees' motion to dismiss was based on CR 12.03, which provides for a party to make a motion for a "judgment on the pleadings." As construed by the Supreme Court of Kentucky, CR 12.03 is intended:

> to expedite the termination of a controversy where the ultimate and controlling facts are not in dispute. It is designed to provide a method of disposing of cases where the allegations of the pleadings are admitted and only a question of law is to be decided. . . . The judgment should be granted if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief.

City of Pioneer Village v. Bullitt County, 104 S.W.3d 757, 759 (Ky. 2003). Whether the dismissal was proper is a question of law. Therefore, the standard on appellate review is *de novo*. *Benningfield v. Pettit Environmental, Inc.*, 183 S.W.3d 567, 570 (Ky. App. 2005). Our review proceeds accordingly.

Puckett first contends the trial court erred in concluding the statutory remedy in KRS 216.215(26) precludes her from maintaining negligence *per se* claims based on the remainder of KRS Chapters 216 and 216B or the various regulations promulgated thereunder. She concedes she cannot maintain a negligence *per se* claim against the Appellees for alleged violations of the rights set forth in KRS 216.515, but maintains that the remainder of her negligence *per se* claims based on statutory and regulatory violations are valid and must be permitted to stand. We disagree.

The doctrine of negligence *per se* allows a court to determine a standard of conduct by reference to a statute. In essence, "[n]egligence *per se* is merely a negligence claim with a statutory standard of care substituted for the common law standard of care." *Young v. Carran,* 289 S.W.3d 586, 588–89 (Ky. App. 2009).

Kentucky has codified the common law negligence *per se* doctrine and created an avenue whereby an individual may seek relief even where a statute does not specifically provide a private remedy. KRS 446.070 provides "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation." This statute creates a private right of action under

which a damaged party may sue for a violation of a statutory standard of care, provided that three prerequisites are met: first, the statute in question must be penal in nature or provide "no inclusive civil remedy," *Hargis v. Baize*, 168 S.W.3d 36, 40 (Ky. 2005); second, "the party [must be] within the class of persons the statute is intended to protect," *Young*, 289 S.W.3d at 589 (citing *Hargis*, 168 S.W.3d at 40); and third, the plaintiff's injury must be of the type the statute was designed to prevent. *Carman v. Dunaway Timber Co.*, 949 S.W.2d 569, 570 (Ky. 1997).

Our Supreme Court has made clear "the 'any statute' language in KRS 446.070 is limited to Kentucky statutes," *Young*, 289 S.W.3d at 589, and does not "embrace the whole of the federal laws and the laws of other states and thereby confer a private civil remedy for such a vast array of violations." *T & M Jewelry v. Hicks*, 189 S.W.3d 526, 530 (Ky. 2006). Thus, to the extent Puckett raises claims based on violations of any federal statute or regulation, those claims fail as a matter of law and were properly dismissed.

The enumeration of specific rights enforceable via KRS 216.515(26) precludes a negligence *per se* action to enforce the broader provisions of KRS Chapter 216. The specific enumeration evidences the intent of the General Assembly to confine private rights of action to those rights in KRS 216.515 to the exclusion of other aspects of Chapter 216. Any negligence *per se* claim for enforcement of the other provisions of KRS Chapter 216 fails as a matter of law

because only those rights created by KRS 216.515 are enforceable in a private right of action.

A plaintiff lacks a negligence *per se* cause of action under KRS 446.070 where the more specific statute at issue "both declares the unlawful act and specifies the civil remedy available[.]" *Grzby v. Evans,* 700 S.W.2d 399, 401 (Ky. 1985). In that situation, the plaintiff "is limited to the remedy provided by the statute." *Id.* (citations omitted). This outcome flows from the general rule of statutory construction that "when two statutes are in conflict, one which deals with the subject matter in a general way and the other in a specific way, the more specific provision prevails." *Travelers Indem. Co. v. Reker,* 100 S.W.3d 756, 763 (Ky. 2003). The General Assembly, in KRS 216.515, expressly listed the rights granted to residents of long-term care facilities and made those rights enforceable via a private right of action in KRS 216.515(26). This evidences the legislature's intent and ability to create private rights of action for some of the provisions found in KRS Chapter 216 to the exclusion of others. A civil remedy need not be perfect to displace a private cause of action under KRS 446.070. Accordingly, because KRS 216.515 provides a cause of action to enforce the rights enumerated therein, Puckett is precluded from seeking private enforcement of the other provisions of KRS Chapter 216. Her claims grounded on alleged violations of this Chapter were therefore properly dismissed.

Further, as to Puckett's allegations under KRS Chapter 216B, we also conclude that Chapter does not grant a private cause of action to a nursing home

resident for the types of claims asserted. The stated purpose of KRS Chapter 216B is

> to fully authorize and empower the Cabinet for Health and Family Services to perform any certificate-of-need function and other statutory functions necessary to improve the quality and increase access to health-care facilities, services, and providers, and to create a cost-efficient health-care delivery system for the citizens of the Commonwealth.

KRS 216B.010. The Chapter is focused on licensing provisions and the certificate-of-need process intended to provide safe, adequate and efficient medical care for all Kentuckians by limiting health-care providers from amassing new services and equipment and passing the costs of such additions on to patients. As before, we must determine whether the three prerequisites for maintaining a negligence *per se* action have been satisfied.

KRS 216B.086 and 216B.990 provide for the Cabinet to levy civil penalties and assess fines for violations, but none of the penalties provide remedies to an individual. Thus, we conclude there is "no inclusive civil remedy," thereby meeting the first prerequisite for maintaining a negligence *per se* action. *Hargis*, 168 S.W.3d at 40. Further, if construed broadly, the Chapter's licensing provisions seek to protect users of health-care facilities—a class to which Blanton belonged as a Salyersville resident. *Young*, 289 S.W.3d at 589. Accordingly, Puckett's claims satisfy the second prong for maintaining her action.

However, Puckett's claims fail as to the third and final prerequisite as there has been no showing or assertion that Blanton suffered harm of the type KRS

Chapter 216B was designed to prevent. *Carman*, 949 S.W.2d at 570. The clear thrust of the statutes is to prevent economic harm or the preclusion of access to health-care services by some of the citizenry by limiting the types and amount of costs which may be passed on by providers to patients. The claims raised in the instant case are related to physical injuries sustained by Blanton, not economic ones. Consequently, Puckett cannot state a negligence *per se* claim for alleged violations of KRS Chapter 216B, and those claims were properly dismissed.

Finally, Puckett contends the trial court erred in concluding the federal and state statutes were inadmissible as evidence of the standard of care in a common law negligence claim. Contrary to Puckett's allegation, we do not read the trial court's order as prohibiting the introduction of any evidence. In fact, the brief order makes no mention of any evidentiary issues whatsoever. "An appellate court is without authority to review issues not raised in or decided by the trial court." *Baumia v. Commonwealth*, 402 S.W.3d 530, 546 (Ky. 2013) (citations and internal quotation marks omitted). Thus, Puckett's contention is without merit and warrants no further discussion.

For the foregoing reasons, the judgment of the Magoffin Circuit Court is affirmed.

ALL CONCUR.

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