

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-000050-MR

GINA ALLEN, AS ADMINISTRATRIX  
OF THE ESTATE OF MARGARET  
HILLMAN, DECEASED

APPELLANT

v. APPEAL FROM TRIGG CIRCUIT COURT  
HONORABLE CLARENCE A. WOODALL, III, JUDGE  
ACTION NO. 11-CI-00173

EXTENDICARE HOMES, INC.,  
D/B/A SHADY LAWN NURSING  
HOME; EXTENDICARE, INC.;  
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

\*\* \*\* \* \* \* \* \*

BEFORE: MAZE, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Gina Allen, as administratrix of the estate of Margaret Hillman, deceased, brings this appeal from a December 9, 2011, order of the Trigg Circuit Court, dismissing appellant's claims against Extendicare Homes, Inc., d/b/a Shady Lawn Nursing Home; Extendicare, Inc., Extendicare Health Network, Inc., Extendicare REIT, Extendicare, L.P., Extendicare Holdings, Inc., Extendicare Health Services, Inc., and Extendicare Health Facility Holdings, Inc., (collectively referred to as appellees) as time-barred. We affirm.

On August 1, 2011, appellant filed a complaint alleging that appellees violated sundry statutory duties as set forth in Kentucky Revised Statutes (KRS) "216.510 *et seq.*" in their care of Margaret Hillman, a long-term resident of Shady Lawn Nursing Home in Cadiz, Kentucky. Hillman passed away on April 22, 2007. Appellant asserts that while Hillman was a resident of Shady Lawn from June 28, 2006, through April 21, 2007, Hillman "suffered accelerated deterioration of her health and physical condition beyond that caused by the normal aging process" and suffered myriad injuries including malnutrition, pressure sores, delays in treatment, over-medication and death. In particular, appellant claimed that appellees breached the following duties as set forth in KRS 216.515:

- (6) All residents shall be free from mental and physical abuse, and free from chemical and physical restraints except in emergencies or except as thoroughly justified in writing by a physician for a specified and limited period of time and documented in the resident's medical record.

(18) Each resident shall be treated with consideration, respect, and full recognition of his dignity and individuality, including privacy in treatment and in care for his personal needs.

(20) Residents have the right to be suitably dressed at all times and given assistance when needed in maintaining body hygiene and good grooming.

(22) The resident's 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.

Additionally, appellant alleged that appellees violated “the right to have an adequate and appropriate resident care plan developed, implemented and updated to meet her needs” and various “statutory standards and requirements governing licensing and operation of long-term care facilities.” Complaint at 13.

Appellees filed an answer and a Kentucky Rules of Civil Procedure (CR) 12.02(f) motion to dismiss for failure to state a claim upon which relief could be granted. In the motion to dismiss, appellees argued that appellant’s claims were time-barred by operation of either the one-year statute of limitation for personal injury actions (KRS 413.140(1)(a)) or a two-year limitation period for actions by personal representatives and provided by KRS 413.180. Conversely, appellant argued that her claims were based upon statutorily created liability; thus, the applicable statute of limitations was five years as set forth in KRS 413.120.

In deciding that appellant’s claims were time-barred by expiration of the limitation period, the circuit court reasoned:

[Appellees] believe that [appellant's] action is time-barred under all applicable statutes of limitation. KRS 413.140(1) provides that personal injury claims among others "shall be commenced within one (1) year after the cause of action accrued." [Appellees] acknowledge that KRS 413.180 could extend the time for up to two years after the cause of action accrued, but not in excess of four years from that time.

On the other hand, [appellant] asserts that her claims are determined by KRS 413.120(2) which is the five year statute of limitations for an action "upon a liability created by statute, when no other time is fixed by the statute creating the liability." This argument is based upon the recitation in the Complaint that [appellant] seeks compensation for violation of KRS 216.515, specifically (26).

It is true that no specific statute of limitations is provided in KRS 216.510 *et. seq.*

While it is true that the cases cited by [appellees] are distinguishable on their facts, *Toche v. The American Watercraft Association*, 176 S.W.3d 694 (Ky. App. 2005) confirmed that the test for this Court is whether the statute creates new liability or "merely codifies common law liability" or substitutes the legislature's determination of a standard of care for a common law standard of care.

In looking at the claims asserted by [appellant] and the damages sought to be recovered in this action, the claims asserted are for personal injuries and/or wrongful death, and KRS 216.515 does not create a new theory of liability, it simply clarifies that residents of certain long term care facilities have the enumerated rights which "are in addition to and cumulative with other legal and administrative remedies."

Again, assuming that [appellant's] allegations are true, since they are claims for personal injury or wrongful death and since they were not asserted within at least two

years from the date of death, [appellant's] claim is time-barred.

The circuit court granted appellees' CR 12.02(f) motion and dismissed appellant's complaint. This appeal follows.

To begin, a motion to dismiss under CR 12.02 is proper only 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, ALF-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 all claims against appellees as time-barred. Appellant believes that the proper statute of limitations is five years as set forth in KRS 413.120(2), as her claims were based upon statute (KRS 216.515). Appellant points out that she filed the complaint against appellees on August 1, 2011, and that Hillman was a resident of Shady Lawn from June 28, 2006, through April 21, 2007, and died on April 22, 2007. Thus, appellant argues that her complaint was timely filed well-within the five-year limitation period of KRS 216.515.

The parties' adamantly disagree upon the applicable statute of limitations. Appellant believes KRS 413.120(2) is applicable; whereas, appellees believe that either KRS 413.140(1)(a) or KRS 413.180 is applicable. These statutes read as follows.

KRS 413.120(2):

(2) An action upon a liability created by statute, when no other time is fixed by the statute creating the liability.

KRS 413.140(1)(a):

(1) The following actions shall be commenced within one (1) year after the cause of action accrued:

(a) An action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice, or servant[.]

KRS 413.180:

(1) If a person entitled to bring any action mentioned in [KRS 413.090](#) to [413.160](#) dies before the expiration of the time limited for its commencement and the cause of action survives, the action may be brought by his personal representative after the expiration of that time, if commenced within one (1) year after the qualification of the representative.

(2) If a person dies before the time at which the right to bring any action mentioned in [KRS 413.090](#) to [413.160](#) would have accrued to him if he had continued alive, and there is an interval of more than one (1) year between his death and the qualification of his personal representative, that representative, for purposes of this chapter, shall be deemed to have qualified on the last day of the one-year period.

A case similar to the facts herein was decided by this Court in *Toche v. American Watercraft*, 176 S.W.3d 694 (Ky. App. 2005). Therein, appellant suffered personal injuries as a result of a watercraft accident and filed a complaint alleging violation of KRS 235.300. KRS 235.300 was generally applicable to operation of a water vessel and was entitled “civil liability for negligent operation.”

Appellant filed the complaint one year and one month after the watercraft accident occurred. Appellant argued that the complaint was timely filed because the five-year limitation period of KRS 413.120(2) controlled as her action was based upon violation of a statutory duty (KRS 235.300). The Court of Appeals disagreed and held that the one-year limitation period of KRS 413.140(1)(a) applied:

[Appellant] contends that the trial court erred in finding that the one-year statute of limitations of [KRS 413.140](#) applies to her claims. [KRS 413.140\(1\)](#) provides: “The following actions shall be commenced within one (1) year after the cause of action accrued: (a) An action for an injury to the person of the plaintiff . . . .” [Appellant] contends that [KRS 413.120](#), not [KRS 413.140\(1\)\(a\)](#), is controlling, on grounds that her claims arise by statute. [KRS 413.120](#), provides: “The following actions shall be commenced within five (5) years after the cause of action accrued: . . . (2) An action upon a liability created by statute, when no other time is fixed by the statute creating the liability.”

. . . .

In the present case, [KRS 235.300](#) merely codifies common law liability and does not create a new theory of liability. [Appellant’s] claim is still a basic personal injury claim under common law. We therefore conclude that the trial court correctly found that the one-year statute of limitations of [KRS 413.140\(1\)\(a\)](#) applied.

*Toche*, 176 S.W.3d at 696, 698. Hence, in *Toche*, the Court of Appeals determined that as no new theory of liability was created by statute, appellant’s claims were merely for personal injury due to negligence and were controlled by the one-year limitation period in KRS 413.140(1)(a).

Likewise, in this case, 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. *See Stivers v. Ellington*, 140 S.W.3d 599 (Ky. App. 2004). Essentially, appellant’s claims are based upon appellees’ negligence with “the standard of care . . . legislatively declared by statute.” *Id.* at 601. 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.

We view any remaining contentions as moot.

In sum, we hold that the circuit court properly granted appellees’ CR 12.02(f) motion to dismiss appellant’s complaint as time-barred.

For the foregoing reasons, the order of the Trigg Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Mary J. Perry  
Robert E. Salyer  
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ORAL ARGUMENT FOR  
APPELLANT:

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BRIEF FOR APPELLEES:

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