

RENDERED: AUGUST 9, 2013; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002294-MR
AND
NO. 2012-CA-000007-MR

KINDRED NURSING CENTERS LIMITED
PARTNERSHIP D/B/A HARRODSBURG
HEALTH CARE CENTER; KINDRED NURSING
CENTERS EAST, LLC; KINDRED HOSPITALS
LIMITED PARTNERSHIP; KINDRED
HEALTHCARE, INC.; KINDRED HEALTHCARE
OPERATING, INC.; AND KINDRED REHAB
SERVICES, INC. D/B/A PEOPLEFIRST
REHABILITATION

APPELLANTS/CROSS-APPELLEES

v. APPEAL FROM MERCER CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 11-CI-00296

JAMES OVERSTREET, ADMINISTRATOR
OF THE ESTATE OF LULA BELLE GORDON,
DECEASED

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: ACREE, CHIEF JUDGE; STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: Kindred Nursing Centers LTD Partnership, d/b/a Harrodsburg Health Care Center, et.al. (hereinafter collectively referred to as “HHCC”) appeal from an Amended Order and Declaratory Judgment of the Mercer Circuit Court in favor of James Overstreet, Administrator of the Estate of Lula Belle Gordon, deceased. HHCC argues that the circuit court erred in failing to conclude that Overstreet’s action alleging personal injury and violation of Kentucky’s Resident Rights Statute (KRS Chapter 216) was time-barred as having been brought outside the one or two year statutory period for personal injury actions. Based on *Allen v. Extendicare Homes, Inc.*, 2012 WL 6553823 (Ky. App. 2012), we conclude that KRS Chapter 216 merely codifies common law liability and does not create a new theory of liability. We find as controlling the one or two-year period of limitation for personal injury actions set out in KRS 413.140 or KRS 413.180, rather than KRS 413.120(2)’s five-year period of limitation for statutory actions. Accordingly, we Affirm in Part and Reverse in Part the Amended Order and Declaratory Judgment on appeal.

The facts are not in dispute. HHCC is a health care facility located in Harrodsburg, Kentucky, which provides a range of services from short term rehabilitation to long term care. On March 5, 2002, Lula Belle Gordon (“Mrs. Gordon”) was admitted to HHCC for long term care. She died as a resident of the facility on May 17, 2008.

Slightly over three years after Mrs. Gordon's death, James Overstreet filed the instant action against HHCC in his capacity of Administrator of Mrs. Gordon's estate. Overstreet's action alleged that HHCC's treatment of Mrs. Gordon during her residency at the facility violated Kentucky's Resident Rights Statute (KRS 216.515). Specifically, Overstreet alleged that Mrs. Gordon suffered physical injuries to her person by "accelerated deterioration of her health and physical condition beyond that caused by the normal aging process, as well as the following injuries: a) pressure sores; b) urinary tract infections; c) upper respiratory infection; d) infections; e) falls; f) bruising; g) skin tears; h) fracture; i) weight loss; j) dehydration; k) subdural hematoma; and l) death." The complaint also alleged that Mrs. Gordon suffered "unnecessary loss of personal dignity, extreme pain and suffering, hospitalizations, degradation, mental anguish, disability, disfigurement and loss of life, all of which were caused by the wrongful conduct of [HHCC.]"

On October 5, 2011, HHCC filed an Amended Answer and Counterclaim for Declaratory Relief, along with a CR 12.02(1) Motion to Dismiss. As a basis for the motion, HHCC argued that Overstreet was prosecuting a personal injury action which must be brought, if at all, within either one or two years of Mrs. Gordon's death.¹ Conversely, Overstreet argued that the one or two-year period of limitation was not applicable. He maintained that KRS 413.120's five-year period of limitation was applicable as the cause of action was created by statute. After a

¹ KRS 413.140(1)(a) provides that an action for personal injury shall be brought within one year after the cause of action accrued. KRS 413.180 extends the period of limitation to two years if more than one year elapses between the death of the injured party and the qualification of the decedent's personal representative.

hearing on the matter was conducted, the Mercer Circuit Court denied HHCC's motion upon determining that Overstreet was asserting a statutory action which was governed by the five-year period of limitation. The court granted the remaining Kindred defendants' motion to dismiss.

On December 12, 2011, HHCC moved the court to alter or amend its Order. To preserve its right to appeal, HHCC also filed a Notice of Appeal on December 16, 2011. Overstreet cross-appealed. On January 12, 2012, the Mercer Circuit Court declined to consider HHCC's motion to alter or amend the Order on the basis that the court lost jurisdiction. Thereafter, on February 17, 2012, a panel of the Court of Appeals directed the parties to file a motion in Mercer Circuit Court seeking a written Order disposing of the issues raised in HHCC's Motion to Alter or Amend.

The matter was remanded to Mercer Circuit Court, whereupon the court rendered an Amended Order and Declaratory Judgment on March 12, 2012. The Judgment held in relevant part that Overstreet was entitled to exercise the five-year statute of limitation for statutory actions rather than the one or two-year period for personal injury and wrongful death actions, that he had standing to prosecute the action, and that the Kindred co-defendants were not long term care facilities and were therefore dismissed. This appeal followed.

HHCC now argues that the Mercer Circuit Court erred in denying its Motion to Dismiss Overstreet's action as time-barred. At the heart of HHCC's claim of error is its contention that Overstreet's action - though characterized by Overstreet

as a statutory claim asserting residents' rights - is in fact nothing more than a classic common law personal injury and wrongful death action and is therefore subject to the one or two-year periods of limitation for personal injury claims rather than the five-year period for statutory claims. While acknowledging that Overstreet sought to assert a KRS Chapter 216 action (residents' rights), HHCC notes that the underlying damage claims set out in the complaint are merely personal injury allegations such as bruising, infection, fractured bone, dehydration and death. HHCC cites case law it contends is supportive of the proposition that the true nature of the cause of action depends on the allegations set out in the complaint considered as a whole, rather than the plaintiff's subjective characterization of the complaint. Moreover, HHCC notes that the nature of the relief sought - money damages - demonstrates that this is clearly an action arising from bodily injury. Finally, HHCC alleges that an action under KRS Chapter 216 may be brought for two purposes: 1) to enforce resident rights, and 2) to recover actual and punitive damages. Since Mrs. Gordon is no longer a resident at HHCC, it argues that Overstreet clearly is not seeking "to enforce" Mrs. Gordon's rights under the statute. Additionally, HHCC argues that Overstreet lacks standing to enforce Mrs. Gordon's rights retroactively.² In sum, HHCC argues that Overstreet's action is in both form and substance a claim for personal injury damages, that the statutory period for prosecuting a personal injury action is

² HHCC raises other claims of error as well, including laches and the constitutional prohibition against special legislation. In light of our resolution of HHCC's statutory period claim, these additional claims of error are moot.

applicable, and that the Mercer Circuit Court erred in failing to so rule.

In response, Overstreet argues that Kentucky's Resident Rights Statute creates a *new* category of injury above and beyond the common law right to recover for bodily injury. The import of this distinction is this: a claim based on a statute which merely codifies a pre-existing common law cause of action is governed by the common law cause of action's period of limitation (in this case one or two years for personal injury); conversely, if the statute creates a *new* cause of action, a claim asserted thereunder is subject to a five-year period of limitation for statutory claims. *Toche v. American Watercraft*, 176 S.W.3d 694 (Ky. App. 2005). Overstreet contends that KRS Chapter 216 creates a new cause of action rather than a reiteration or codification of the common law claim of personal injury, and that he is entitled to bring an action thereunder within five years after Mrs. Gordon's death.

On December 14, 2012, or some four months after the filing of the parties' written arguments herein, a panel of this Court rendered an unpublished Opinion styled *Allen v. Extendicare Homes, Inc.*, 2012 WL 6553823 (Ky. App. 2012). The facts and issues of law set out in *Allen* mirror those at bar, are persuasive to this Court, and are dispositive of HHCC's instant claim of error. In *Allen*, an Administratrix of an estate filed an action on behalf of the decedent asserting a KRS Chapter 216 claim. As in the matter at bar, the health care provider moved pursuant to CR 12.02 to dismiss the action as time-barred, and the Administratrix responded that KRS Chapter 216 created a new theory of liability implicating the

five-year statutory period. The circuit court therein determined that KRS 216.515 does not create a new theory of liability. In reaching this conclusion, the court found that KRS Chapter 216 merely clarified and codified “that residents of certain long term care facilities have the enumerated rights” previously established in the common law. *Allen* at p. 2. The trial court determined that a KRS Chapter 216 action is a personal injury action subject to the one or two-year statutory periods set out in KRS 413.140(1)(a) or KRS 413.180, respectively.

That conclusion was affirmed on appeal, wherein a panel of this Court stated that

we do not believe that KRS 216.515 creates any new statutory theory of liability; rather, we are of the opinion that KRS 216.515 merely sets forth sundry standards of care created by legislative fiat. Essentially, appellant’s claims are based upon appellees’ negligence with “the standard of care . . . legislatively declared by statute.” Under either the one-year limitation period as set forth in KRS 413.140(1)(a) or under KRS 413.180, we conclude that appellant’s claims were clearly time-barred.

Allen at p. 8 (citations omitted).

Allen considered the same factual scenario and issues of law as those before us.³ The parties have cited no published case law disposing of the issues presented, nor has our own research revealed any such published opinions; therefore, we find persuasive the reasoning set out in *Allen* and adopt it herein. The common law right to prosecute a personal injury cause of action pre-dated the enactment of KRS

³ Pursuant to Kentucky Rules of Civil Procedure (CR) 76.28(4)(c), unpublished Kentucky appellate decisions rendered after January 1, 2003, may be cited for our consideration if there is no published opinion that would adequately address the issue before us.

Chapter 216, and the statutory language serves to reiterate and codify that cause of action as it relates to residents of certain long term care facilities. We also recognize that Mrs. Gordon, or her personal representative or Administrator, could have asserted a common law action to recover damages for negligent or other improper residential care, personal injury and/or death without implicating the provisions of KRS Chapter 216, or if KRS Chapter 216 had never been enacted. The estate's appellate counsel candidly acknowledged this at oral argument. As in *Allen*, we cannot conclude that KRS 216.515 creates any new statutory theory of liability; rather, KRS 216.515 merely sets forth various standards of care created by legislative enactment. The underlying common law personal injury claims remain undisturbed, and were merely reiterated by the legislature in KRS Chapter 216.

Because KRS Chapter 216 does not create a new theory of liability, the one or two-year statutory periods for personal injury actions are applicable. Overstreet's action was not filed within two years of Mrs. Gordon's death, and is therefore time-barred. While we recognize that the Mercer Circuit Court was not availed of the *Allen* opinion at the time of its ruling, the *Allen* decision and its reasoning are persuasive and guide our reasoning herein.

In his cross-appeal, Overstreet argues that the Mercer Circuit Court improperly sustained HHCC's corporate co-defendants' Motion to Dismiss. These co-defendants include Kindred Nursing Centers East, LLC, Kindred Hospitals Limited Liability Partnership, Kindred Healthcare, Inc., Kindred Healthcare

Operating, Inc. and Kindred Rehab Services, Inc. In sustaining the Motion to Dismiss as to these co-defendants, the Mercer Circuit Court determined that they are not “long-term care facilities” as defined in KRS 216.515. Overstreet maintains that a proper interpretation of KRS Chapter 216 reveals that liability under the statute extends to all corporate entities involved in the operation, management and control of the long term healthcare facility, and that liability may be assessed through theories of joint venture, alter ego, vicarious liability, etc. Overstreet contends that at this juncture in the litigation, all allegations must be taken as true and that the circuit court erred in failing to so rule.

Having determined that Overstreet’s action is time-barred, we hold this issue to be moot. *Arguendo*, even if the corporate co-defendants were improperly dismissed, the application of the one or two-year statutory periods would bar recovery as against them. Accordingly, we find no error on this issue.

For the foregoing reasons, we Reverse the Amended Order and Declaratory Judgment of the Mercer Circuit Court as to its holding that 1) Overstreet is entitled to prosecute his action within the five-year period of limitation set out in KRS 413.120(2), and 2) HHCC is not entitled to an Order Dismissing. The Amended Order and Declaratory Judgment are in all other respects Affirmed.

ALL CONCUR.

BRIEFS FOR
APPELLANTS/CROSS-
APPELLEES:

Donald L. Miller, II
J. Peter Cassidy, III
Kristin M. Lomond
Louisville, Kentucky

ORAL ARGUMENT FOR
APPELLANTS/CROSS-
APPELLEES:

Donald L. Miller, II
Louisville, Kentucky

BRIEFS FOR APPELLEE/CROSS-
APPELLANT:

Corey T. Fannin
Robert E. Salyer
Lexington, Kentucky

ORAL ARGUMENT FOR
APPELLEE/CROSS-APPELLANT:

Robert E. Salyer
Lexington, Kentucky