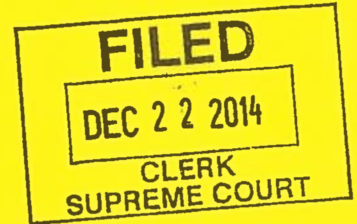

Commonwealth of Kentucky
Supreme Court of Kentucky

2013 -SC-000620
(2011-CA-002294)
(2012-CA-000007)

JAMES OVERSTREET, ADMINISTRATOR of the ESTATE of LULA BELLE GORDON, deceased — APPELLANT

v.

KINDRED NURSING CENTERS LT. 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 PEOPLE*FIRST* REHABILITAITON — APPELLEES

REPLY BRIEF OF APPELLANT

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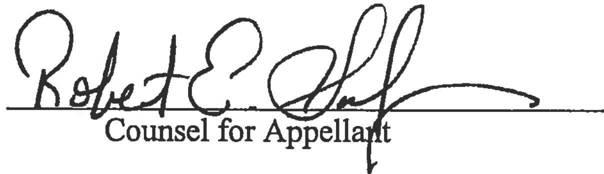
NOTICE

Please take notice that this document will be filed in the Office of the Clerk of the Supreme Court of Kentucky on this, the 19th day of December, 2014.

CERTIFICATE OF SERVICE

I certify that this document was served upon Donald L. Miller, II, Esq., J. Peter Cassidy, III, Esq., and Kristin M. Lomond, Esq. of Quintairos, Prieto, Wood & Boyer, P.A., 9300 Shelbyville Road, Suite 400, Louisville, KY 40222; upon the Hon. Darren W. Peckler, Mercer Circuit Court, 224 S. Main St., Harrodsburg, KY 40330; and upon the Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, on this the 19th day of December, 2014.



Counsel for Appellant

TABLE OF CONTENTS, POINTS, AND AUTHORITIES

KRS § 216.515 .... *passim*

TABLE OF CONTENTS, POINTS, AND AUTHORITIES iii

REPLY 1

CR 76.12 1
Oakley v. Oakley, 391 SW3d 377, 380 (Ky.App. 2012) 1
Phelps v. Louisville Water Co, 103 SW3d 46 (Ky. 2003) 2

I. The Statute and the Complaint 4

A. KRS § 216.515 creates a statutory cause-of-action 4

KRS § 413.140 4
KRS § 413.120 5

B. Appellant has made out a KRS § 216.515 cause-of-action in his Complaint.. 6

RICHARD WEAVER, IDEAS HAVE CONSEQUENCES (1948) 6

C. KRS § 216.515 does not constitute impermissible "Special Legislation" 6

Kling v. Geary, 667 SW2d 379, 382 (Ky. 1984) 7

II. Liability going to entities other than the "Facility" 8

KRS § 362.210 8
CR 69.. 8
Merrill ex rel. Estate of Merrill v. Arch Coal, Inc., 118 Fed. Appx. 37 (6th Cir. 2004) 8
Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 663 (6th Cir. 1979) 8
Morgan v. O'Neil, 652 S.W.2d 83 (Ky.1983) 8
Schlegel v. Li Chen Song, 547 FSupp2d 792 (N.D.Oh. 2008) 9

III. Standing 9

Layne v. Newberg, 841 S.W.2d 181 (Ky.1992) 9

IV. Laches 9

V. Conclusion 9

APPENDIX

REPLY

Again, there are three basic questions presented in this appeal:

(1) What is the Statute of Limitations appertaining to KRS § 216.515?[1]

(2) Does Appellant's Complaint make out a KRS § 216.515 claim?

(3) Can an owning and operating corporation for a long term care facility itself be liable for violations of KRS § 216.515?

Additionally, Appellees invoke the Doctrine of Laches to prevent prosecution of Appellant's claims and uphold the lower court's order, and Appellees also challenge Appellant's standing to proceed under KRS § 216.515. As an initial matter, Appellees assert that the errors assigned by Appellant were not preserved because Appellant failed to indicate the exact point of preservation in the record.

This last is an utterly frivolous contention. Appellees should be reminded that this is not a game.

The errors were preserved… in the Court of Appeals Order. This is the order which… is now on appeal… which addressed all points on appeal… and which was attached to Appellant's Motion for Discretionary Review. (*See* **Appellate Exhibit A**) The Circuit Court Order, also addressing the matters on review, too was attached. (*See* **AE B**) According to lower court case law, the point of CR 76.12(4)(c)(v) is to establish with confidence that a matter has in fact been preserved, and had been argued in the lower court, *Oakley v. Oakley*, 391 SW3d 377, 380 (Ky.App. 2012), not simply to test whether counsel can overcome pettifogging objections.[2] There is no question of

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[1] In addition to argument from case and statutory law, Appellees also argue that Constitutional law mandates their preferred construction of the Statute of Limitations.

[2] As Appellees are fully aware, the only cause-of-action pled in the Circuit Court was filed pursuant to KRS § 216.515; the questions at bar, all pertaining to the legal construction of that statute, were aggressively

searching through a "vast record on appeal," and Appellees' citation to *Phelps v. Louisville Water Co*, 103 SW3d 46 (Ky. 2003), to this effect, is meritless.

Likewise, Appellees also vainly bleat that the circumstances and importance of the nursing home industry should influence this Court's decision.[3] It should not.

In fact, Appellees' argument in this vein is self-defeating. The fact that Kentucky has a growing nursing home population (*i.e.*, an ever-growing class of vulnerable citizens committed to the tender mercies of for-profit businesses) is not at all justification for hobbling those citizens' ability to protect themselves by artificially curtailing a Statute of Limitations, as the Court of Appeals has inadvertently done. If anything, circumstances and current events counsel increased scrutiny of the for-profit nursing home industry.

Appellees lament the state-of-affairs of Kentucky and extol those of Texas. Perhaps the state-of-the law in Texas explains the disregard with which the nursing home industry treats elderly Texans.

> [F]or older people with Alzheimer's or other forms of dementia, they can be deadly. The Food and Drug Administration has given these drugs a black box warning, saying they can increase the risk of heart failure, infections and death. Yet almost 300,000 nursing home residents still get them.
>
> * * *
>
> Take Texas for example. More than a quarter of nursing home residents there still get antipsychotic drugs. Since the beginning of the federal initiative, the nationwide average has dropped below 20 percent. That puts Texas in last place compared with other states and the District of Columbia.

(*See* http://www.npr.org/blogs/health/2014/12/09/368538773/nursing-homes-rarely-penalized-for-oversedating-patients; **AE C**)

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litigated by all parties in the trial court; and the appropriate standard of review for these, purely legal questions (applicable Statute of Limitations and reach of a statute), is *de novo*.

[3] "The questions posed here loom critically over an entire industry providing care to the fastest growing segment of our population…" etc…. (Appellees' Brief at p. 20)

It should go without saying that administering antipsychotic drugs, without an appropriate diagnosis and without a prescription, just to get the nursing home resident 'to shut up,' would be violative of the resident's dignity and of the rights guaranteed by KRS § 216.515.

> "My mom was standing up with a lot of the other ladies, doing the hula," recalls Levine. "And she pulled me up off the chair and said, 'Hula with me. It's fun.' And I think that was the last time I remember her having that 'I love my life' kind of look on her face."
>
> Not long after that, Patricia Thomas fell and fractured her pelvis. After a brief hospital stay, she went to a nursing home for rehab.
>
> "But within a week," says Levine, "she was in a wheelchair, slumped over, sucking on her hand, mumbling to herself, completely out of it, not even aware that I was there."
>
> Her mother was so "out of it," she couldn't do the rehabilitation work that was the reason she went to the nursing home in the first place. So they discharged her. That's when Levine first saw a list of her mother's medications.
>
> "I literally freaked out," says Levine. "I couldn't believe all of these drugs on a list for my mother."
>
> Among them were Risperdal and Haldol, both powerful antipsychotics. Levine tried to slowly wean her mother from the drugs, but Patricia Thomas remained in her wheelchair. She never had another conversation. She was dead in two months.

(*See* http://www.npr.org/blogs/health/2014/12/08/368524824/old-and-overmedicated-the-real-drug-problem-in-nursing-homes; **AE D**)

So perhaps it isn't the nursing home industry which is most subject to being "battered and devastated" (*see* Appellees' Brief at p. 20), and perhaps Texas nursing home residents would be bettered served by a reasonable Texas Statute of Limitations. But in any event, it is wholly improper to subtly counsel that interpretation of Kentucky statutes and Statute of Limitations law should be conducted with an eye on the

importance of an industry and its supposed "dire" circumstances. Appellees are surreptitiously arguing for a type of tort "reform," through artificially limiting actions, and such argumentation is improper *in se*.

I. The Statute and the Complaint

To be expected, Appellees have argued both that (1) KRS § 216.515 does not create a new cause-of-action entitled to a Statute of Limitations different from that for personal injury, and/or that (2) Appellant did not make out such a distinctive cause-of-action in his Complaint. Neither argument has merit.

A. KRS § 216.515 creates a statutory cause-of-action.

> Any 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****....*

KRS § 216.515(26) (emphasis added).

Appellees have conceded that if a statute creates a new right enforceable at law, then this constitutes a statutory cause-of-action entitled to a Statute of Limitations different from that of KRS § 413.140. So Appellees necessarily argue that the 25 line rights list in KRS § 216.515 all existed at Common Law. Appellees call KRS § 216.515 a bundling of contract rights, civil rights, personal integrity rights, etc... in the nursing home context, in a single nursing home standard of care statute. Yet, it is a mystery just what Common Law action covered a right to "the use of [...] personal clothing" at a nursing home ((KRS § 216.515(12)), or "the right to have access to all inspection reports on the facility" ((KRS § 216.515(24)), and Appellees haphazardly characterizing these as preexisting civil rights, etc... does not make it so.

Appellees have explicitly argued that KRS § 216.515 encompasses a wide range of Statutes of Limitations because the 1-25 line items stretch the breadth of the Common Law. (*See* Appellees' Brief at p. 24) How this is to be workable in practice is yet another mystery which Appellees have posed. Furthermore, Appellees fail to adequately explain the purpose of KRS § 216.515, merely characterizing it as a statute designed to put a "'finer point'" on nursing home rights. (*See* Appellees' Brief at p. 7) This characterization explains nothing, and serves to introduce the mystery as to why the General Assembly would simply reiterate rights and causes-of-action already covered by the Common Law. A more rational explanation would be that, in the desire to protect a particularly vulnerable class of Kentucky citizens, the General Assembly intended, while reaffirming the nursing home resident's other potential remedies, to otherwise subsume the field of nursing home litigation—converting even Common Law torts committed in the nursing home context (at least those arguably covered by the KRS § 216.515 list), into statutory torts... which would be entitled to the statutory Statute of Limitations served by KRS § 413.120. That is, it would seem that the General Assembly intended that nursing home person injury, civil rights deprivation, etc... be placed under a five year Statute of Limitations for the ***very justifiable reason*** that this is a class of citizen in need of protection, and ***given their physical and mental circumstances***, in need of a reasonable Statute of Limitations longer than that pertaining to the average citizen.

Creation of a right perforce creates with it a remedy. As such, Appellees citations to *Toche*, *Adkins*, *Stivers*, etc... are misplaced. Those cases involved changes in standards of care, changes in ***how*** violations of preexisting Common Law rights might be shown. Changing or adding as to how a right may be violated does not alter the

appertaining Statute of Limitations. Creating an enforceable list… denominating these as "rights"… with the language "shall have a cause of action"… does, by standing up a statutory cause-of-action, entitled them to the Statute of Limitations of KRS § 413.120.

B. Appellant has made out a KRS § 216.515 cause-of-action in his Complaint.

As a second line of defence, Appellees argue that, even if KRS § 216.515 makes out a statutory cause-of-action, Appellant's Complaint is not really a KRS § 216.515 action. Appellees argue that it represents a disguised Common Law personal injury claim. That the "gist" of a Complaint (*see* Appellees' Brief at p. 11) forms the reality of the Complaint is not a matter in question. Ironically however, Appellees argue as if the intent of the Complaint-drafter is the entire crux of the meaning, the crux of the legal significance, of a drafted Complaint. Not so.

Words have meaning. Just as ideas have consequences, words have meaning. RICHARD WEAVER, IDEAS HAVE CONSEQUENCES (1948). In a Complaint, words have legal significance apart from, and above, the alleged desires or aversions of the drafter. So even if Appellant had wished to plead out a personal injury cause-of-action, and even if he has done so in some aspects of the Complaint; Appellant has inescapably also pled out a cause-of-action for a tort under the independent tort statute, KRS § 216.515. *See* Appellant's Complaint ¶ 26. (RA at p. 11) So whatever the status of any extra verbiage in Appellant's Complaint, Appellant has pled out injury of residents' rights, made actionable by KRS § 216.515.

C. KRS § 216.515 does not constitute impermissible "Special Legislation."

Finally, Appellees argue that KRS § 216.515, with its five year Statute of

Limitations, represents prohibited "Special Legislation." It does not.

The prohibition against special legislation exists in large part to prevent what in the U.S. Constitution is characterised by the granting of titles of ennoblement on the one hand, and bills of attainder or bills on the corruption of blood on the other. That is, the prohibition against "Special Legislation" exists to prevent the singling out of single persons or groups for preferential treatment or persecution.

In this case Appellees are obviously not being singled out in any individualistic sense; every Kentucky nursing home regardless of owner is subject to KRS § 216.515. However, Appellees complain that they are in effect being penalized by the raising of the status of nursing home resident plaintiffs to a protected class, with additional rights for enforcement, and a different Statute of Limitations. However, not all "preferential" treatment constitutes an injustice, corruption, or tyranny. "[A] classification made upon a reasonable and natural distinction which relates logically" to a law with a legitimate purpose, *see Kling v. Geary*, 667 SW2d 379, 382 (Ky. 1984), *e.g.*, protection of vulnerable nursing home residents, is not impermissible. Rather, the establishment of a class of people in need of special protection, granting them enforceable statutory rights with a distinct Statute of Limitations, is a very reasonable State response to a societal need. The state has a legitimate interest in passing additional protections for a particularly vulnerable class of citizens and has a legitimate interest in establishing a reasonable Statute of Limitations of five years for torts committed in the nursing home setting. Due to the peculiar circumstances present with nursing home residents, *e.g.*, diminished functional and mental capacity, potential absence of family and friends, etc.... KRS § 216.515 is not a species of "Special Legislation," and the General Assembly could

and did establish a distinctive Statute of Limitations pertaining to these residents.

II. Liability going to entities other than the "Facility"

Ironically and paradoxically, Appellees apparently believe that the General Assembly intended to protect the corporate appellees from the extent of liability which would be available to tort victims in a Common Law action. There is no warrant to believe the General Assembly intended any such thing.

Corporate appellees were in the business of running nursing homes, *i.e.*, exercising control over care matters at the Facility. In *Merrill ex rel. Estate of Merrill v. Arch Coal, Inc.*, 118 Fed. Appx. 37 (6th Cir. 2004), the U.S. Court of Appeals made clear that while setting general guidelines does not engender tort liablity, where a parent asserts direct oversight over a subsidiary in a particular area—such as safety or care—then the parent can be held directly liable. *See also Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655, 663 (6th Cir. 1979) (a parent corporation is liable for harm resulting from its own conduct through a subsidiary); KRS § 362.210 (entity liable for acts/omissions of partner in course of partnership). This is a question of fact, and there is no indication in KRS § 216.515 that the General Assembly intended to curtail such a theory.

Appellees specifically single out "piercing the corporate veil" as a theory which is inapplicable to them. Although piercing the corporate veil is of course a second tier theory of liability, it is a theory which should be pled in the Complaint. *See Morgan v. O'Neil*, 652 S.W.2d 83 (Ky.1983). It exists primarily to permit easier collections of judgment against a tortfeasor's superior entity when the primary tortfeasor is not good for the judgment and was in reality under the control of the superior entity. It is supported by the Civil Rules. *See e.g.*, CR 69. In at least one jurisdiction, Ohio, piercing the corporate

veil in Tort has been permitted. In *Schlegel v. Li Chen Song*, 547 FSupp2d 792 (N.D.Oh. 2008), applying Ohio law, the federal court held that, as the owning shareholder of the defendant trucking company had caused the company to evade federal safety law and injure the plaintiff, the shareholder could be held liable for the torts caused.

Furthermore, the principles of Common Law could, if proven appropriately, also extend vicarious liability to all appellees. Appellant's action relies upon the black letter of the statute and the normal operation of principles of law in Kentucky. Here, the General Assembly said nothing about vicarious liability, so this Court should assume that the principles of vicarious liability are also alive and well with respect to KRS § 216.515.

III. Standing

"Kentucky's legislature intended to create a remedy for the resident during his/her period of residency, because (and otherwise, logically) there is no need to 'enforce' Mrs. Gordon's resident's rights ***after her death***." (Appellees' Brief at p. 42 (emphasis altered)). That is, Appellees propose a rule which relieves them of liability under the statute if they kill the resident (or discharge her). This position violates Kentucky's rule against an absurd reading of a statute. *Layne v. Newberg*, 841 S.W.2d 181 (Ky.1992).

IV. Laches

Appellees cite to no case whatsoever indicating that a detriment significant enough to trigger laches exists where a tortfeasor forgets about committing the abuse. (*See* Appellees' Brief at p. 45)

V. Conclusion

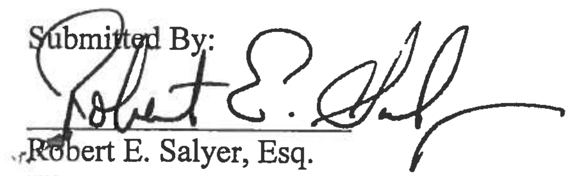
KRS § 216.515 is a statute engendering new rights, and creating a new and independent cause-of-action, and the Statute of Limitations for such a cause-of-action is

set by KRS § 413.120. Appellant has made out a KRS § 216.515 action. As Appellees' long term care facility is owned and operated in a holistic business venture, that venture may be held liable for violations of KRS § 216.515, either directly or vicariously. Appellant prays this Court reverse the lower court's order, and return this case below with appropriate instructions regarding the Statute of Limitations and reach of liability.

Additionally, as noted *supra*, Appellees lugubriously lament the presence of "personal injury" factual predicate language in the Complaint. Despite the fact that a distinguishable KRS § 216.515 statutory claim exists in Appellant's Complaint, the presence of this physical injury verbiage should indeed be a matter addressed by this Court. Is this verbiage proper in a KRS § 216.515 claim, and if so, for what purpose?

There are three options for its treatment: (1) The language may be struck out as superfluous. (2) It may be retained, and protected from motions in limine to exclude evidence going thereto, because such evidence is relevant to demonstrate violations of KRS § 216.515. ***Or*** (3) these physical injury allegations may in fact be material to a KRS § 216.515 cause-of-action, *i.e.*, KRS § 216.515 in effect placed many (if not all) nursing home injuries under a five year Statute of Limitations. If this Court is convinced that the General Assembly intended to bundle together a variety of torts committed in the nursing home context—and it should be so convinced, given a holistic reading of the statutory language and context, as well as Appellees' own arguments—then this Court should hold that physical injury claims are material to a KRS § 216.515 statutory claim.

Submitted By:



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