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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001333-MR

HOLLY WILSON, ADMINISTRATRIX OF
THE ESTATE OF CHESTER GRAY — APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 11-CI-00237

SPRING VIEW HEALTH &
REHAB CENTER — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, JONES, AND K. THOMPSON, JUDGES.

ACREE, JUDGE: In 2016, in this same Grayson Circuit Court action, this Court held that the trial court erred by granting summary judgment to Appellee on Chester Gray's claim brought pursuant to Kentucky Revised Statute (KRS) 216.515, a bill of rights for residents of long-term care facilities. *Wilson v. Spring*

View Health & Rehab Center, No. 2015-CA-001622-MR, 2016 WL 7408847, at *5 (Ky. App. Dec. 22, 2016) ("*Wilson I*") (holding the KRS 216.515(4) claim had "potential merit" and, so, "[a]t the very least, there are genuine issues of material fact that preclude summary judgment"). Nonetheless, on remand the trial court granted Appellee's motion to dismiss the claim, believing it was compelled to do so by *Overstreet v. Kindred Nursing Centers Limited Partnership*, 479 S.W.3d 69 (Ky. 2015). Because the trial court's decision violates the law of the case doctrine, we reverse and remand.

I. Relevant Factual and Procedural History

In *Wilson I*, we summarized the underlying facts as follows:

> Chester Gray was a long-term resident of Spring View and Ms. Wilson is his daughter. On July 7, 2010, the staff at Spring View became concerned for Mr. Gray's mental health. They arranged for Wellstone Regional Hospital to accept Mr. Gray for an inpatient psychiatric evaluation. In order to transport Mr. Gray to Wellstone, the Spring View staff contacted Grayson County EMS. The EMS arrived and transported Mr. Gray to Wellstone via ambulance. Once at Wellstone, the EMS attempted to transfer Mr. Gray from the ambulance to a wheelchair. While doing so, Mr. Gray was dropped and injured.
>
> The Complaint against Spring View and Grayson County EMS was filed on July 6, 2011. Mr. Gray passed away July 27 of the same year; therefore, the case was held in abeyance until the estate could be opened and an administrator appointed. On November 2, 2011, the estate was substituted as the plaintiff with Ms. Wilson acting as administratrix. The Complaint alleged that Spring View was negligent in transferring Mr. Gray to

> Wellstone, which led to his injuries, and that Spring View violated Kentucky Revised Statute (KRS) 216.515, which concerns the rights of residents of long-term care facilities.

2016 WL 7408847, at *1 (footnotes omitted).

This Court concluded in *Wilson I* that Appellee was entitled to summary judgment on Appellant's negligence claims, but not the KRS 216.515(4)[1] claim. Appellee filed a petition for rehearing arguing, for the first time, that our decision contravened *Overstreet*, which was rendered during the pendency of the *Wilson I* appeal. The Court denied the petition for rehearing without comment.

Instead of seeking the Supreme Court's discretionary review, Appellee promptly moved the circuit court to dismiss – again based on its interpretation of *Overstreet*. Despite our holding in *Wilson I*, in August 2017 the trial court dismissed the KRS 216.515(4) claim. This appeal followed.

II. Analysis

The overarching question before us is whether the trial court erred by dismissing the very claim we had concluded was potentially meritorious. It should come as no great surprise that the answer is yes.

[1] KRS 216.515(4) provides in relevant part that a resident of a long-term care facility "shall be transferred or discharged only for medical reasons, or his own welfare, or that of the other residents, or for nonpayment, except where prohibited by law or administrative regulation. Reasonable notice of such action shall be given to the resident and the responsible party or his responsible family member or his guardian."

"The law-of-the-case doctrine describes a principle which requires obedience to appellate court decisions in all subsequent stages of the litigation. Thus, on remand, a trial court must strictly follow the mandate given by an appellate court in that case." *Buckley v. Wilson*, 177 S.W.3d 778, 781 (Ky. 2005) (footnotes omitted). The doctrine is an "iron rule" that applies "however erroneous the [appellate] opinion or decision may have been." *University Medical Center, Inc. v. Beglin*, 432 S.W.3d 175, 178 (Ky. App. 2014) (quotation marks and citation omitted). The doctrine also encompasses all errors "lurking in the record on the first appeal which might have been, but were not expressly relied upon as error." *Id.* (quotation marks and citation omitted). Because it is a question of law, we review application of the doctrine *de novo*. *Id.*

Though the doctrine usually applies to erroneous appellate decisions, there is a narrow exception reserved for "rare" instances when the prior appellate decision is "clearly and palpably erroneous." *Patmon v. Hobbs*, 495 S.W.3d 722, 728 (Ky. App. 2016) (quotation marks and citation omitted). The exception is utilized sparingly because even "the mere existence of conflict between the law of a case and other decisions does not guarantee the application of an exception." *Brooks v. Lexington-Fayette Urban County Housing Auth.*, 244 S.W.3d 747, 753 (Ky. App. 2007).

An error is generally deemed to be palpable only if it is "easily perceived or obvious." *Nichols v. Commonwealth*, 142 S.W.3d 683, 691 (Ky. 2004). Or, as the Supreme Court memorably phrased it, a palpable error is "so egregious that it jumps off the page . . . and cries out for relief." *Chavies v. Commonwealth*, 374 S.W.3d 313, 323 (Ky. 2012) (quotation marks and citation omitted).

In short, the law of the case doctrine reflexively applies absent rare, extraordinary circumstances which immediately lead to a nearly irrefutable conclusion that the prior appellate decision is so egregiously incorrect that following it would lead to a manifest injustice. "In such a case it is deemed to be the duty of the [appellate] court to admit its error rather than to sanction an unjust result . . . ." *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539, 542 (Ky. 1956).

It is beyond debate that the trial court's dismissal of the KRS 216.515(4) claim on remand did not "strictly follow" this Court's decision in *Wilson I*. Thus, the trial court's decision must be reversed, unless the prior decision can fairly be called palpably erroneous (*i.e.*, directly and unmistakably contrary to the holding in *Overstreet*).

In *Overstreet*, the estate of a deceased former resident of a long-term care facility filed an action three years after the resident's death alleging the

facility had violated several sections of KRS 216.515 (not including section four). The Kentucky Supreme Court phrased the two discrete issues before it as follows:

> In this appeal we address the statute of limitations applicable to actions brought pursuant to that statute [KRS 216.515]. We also consider 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.*

479 S.W.3d at 71 (emphasis added). The Court held that claims alleging a violation of the statute which also set forth a recognized common law claim (such as for personal injury) are subject to a one-year statute of limitations and may be brought by the resident's estate following his/her death, but claims based solely on KRS 216.515 which would not otherwise be cognizable under the common law are governed by a five-year statute of limitations and must be brought prior to the resident's death. *Id.*

Because there is no dispute that Wilson timely filed his complaint before he died, the discussion in *Overstreet* which could be controlling here is whether the complaint survived his death. Indeed, the parties argue at length whether Wilson's claims are based on KRS 216.515 alone or a combination of the statute and the common law. However, under these facts that issue is not determinative.

Overstreet emphasized repeatedly that it addressed only whether claims which are viable solely pursuant to KRS 216.515, and not the common law, may be brought by the estate of a *deceased* resident. The Court said:

> We also consider 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*. . . . Some of Overstreet's KRS 216.515 claims were not in the nature of a personal injury action, and thus were not necessarily extinguished by the expiration of the one-year limitation period. *We must next address whether those claims survived Gordon's death, such that they could be properly brought by the administrator of her estate*. . . . We are further persuaded that the other causes of action based upon provisions of KRS 216.515, for which Overstreet seeks redress, are 'liabilities created by statute,' and, therefore, are subject to the five-year limitations period established by KRS 413.120. However, those causes of action do not fit within the survival provisions of KRS 411.140 and, based upon the language of KRS 216.515(26), *must be brought during the lifetime of the resident by the resident or his guardian*.

Id. at 71, 77, 78 (emphasis added). Consequently, even if we assume, *arguendo*, that Wilson's claims would not be cognizable under the common law, *Overstreet* simply did not address situations in which the resident brought *inter vivos* claims but died before they were finally adjudicated. Because *Overstreet* answered a question which this case does not pose and did not answer the question this case does pose, the trial court erred by choosing to follow the distinguishable opinion in *Overstreet* instead of our clear mandate. Even the possibility of some degree of

tension between *Wilson I* and *Overstreet* would not give the trial court license to ignore this Court's express mandate. *Brooks*, 244 S.W.3d at 753.

We will grant that *Overstreet* does seem to broadly state that claims brought under KRS 216.515 which are not also cognizable under the common law do not survive the resident's death. However, ignoring such generalized dicta and focusing on the questions the opinion expressly says it is addressing, that facially sweeping language must be construed in a more limited manner. Therefore, we interpret the opinion to have meant that the right to bring such claims dies at the same time as the resident, not that extant claims are extinguished at the exact moment of a resident's death.

In addition, *Overstreet* does not even specifically address claims brought under KRS 216.515(4). Indeed, the parties have not cited, nor have we independently located, any authority construing that statutory subsection in this context. Thus, neither *Overstreet* nor any other controlling authority directly contradicts our decision in *Wilson I*.

A palpable error is plain, obvious, and egregious. Because *Overstreet* is materially distinguishable, our conclusion in *Wilson I* regarding the potential merit of Wilson's KRS 216.515(4) claim is not obviously, egregiously, and irrefutably in conflict with *Overstreet*. One must presume that when *Overstreet* was brought to the attention of this Court on the petition for rehearing of *Wilson I*,

the Court considered the case distinguishable, just as the Court has done here. In hindsight, the Appellee's best opportunity to present a contrary argument was the thirty-day window following this Court's denial of the petition to seek discretionary review by the Supreme Court.[2] Neither this Court's denial of the petition, nor the Appellee's failure to seek review in the Supreme Court created an error which cries out for relief. Consequently, the law of the case doctrine applies and the trial court's failure to adhere to our decision must be reversed.

III. Conclusion

For the foregoing reasons, the trial court's dismissal of the KRS 216.515(4) claim is reversed and this case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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[2] If Appellee believed *Wilson I* was legally erroneous in light of *Overstreet*, it should have sought discretionary review from the Kentucky Supreme Court instead of seeking nullification in the trial court. As stated in *Williamson v. Commonwealth*:

> It is fundamental that when an issue is finally determined by an appellate court, the trial court must comply with such determination. The court to which the case is remanded is without power to entertain objections or make modifications in the appellate court decision. It necessarily follows, therefore, that if a party is aggrieved by an adverse appellate determination, his remedy is in an appellate court at the time the adverse decision is rendered. This is so because an objection in the trial court is futile and an appeal from the trial court's implementation of the appellate determination is nothing more than an attempt to relitigate an issue previously decided.

767 S.W.2d 323, 325 (Ky. 1989) (paragraph break and citations omitted).

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