

# Commonwealth of Kentucky

## Court of Appeals

NO. 2013-CA-002175-MR  
AND  
NO. 2014-CA-000308-MR

BRENDA SHOBE, AS ADMINISTRATIX  
OF THE ESTATE OF ALMA SHOBE,  
DECEASED

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE  
ACTION NO. 11-CI-005300

GGNSC LOUISVILLE MT. HOLLY, LLC,  
D/B/A GOLDEN LIVING CENTER -  
MT. HOLLY; GGNSC ADMINISTRATIVE  
SERVICES, LLC, D/B/A GOLDEN VENTURES;  
GGNSC HOLDINGS, LLC, D/B/A GOLDEN  
HORIZIONS; GGNSC EQUITY HOLDINGS,  
LLC; GOLDEN GATE NATIONAL SENIOR  
CARE, LLC, D/B/A GOLDEN LIVING;  
GOLDEN GATE ANCILLARY, LLC, D/B/A  
GOLDEN INNOVATIONS; GPH LOUISVILLE  
MT. HOLLY, LLC; GGNSC CLINICAL  
SERVICES, LLC; GOLDEN CLINICAL  
SERVICES; RAYMOND A. DICKISON, JR.,  
IN HIS CAPACITY AS ADMINISTRATOR  
OF GOLDEN LIVING CENTER - MT HOLLY;  
RENAY ADKINS, IN HER CAPACITY AS  
ADMINISTRATOR OF GOLDEN LIVING  
CENTER - MT HOLLY

APPELLEES/CROSS-APPELLANTS

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; D. LAMBERT AND NICKELL, JUDGES.

ACREE, CHIEF JUDGE: In August, 2011, Appellant/Cross-Appellee Brenda Shobe, Administratrix of The Estate of Alma Shobe, filed suit against the corporate owners and administrators of the Golden Living Center – Mt. Holly, a nursing home in Jefferson County, Kentucky (collectively, GGNSC).<sup>1</sup> The circuit court granted summary judgment in favor of the nursing home, finding Shobe’s claims time-barred by the applicable statute of limitations. Shobe appealed and GGNSC cross-appealed.

On our own motion, we held this matter in abeyance pending a decision by the Kentucky Supreme Court in the factually similar and legally indistinguishable case of *Overstreet v. Kindred Nursing Centers Limited Partnership*, --- S.W.3d ---, ---- (Ky. 2015) (finality Feb. 18, 2016). The Supreme Court rendered its decision in August 2015. Because *Overstreet* is now final and published, we are bound by its dictates and therefore rely on it.<sup>2</sup> After careful

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<sup>1</sup> The Appellees/Cross-Appellants in this case are: GGNSC Louisville Mt. Holly, LLC d/b/a Golden Living Center – Mt. Holly; GGNSC Administrative Services, LLC d/b/a Golden Ventures; GGNSC holdings LLC d/b/a/ Golden Horizons; GGNSC Equity Holdings, LLC; Golden Gate National Senior Care, LLC d/b/a Golden Living; Golden Gate Ancillary LLC d/b/a Golden Innovations; GPH Louisville Mt. Holly, LLC; GGNSC Clinic Services, LLC d/b/a Golden Clinical Services; Raymond A. Dickison, Jr., in his capacity as Administrator of Golden Living Center – Mt. Holly; and Renay Adkins, in her capacity as Administrator of Golden Living Center – Mt. Holly.

<sup>2</sup> By this opinion we remove this case from abeyance and place it back on the active docket.

consideration of the record and the holding in *Overstreet*, we affirm the decision reached by the circuit court, but partially on different grounds. We deny the cross-appeal as moot.

## I. FACTS AND PROCEDURE

Alma was admitted to Golden Living Center – Mt. Holly in January 2005. She died on May 12, 2007, and Shobe, as administratrix of Alma’s estate, filed suit on August 9, 2011, alleging the nursing home violated duties owed to Alma as a resident of a long-term-care facility, thereby causing her injury and death. Specifically, Shobe’s complaint asserts the following violations of KRS<sup>3</sup> 216.515<sup>4</sup>, Kentucky’s long-term care residents’ rights statute:

- a. the right to be treated with consideration, respect, and full recognition of her dignity and individuality, including privacy in treatment and in care of her personal needs, KRS 216.515(18)
- b. 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. the right to have responsible party or family member or his guardian shall be notified immediately of any accident, sudden illness, disease, unexplained absence, or anything unusual involving the resident, KRS 216.515(22)

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<sup>3</sup> Kentucky Revised Statute.

<sup>4</sup> “KRS 216.515 consists of twenty-six subsections enumerating specific rights conferred upon residents of ‘long-term-care facilities.’” *Overstreet*, --- S.W.3d at ---. Only five subsections are at play in this case.

d. the right to have an adequate and appropriate residential care plan developed, implemented, and updated to meet her needs;<sup>5</sup>

e. be free from mental and physical abuse, and neglect, KRS 216.515(6).

(R. at 12).

The complaint also alleges that, as a result of these violations, Alma “suffered unnecessary loss of personal dignity, severe pain and suffering, degradation, disability, loss of personal items, hospitalizations, and emotional distress, all of which were caused by the wrongful conduct of [GGNSC].” (R. at 12). And further, according to the complaint, GGNSC’s wrongful conduct caused Alma to suffer:

accelerated deterioration of her health and physical condition beyond that caused by the normal aging process, as well as the following injuries: (a) multiple falls; (b) fractures; (c) intracranial hemorrhage; (d) abrasions; (e) skin tears; (f) hematomas; (g) bruising; (h) pressure sores; (i) sepsis; (j) gangrene of foot; (k) cellulitis; (l) malnutrition; (m) dehydration; (n) weight loss; (o) aspiration pneumonia; (p) infections, including multiple urinary tract infections, with E. Coli; (q) poor hygiene; (r) severe pain; and (s) death.

(R. at 11).

GGNSC simultaneously answered the complaint and asserted a counterclaim for a declaratory judgment seeking the court’s determination that the action should be dismissed based upon the statute of limitations and Shobe’s lack of standing to bring such a claim under KRS 216.515.

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<sup>5</sup> We are unable to find a comparable counterpart for this particular claim in KRS 216.515.

Shortly thereafter, GGNSC moved for summary judgment claiming that the action was time barred. GGNSC argued that despite the invocation of KRS 216.515, Shobe's cause of action was, in reality, a common-law personal injury action subject to the one-year limitation provided by KRS 413.140,<sup>6</sup> with the possible extension of an additional year pursuant to KRS 413.180. GGNSC also reasserted its standing argument. Shobe argued in response that the action was timely filed because it was based upon a statutory cause of action for which KRS 413.120(2)<sup>7</sup> provides a five-year limitations period.

The circuit court held the motion in abeyance pending decisions by this Court in *Allen v. Extencicare Homes, Inc.*, 2012-CA-000050-MR, and *Kindred Nursing Centers Ltd. Partnership v. Overstreet*, 2011-CA-002294-MR. *Allen* was rendered unpublished and became final on January 25, 2013. The Court in *Allen* held that an action brought pursuant to KRS 216.515 is a personal-injury action subject to the one or two-year statutory period in KRS 413.140 or KRS 413.180, respectively, and KRS 216.515 did not create a new statutory-based cause of action subject to the five-year statute of limitation in KRS 413.120.

Preemptively, and without waiting for this Court's opinion in *Kindred*, the circuit court granted GGNSC's summary-judgment motion by order entered July 2, 2013. Adopting the logic of *Allen*, the circuit court viewed all of Shobe's claims

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<sup>6</sup> KRS 413.140(1) states that "[a]n action for injury to the person of the plaintiff," shall be commenced within one year upon accrual of the cause of action.

<sup>7</sup> KRS 413.120(2) states that "[a]n action upon a liability created by statute, when no other time is fixed by the statute creating the liability[.]" shall be commenced within five years upon accrual of the cause of action.

under KRS 216.515 as common-law personal-injury causes of action subject to the one-year statute of limitations and therefore untimely filed.

Shobe filed a CR<sup>8</sup> 59.05 motion requesting that the circuit court vacate its decision as premature and await this Court's decision in *Kindred* in conformity with its original abeyance order. At this point, the procedural course took an interesting twist. At the hearing on Shobe's motion, GGNSC informed the circuit court that *Kindred* had, coincidentally, been rendered that day (designated to be published) and that it was consistent with *Allen*. Shobe claims it was her counsel's belief that the circuit court intended to grant Shobe's CR 59.05 motion, but then immediately re-issue summary judgment in favor of GGNSC. Contrary to this belief, the circuit court overruled Shobe's motion on August 12, 2013.

To further muddy the procedural waters, the circuit court's order was not served upon Shobe.<sup>9</sup> Once learning of it, Shobe promptly filed a CR 60.02 motion requesting relief from the August 12, 2013 order. GGNSC filed no response. The circuit court granted Shobe's motion by order entered December 3, 2013, giving the following reasoning: "Procedurally, the Court intended to grant [Shobe's] Motion to Vacate, then issue a new order on the Motion for Summary judgment. But the Court instead issued an Order overruling the Motion to Vacate, and that Order was apparently not sent to [Shobe's] counsel." (R. at 819). The court further issued orders: (i) *vacating* the August 12, 2013, order (that overruled Shobe's CR 59.05 motion); (ii) *vacating* the July 2, 2013, order (that prematurely

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<sup>8</sup> Kentucky Rules of Civil Procedure

<sup>9</sup> Shobe discovered its entry by calling the circuit clerk's office.

granted GGNSC's motion for summary judgment); and (iii) re-issuing an order *granting* GGNSC's motion for summary judgment as of December 3, 2013.

GGNSC then filed a CR 59.05 motion seeking to vacate the December 3, 2013 order. It argued the circuit court's July 2, 2013 and August 12, 2013 orders should stand. The circuit court denied GGNSC's post-judgment motion by order entered February 10, 2014. The circuit court found "that there was some reasonable confusion regarding the status of the August 12 Order – an Order which, as noted, was never forwarded to [Shobe's] counsel after entry[,]” and that “based on the totality of the circumstances, the proper result was to vacate the original summary judgment order and issue a new order granting summary judgment, and that's precisely what the Court did on December 3, 2013.” (R. at 957). This appeal and cross-appeal<sup>10</sup> followed.

## II. STANDARD OF REVIEW

Generally, “[t]he standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). This particular appeal involves no disputed facts. Our review is of a purely legal question and is *de novo*.

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<sup>10</sup> In its cross-appeal, GGNSC argues the circuit court, under the authority of CR 77.04(4) and controlling case law, abused its discretion in granting Shobe CR 60.02 relief and, as a result, the time for filing this appeal ran from the date the court denied Shobe's CR 59.05 motion: August 12, 2013. It follows then, so the argument goes, that this appeal, which was filed in 2014, should be dismissed as untimely. As a cursory matter, we tend to disagree with GGNSC under the specific facts of this case. However, we need not reach this cross-appeal. The end result is the same: summary judgment in favor of GGNSC.

### III. ANALYSIS

Despite the procedural twists found in this case, the Supreme Court's opinion in *Overstreet* is directly on point and controlling. There, as here, the Court faced two legal inquiries: (1) "the statute of limitations applicable to actions brought pursuant to" KRS 216.515; and (2) "whether actions based upon rights created by KRS 216.515 survive the death of the nursing home resident so that such actions may be brought after the resident's death by the personal representative of the resident's estate." *Overstreet*, --- S.W.3d at ----.

The limitations issue addressed in *Overstreet*, and which is before us, is a relatively simple one to relate: whether claims brought under KRS 216.515 are akin to personal-injury causes of action and, therefore, are subject to the one-year limitation period prescribed by KRS 413.140, or are statutorily-created rights governed by the five-year limitation period prescribed by KRS 413.120(2). The Supreme Court in *Overstreet* found that the nature of the statute did not admit of a single, universally-applied approach to the limitations analysis. Instead, the Court spoke of the "nature of the rights and liability created by the various sections of KRS 216.515[.]" -- S.W.3d at ---. Its analysis first yielded several points of law.

First, "[t]he five-year limitation period provided by KRS 413.120(2) for claims brought pursuant to a statute does *not* apply to claims based on a statutory provision that 'merely codifies common law liability and does not create a new theory of liability.'" *Overstreet*, --- S.W.3d at --- (quoting *Toche v.*



*American Watercraft*, 176 S.W.3d 694, 698 (Ky. App. 2005) (emphasis in original).

Second, “a theory of liability cannot be regarded as having been ‘created by statute’ as stated in KRS 413.120(2) if it otherwise existed at common law prior to the enactment of the statute.” *Id.*

And, third, “the five-year limitations period established by KRS 413.120(2) ‘was designed to deal with new liabilities created by statute as to which no existing statute of limitation was applicable’ and was not intended to ‘repeal’ or ‘pre-empt’ existing limitation periods for common law causes of action.” *Id.* (quoting *Robinson v. Hardaway*, 293 Ky. 627, 169 S.W.2d 823, 824 (1943)).

Applying these principles to the five specific subsections of KRS 216.515 alleged in *Overstreet* as having been violated – which, significantly, are the same five subsections invoked by Shobe in this case – the Supreme Court found that subsection 6 of KRS 216.515 simply represents a codification in the nursing home context of the common law personal-injury cause of action and therefore a claim under this subsection is subject to KRS 413.140’s one-year statute of limitations. However, *Overstreet*’s other causes of action based upon subsections 18, 20, and 22 of KRS 216.515 are “liabilities created by statute,” and, therefore, are subject to the five-year limitations period established by KRS 413.120. We quote the Court’s reasoning at length:

The liabilities created for violating at least some of the rights set forth in KRS 216.515, and upon which *Overstreet* bases his cause of action, have no apparent

nexus with a common law personal injury action. For example, [the resident's] rights as a nursing home resident to "be treated with consideration, respect, and full recognition of [her] dignity" [KRS 216.515(18)] and "to be suitably dressed at all times" [KRS 216.515(20)] are not necessarily related to a common law personal injury action. By virtue of KRS 216.515, those rights exist independent of any claim for personal injury. Similarly, other rights provided in KRS 216.515, including some not asserted by Overstreet, have no inherent connection with a cause of action for personal injury. For example, the resident's rights to spousal visits, [KRS 216.515(9)] to wear her own clothing, [KRS 216.515(12)] to participate in social and religious activities, [KRS 216.515(14)] and to have access to a telephone, [KRS 216.515(21)] exist independently of a claim for personal injury. These legislatively-established rights, along with others provided by KRS 216.515, are not codifications of common law causes of action; nor are they new standards of care attached to established common law claims. Rather, they exist by virtue of the statute outside the context of any common law cause of action. They are, indeed, new theories of liability not otherwise available under the common law causes of action. These rights are established statutorily by KRS 216.515(26), which provides that "[a]ny resident whose rights as specified in this section are deprived or infringed upon shall have a cause of action against any facility responsible for the violation."

Given the nature of the rights bestowed in many subsections of KRS 216.515, we have no difficulty in concluding that the legislature intended to do something more than codify standards of care relating to the personal injury claims of nursing home residents. Consequently, we are satisfied that claims based upon these new theories of liability are subject to the five-year limitation period of KRS 413.140. That would include Overstreet's claims for violations of KRS 216.515(18) (the right to be treated with consideration, respect, and full recognition other [sic] dignity and individuality); KRS 216.515(20) (the right to be suitably dressed at all times and given assistance when needed in maintaining

body hygiene and good grooming); and, KRS 216.516(22) (the right to have a responsible party or family member notified immediately of any accident, sudden illness, or anything unusual involving the resident). Such claims are not subject to the one-year limitation period for personal injury claims. . . . As obvious as it is to us that some subsections of KRS 216.515 represent new theories of liability, it is equally obvious that Overstreet’s invocation of Subsection (6) of KRS 216.515 is nothing other than a common law personal injury claim. . . .

Subsection 6 encompasses, in the context of a nursing home environment, the traditional common law duty to avoid negligently or intentionally injuring another person. Unlike conduct that, for example, violates one’s right of access to a telephone or one’s right to be suitably dressed in one’s own clothing as provided elsewhere in KRS 216.515, the right afforded by subsection 6 — to be free of physical abuse, as asserted by Overstreet, does not present a new theory of liability.

*Id.* (footnotes omitted).

As in *Overstreet*, the “specific injuries alleged by [Shobe] fit squarely within the traditional parameters of a common law cause of action for personal injury.” --- S.W.3d at ---. The one-year limitations period of KRS 413.140 applies to Shobe’s claim under KRS 216.515(6). Shobe filed her complaint over four years after Alma’s death. Her claim pursuant to KRS 216.515(6) was brought well beyond the limitations period and is time-barred.

To Shobe’s remaining claims under subsections 18, 20, and 22 of KRS 216.515, the five-year statute of limitations in KRS 413.120 applies. These claims were timely filed. But a pivotal question remains: does Shobe, as

administratrix of Alma's estate, retain standing to bring these claims?<sup>11</sup> *Overstreet*

provides the answer and the answer is "No."

The Supreme Court explains why:

First, KRS 411.140 allows for the survival of actions to recover damages for "personal injury" and "injury to real or personal property." It provides:

No right of action for personal injury or for injury to real or personal property shall cease or die with the person injuring or injured, except actions for slander, libel, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury.

So, to the extent that *Overstreet's* claims are based upon the common law personal injury cause of action or a wrongful death claim, they survive [the resident's] death and, in the normal course of events, could have been brought by *Overstreet* as [the resident's] personal representative. However, as noted above, the statute of limitations for those claims had expired long before the action was initiated. 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 the resident.

This construction of the statutory language is consistent with the apparent purpose of KRS 216.515 to KRS 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 posthumous action, for example, to vindicate

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<sup>11</sup> GGNSC argues standing as an alternative ground to affirm the circuit court's decision. We "may affirm on any grounds supported by the record." *Southern Financial Life Ins. Co. v. Combs*, 413 S.W.3d 921, 926 (Ky. 2013).

the resident's right of access to a telephone or to wear her own clothing.

*Overstreet*, --- S.W.3d at --- (footnote omitted).

Under the binding authority of *Overstreet*, we likewise find that Shobe lacks standing to seek judicial redress for GGNSC's alleged violation of KRS 216.515(18), (20), and (22), for these "must be brought within the lifetime of the resident by the resident or his guardian." *Id.* Alma died long before Shobe filed the underlying complaint.

### CONCLUSION

Accordingly, we affirm the Jefferson Circuit Court's December 3, 2013, Order granting summary judgment in favor of GGNSC, although partly on different grounds. We dismiss GGNSC's cross-appeal as moot.

ALL CONCUR.

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