COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC-000620-DG

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

v.

KINDRED NURSING CENTERS LTD. 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 KINRED REHAB SERVICES, INC. d/b/a
PEOPLE*FIRST* REHABILITATION — APPELLEES

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ON REVIEW FROM THE COURT OF APPEALS
CASES 2011-CA-002294 & 2012-CA-000007
MERCER CIRCUIT COURT CASE NO. 11-CI-00296

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BRIEF OF APPELLEES

Submitted by:
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of this brief were served this 5th day of December 2014, upon Samuel Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; Honorable Darren W. Peckler, Circuit Judge, Mercer County, Boyle County Courthouse, 321 W. Main, 2nd Floor, Danville, KY 40422; and Robert Salyer, Wilkes & McHugh, P.A., P.O. Box 1747, Lexington, KY 40588-1747.

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INTRODUCTION

Two Court of Appeals' panels have correctly determined that KRS §413.120(2) neither applies nor extends the one-year statute of limitations for "injury to the person" to five years, regardless of the theory of recovery asserted in the complaint. Appellant's action claiming damages for injuries to the person of Lula Belle Gordon, characterized solely as one for violations of the Residents' Rights Act, KRS §216.515(26), is not a "liability created by statute" subject to a five-year statute of limitations. Rather, KRS §413.140(1)(a) bars Appellant's action filed well-beyond the applicable one-year statute of limitations for "injury to the person of the plaintiff." This Court need not reach the remaining issues to resolve this appeal.

STATEMENT CONCERNING ORAL ARGUMENT

Several of the issues presented are, and have been, litigated in numerous cases throughout Kentucky. The Court of Appeals panels had little difficulty with the issues presented, and those panels held unanimously. If, however, this Court wishes to decide the issue, Appellees have no objection to oral arguments as they would likely assist the Court in its evaluation and resolution.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Court of Appeals' Opinion correctly recognized Appellant's action as one for injury to the person of the plaintiff and dismissed it as time-barred by the applicable one-year statute of limitations in KRS § 413.140(1)(a).

More than three years after his mother's death, James Overstreet filed his Complaint, alleging specifically that Appellees caused his mother's personal injuries and death. Appellees moved to dismiss the Complaint against them pursuant to CR 12.02(f), because the Complaint stated a cause of action barred by the one-year statute of limitations in KRS §413.140(1)(a) for injury to the person of the plaintiff. Denying Appellees' motion, the Mercer Circuit Court held that Appellant stated a cause of action for statutory violations of his mother's resident rights under KRS §216.515, and not for personal injury or wrongful death. Therefore, the circuit court applied KRS §413.120(2), the five-year statute of limitations for actions based upon liability created by statute, to Appellant's statutory action. The circuit court also held, contradictorily, that Mr. Overstreet had standing to bring the action pursuant to KRS §411.140 -- the personal injury survival statute. However, the circuit court did grant Appellees' motion to dismiss claims against co-Defendants/Appellees 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, on grounds they are not "long-term care facilities" subject to statutory liability as defined in KRS §216.515.[1]

[1] The trial court's order contained the recitation of finality required by CR 54 and, moreover, is a decision on Appellees' petition for declaration of rights and also immediately appealable. KRS §418.060.

Reversing in part, the Court of Appeals agreed with Appellee HHCC that the one-year statute of limitations in KRS §413.140(1)(a) for injury to the person applied to Appellant's claims and barred his Complaint. Because the Court found Mr. Overstreet's entire action to be barred by KRS §413.140(1)(a), it did not address the issue of whether liability extended to the other corporate defendants. The Court of Appeals directed that Appellant's Complaint be dismissed as time-barred. This Court granted Appellant's motion for discretionary review.

PROCEDURAL HISTORY

Appellant James Overstreet, Plaintiff in the circuit court, filed the underlying Complaint as Administrator of the Estate of Lula Belle Gordon on August 12, 2011. *See* Record on Appeal (hereinafter "RA") at 1-12. Although his claims stated claims for "medical expenses," "mental anguish," "death" and other typical injuries to Mrs. Gordon's person which would govern the damages instruction to a jury, Appellant instead entitled his claims as violations of Kentucky's Residents Rights statute, KRS §216.515, only. *See id.* This, of course, was an attempt to circumvent the personal injury statute of limitations, which had run more than a year before he filed his lawsuit, and despite the fact that his Complaint requested compensatory and punitive damages for physical injuries and wrongful death. *See* RA at 11.

On October 5, 2011, Appellees filed their Amended Answer and Counterclaim for Declaratory Relief, and also a CR 12.02(f) motion to dismiss the plaintiff's claims as time-barred. *See* RA at 78-113; RA at 114-134. Appellant filed an Answer to the Counterclaim on October 24, 2011 and Response opposing the Motion to Dismiss on November 3, 2011. *See* RA at 148-157; RA at 164-181. The circuit court, at oral

argument on November 9, 2011, denied Appellees' Motion to Dismiss, but granted the remaining Kindred Defendants/Appellees' motion to dismiss on grounds that they were not "facility entities" under KRS §216.515 (26). *See* RA at 193-194.[2] The Mercer Circuit Court subsequently entered its Amended Order and Declaratory Judgment, on March 12, 2012, from which order HHCC appealed to the Court of Appeals. *See* Appendix 2, attached hereto.

Following oral argument, the Court of Appeals reversed the circuit court's amended order and held that Appellant was not entitled to prosecute his action under the five-year statute of limitations in KRS § 413.120(2), but instead directed that the circuit court grant HHCC's motion to dismiss the Complaint as time-barred by the one-year statute of limitations in KRS §413.140(1). *See* Opinion Affirming in Part, Reversing in Part and Remanding, Appendix 1. Appellant filed a timely motion for discretionary review to which Appellees timely responded. This Court granted review.

FACTUAL BACKGROUND

James Overstreet ("Appellant") is the son of Lula Belle Gordon ("Mrs. Gordon") and Administrator of her Estate. *See* RA at 2. Mrs. Gordon admitted to Harrodsburg Health Care Center on March 5, 2002, and resided there for over six years until her death on May 17, 2008. *See* RA at 2. On August 12, 2011, more three years after her death, Appellant filed this action as Mrs. Gordon's Administrator against Appellees alleging that their treatment of Mrs. Gordon violated Kentucky's residents' rights statute, KRS

[2] Additionally, on December 12, 2011, Appellees moved the Court to alter or amend its Order. *See* RA at 195-201. To preserve their right to appeal, Appellees filed a Notice of Appeal on December 16, 2011. *See* RA at 202-203. Appellant also filed a Notice of Cross-Appeal on December 28, 2011. *See* RA at 211-213. The Mercer Circuit Court subsequently refused to rule on Appellees' Motion to Alter or Amend, on the grounds that it had lost jurisdiction of the action. By Order dated February 17, 2012, the Court of Appeals directed the parties to file a motion with Mercer Circuit Court for written ruling disposing of the issues raised in Appellees' Motion to Alter or Amend. *See* Order dated February 17, 2012, attached hereto as Appendix 3.

§216.515. Appellant characterized his action in this manner because his claims, as shown below, which stated allegations for bodily injury and wrongful death, were already time-barred by the applicable one-year statute of limitations for injury to the person of the plaintiff. *See* KRS 413.140(1)(a).

In 1978 Kentucky's legislature enacted KRS §216.515, a statute similar to those enacted in many states, as one way to improve care for our aging population. *See* Donna Lenhoff, J.D., *LTC Regulation and Enforcement,* 26 J. LEGAL MEDICINE 9, 29, March 2005. Residents' rights are a core concept enshrined in the federal Nursing Home Reform Act, 42 U.S.C. §1395i-3. *Id.* KRS §216.515 outlines certain rights of individuals admitted to a licensed, long-term care facilities operating in Kentucky and provides for, among other things, access to a phone, preclusion of forced labor, to be suitably dressed, to be free from mental and physical abuse, and to have their medical conditions documented and communicated to persons of their choice.

KRS §216.515(26) directs that:

> 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. The action may be brought by the resident or his guardian. The action may be brought in any court of competent jurisdiction to enforce such rights and to recover actual and punitive damages for any deprivation or infringement on the rights of a resident. Any plaintiff who prevails in such action against the facility may be entitled to recover reasonable attorney's fees, costs of the action, and damages, unless the court finds the plaintiff has acted in bad faith, with malicious purpose, or that there was a complete absence of justifiable issue of either law or fact. Prevailing defendants may be entitled to recover reasonable attorney's fees. The remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to a resident and to the cabinet.

Id. (emphasis added). So, for example, if a resident is denied access to a telephone, the statute provides an express, direct and cost-shifting mechanism to correct the problem.

KRS §216.510 defines a resident as "any person who is admitted to a long-term-care facility as defined in KRS 216.515 to 216.530 for the purpose of receiving personal care and assistance." *See* KRS §216.510(1). Long-term care facility is defined as "those health-care facilities in the Commonwealth which are defined by the Cabinet for Health and Family Services to be family-care homes, personal-care homes, intermediate-care facilities, skilled-nursing facilities, nursing facilities as defined in Pub. Law 100-203, nursing homes, and intermediate-care facilities for the intellectually and developmentally disabled." *See* KRS §216.510(2).

Appellant's Complaint alleges only that Mrs. Gordon suffered 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 infections; d) infections; e) falls; f) bruising g) skin tears; h) fracture; i) weight loss; j) dehydration; k) subdural hematoma; and l) death." *See* RA at 9 (emphasis added). Appellant further 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 ...[Appellees] as alleged below." *See* RA at 10. These are all typical damages included in a medical negligence or other personal injury action.

As his theory of recovery for these injuries, Appellant pled, by recitation of the statutory language, that Kindred violated KRS §216.515 by offending an array of Mrs. Gordon's rights, including her right to be treated with consideration and respect, her right to be suitably dressed at all times, her right to have responsible family notified of

accident, illness, etc., her right to an adequate and appropriate care plan, her right to be free from physical and mental abuse, and by HHCC and corporate Appellees violating the statutory standards governing licensing and operation of long-term care facilities pursuant to KRS Chapter 216, as well as applicable federal laws and regulations governing the certification of long-term care facilities under the Social Security Act (negligence *per se*). *See* RA at 10-11. However, Appellant alleged no injury or damages other than "mental anguish," "pain and suffering," and other elements of damages typical for any personal injury lawsuit. Indeed, he sought judgment "in an amount to be determined by the jury" for compensatory damages for "significant medical expenses... embarrassment, physical impairment and death and incurred funeral expenses," and for punitive damages. *See* RA at 11-12.

Applying the five-year statute of limitations in KRS §413.120(2), the circuit court allowed Appellant's action to go forward as against HHCC, "the facility entity," but correctly dismissed without prejudice the claims against the remaining Appellees. Although neither a "resident or his guardian," as required by the express language of KRS §216.515, the circuit court also allowed Appellant as Administrator of his mother's estate to proceed with the statutory claims "in accordance with KRS §411.140" [the survival statute]. *See* RA at 193. This starkly contradicted the court's finding that Appellant's claims were **not** claims for personal injury: KRS §411.140 permits a personal representative to sue on behalf of his decedent in cases "for personal injury or for injury to real or personal property." *See* KRS §411.140. KRS §411.140 makes no provision for the personal representative to sue for statutory violations not involving injury to the person.

Mrs. Gordon passed away on May 17, 2008. *See* RA at 2. Nevertheless, Appellant delayed bringing his action until August 12, 2011, more than three years after Mrs. Gordon's death and far beyond the applicable period of limitations even extended by the "grace period" for creating an estate and appointment of a personal representative. Remarkably then, if a patient in a hospital hypothetically develops and dies from a "pressure sore," that action must be brought within one year; but, an action against another type of medical caregiver (a nursing home) could, under Appellant's and the circuit court's theory, be brought within five years.

The Court of Appeals' panel here, as well as another previous panel to consider this issue, had little difficulty recognizing Appellant's claims as one for injury to the person of the plaintiff, regardless of Appellant's attempt to use as his theory of recovery the statutory violations pursuant to KRS §216.515. Moreover the Court of Appeals correctly determined that KRS §216.515(26) does not create a new mechanism of liability but simply puts a "finer point" on behavior creating common law causes of action for certain long-term care residents consistent with the purpose of residents rights statutes generally.

This Court should affirm the Court of Appeals determination that claims for bodily injury in Kentucky, regardless of whether they are characterized as common law or KRS §216.515 causes of action, are still, in the final analysis, all "injuries to the person of the plaintiff" and governed by the one-year statute of limitation in KRS §413.140(1)(a). Appellees further request that this Court affirm the Court of Appeals' dismissal of Appellant's Complaint against them as time-barred.

ARGUMENT

THE COURT OF APPEALS CORRECTLY DISMISSED APPELLANT'S COMPLAINT AS TIME-BARRED AND THIS COURT SHOULD DISMISS THE APPEAL ON IMPORTANT PROCEDURAL GROUNDS

A motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, reviewed under a *de novo* standard on appeal. *See Fox v. Grayson*, 317 S.W. 3d 1, 7 (Ky. 2010). Additionally, an appellate court may affirm a lower court's decision on other grounds as long as the lower court reached the correct result. *See Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 576 (Ky. 2009)(citing *McCloud v. Commonwealth,* 286 S.W.3d 780, 786 n. 19 (Ky. 2009) ("[I]t is well-settled that an appellate court may affirm a lower court for any reason supported by the record.")(*citing Kentucky Farm Bureau Mut. Ins. Co. v. Gray,* 814 S.W.2d 928, 930 (Ky. App.1991)).

Civil Rule 8 requires a complaint to give a short, plain statement of the alleged wrong and the relief sought. In Appellant's case, the relief sought is for "significant medical expenses,... embarrassment, physical impairment and death and incurred funeral expenses." *See* RA at 11. Appellant alleged that these damages were caused by pressure sores, urinary tract infections, falls, fractures, and several other, enumerated bodily injuries. *See* RA at 9. Appellant sought no other relief. However, because the applicable period of limitations for injury to the person had long-ago expired, Appellant attempted to circumvent it simply by alleging a statutory theory of recovery, contending the five-year period of limitations in KRS §413.120(2) applied instead. The Court of Appeals quickly recognized Appellant's claim for what it actually is – an action for damages resulting from "injuries to the person" of Lula Belle Gordon – for which the period of

limitations in KRS §413.140(1)(a) properly applied: Appellant's Complaint is time-barred.

As a preliminary matter, CR 76.12(4)(c)(v) requires that an appellant's brief shall contain "at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." This rule applies in all Kentucky appellate courts. Appellant did not comply, as none of his arguments contain the required preservation statement. As this Court previously stated:

> Rule of Civil Procedure (CR) 76.12(4)(c)(iv) mandates that a party indicate how an issue is properly preserved for review by an appellate court. LWC's briefs do not cite to where in the record this issue is preserved and we will not search the vast record on appeal to make that determination. *See Robbins v. Robbins,* Ky.App., 849 S.W.2d 571 (1993); *Ventors v. Watts,* Ky.App., 686 S.W.2d 833 (1985).

Phelps v. Louisville Water Co., 103 S.W.3d 46, 53 (Ky. 2003). Accordingly, the appellate courts refuse to consider issues not preserved in accordance with CR 76.12(4)(c)(v) absent palpable error. *See Elwell v Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990)(refusal to review any argument that fails to comply with CR 76.12(4)(c)(v) unless necessary "to avert manifest injustice."). Appellant completely ignores CR 76.12(4)(c)(v), as none of the issues raised in his "Argument" section contain a statement concerning error preservation. Furthermore, Kentucky law prevents him from doing so in his reply brief, as "the reply brief is not a device for raising new issues which are essential to the success of the appeal." *Catron v. Citizens Union Bank,* 229 S.W.3d 54, 59 (Ky. App. 2006); *Milby v. Mears,* 580 S.W.2d 724, 728 (Ky. App.1979). The Court of Appeals' Order reversing and dismissing Appellant's Complaint as violative of KRS §413.140(1)(a) should be affirmed for this reason alone.

I. THE COURT OF APPEALS CORRECTLY DISMISSED APPELLANT'S CLAIMS FOR BODILY INJURY AND WRONGFUL DEATH AS BARRED BY THE ONE-YEAR STATUTE OF LIMITATIONS IN KRS §413.140(1)(A)

Statutes of limitation serve a very important role in civil jurisprudence. They prevent stale claims and preclude plaintiffs from sleeping on their rights. The Kentucky General Assembly and the Kentucky Supreme Court have long recognized this value, enforcing statutes of limitations which "bar stale claims arising out of transactions or occurrences which took place in the distant past." *See Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 573 (Ky. 2009), (*citing Munday v. Mayfair Diagnostic Lab.*, 831 S.W.2d 912, 914 (Ky.1992) (*quoting Armstrong v. Logsdon,* 469 S.W.2d 342, 343 (Ky.1971)). Statutes of limitation rest upon sound public policy tending to the peace and welfare of society. *See Fannin v. Lewis,* 254 S.W.2d 479, 481 (Ky.1952).

A dismissal pursuant to CR 12.02(f) is proper if it appears that the pleading party would not be entitled to relief under any set of facts that could be proved in support of the claim. *See Pari-Mutuel Clerks' Union of Kentucky v. Kentucky Jockey Club,* 551 S.W.2d 801, 802 (Ky.1977). Where the pertinent facts are not in dispute, the validity of the defense of the statute of limitations can and should be determined by the court as a matter of law. *See Lynn Min. Co. v. Kelly,* 394 S.W.2d 755, 759 (Ky.1965)(*citing Carr v. Texas Eastern Transmission Corp.,* 344 S.W.2d 619 (Ky.1961)). The Court of Appeals properly dismissed Appellant's action under CR 12.02(f) because the applicable statute of limitations had expired.

Appellant drafted and is the master of his Complaint, alleging injuries to the person of his mother, including: pressure sores, urinary tract infections, upper respiratory infections, infections, falls, bruising, skin tears, fracture, weight loss, dehydration,

subdural hematoma, and death. *See* RA at 9. More than three years after Mrs. Gordon's death, Appellant presumed to revive his stale personal injury action simply by denoting it instead as a violation of KRS §216.515. He now asks this Court to condone his method for enlarging Kentucky's one-year statute of limitations **for injury to the person**: simply label the action as one "to vindicate the rights owed to his late mother" arising upon a liability created by statute. *See* Appellant's Brief at p. 8. In doing so, however, Appellant conveniently ignores that he can only "vindicate the rights of his late mother" by recovering for those damages caused by the alleged violative conduct. A cause of action does not exist until the conduct causes injury that produces damage. *See Saylor v. Hall,* 497 S.W.2d 218, 225 (Ky. 1973); *accord, Wood v. Wyeth-Ayerst Labs., Div. of Am. Home Products,* 82 S.W.3d 849, 852 (Ky. 2002).

We did not have traffic control signals in the horse and buggy days but we still required their drivers to exercise "ordinary care" while hauling their goods to the market. The invention of the motor vehicle did not change that. Running a red light as prohibited by statute creates no civil liability *unless* that action causes injury to a person, and that claim remains controlled generally by the period of limitations for "injury to the person of the plaintiff." KRS §413.140(1)(a).

It has long been recognized in this Commonwealth that the period of limitations for a claim is governed by the nature, or "gist," of the claims asserted. The Court of Appeals easily recognized the true nature of Appellant's action as one for "injuries to the person" of Mrs. Gordon, directing dismissal of Appellant's Complaint as time-barred by KRS §413.140(1)(a). This Court should affirm. Appellant alleged no damages other than those resulting from injuries to the person of his mother.

Trial courts can only instruct on elements of damages raised in the complaint and proven by the evidence. *See Adams Const. Co. v. Bentley*, 335 S.W.2d 912, 913 (Ky. 1960). The accepted form of instruction has always limited recovery to the amount pleaded. *Id.* at 913, *citing Louisville & N.R. Co. v. Engleman's Adm'x,* 141 S.W. 374 (Ky. 1911); *Pape v. Sutherland*, 220 S.W.2d 372 (Ky. 1949). Here, the only claimed damages are those for injuries to Mrs. Gordon's person. That is all that can ever go to the jury. Courts everywhere have long held that the true nature of the cause of action depends upon the damage allegations in the complaint considered as a whole:

> The selection of what statute of limitations is applicable depends upon the inherent nature of the claim. *Williamson v. Columbia Gas and Electric Corp.*, 3 Cir., 110 F.2d 15, *certiorari denied* 310 U.S. 639, 60 S.Ct. 1087, 84 L.Ed. 1407. It at times becomes necessary to determine whether the action is one in rem or in personam. *Norrie v. Lohman*, 2 Cir.,16 F.2d 355, 358. Also whether an action is one ex contractu or ex delicto determines whether exemplary damages can be recovered in addition to reasonable compensation. *Peitzman v. City of Illmo*, 8 Cir., 141 F.2d 956, 961. The nature of the cause of action depends upon the allegations in the complaint considered as a whole. **If the complaint states facts showing that the action is upon a contract, it will be considered as an action ex contractu even though the complaint alleges a conversion and seeks remedies ex delicto.** *Parker State Bank v. Pennington*, 8 Cir., 9 F.2d 966, 970; *Minez v. Merrill,* D.C.S.D.N.Y., 43 F.2d 201; *Genuine Panama Hat Works, Inc. v. Webb*, D.C.S.D.N.Y., 36 F.2d 265, 267. **Although the complaint may state that it is an action in tort, as it did in the present case, such an allegation is not controlling, and the Court will determine from the complaint whether the action is one in tort or one in contract**. *Dallas v. Garras,* 306 Mich. 313, 316, 10 N.W.2d 897; *Thrift v. Haner*, 286 Mich. 495, 497, 282 N.W. 219.

Nat'l Disc. Corp. v. O'Mell, 194 F.2d 452, 454-55 (6th Cir. 1952)(emphasis added). *See also, Jones v. Furnell*, 406 S.W.2d 154 (Ky. 1966)(one-year statute of limitations applies to an action for malpractice regardless of allegation claiming a breach of contract)(*overruled* on other grounds, *Tomlinson v. Siehl*, 459 S.W.2d 166 (Ky. 1970)); *Bennett v. Malcomb*, 320 S.W.3d 136 (Ky. App. 2010)(one-year limitation for tort

actions, rather than alleged five-year limitations period for tort of outrage, applied to plaintiff's action against tractor driver who pinned plaintiff to post with tractor).

Determining which statute of limitations applies to a particular cause of action, Ohio's highest court articulated the rule as one of substance over form: "courts must look to the actual nature or subject matter of the case, ***rather than to the form in which the action is pleaded.*** The grounds for bringing the action are the determinative factors[;] the form is immaterial." *Lawyers Coop. Publishing Co. v. Muething,* 603 N.E.2d 969 (Ohio 1992)(quoting *Hambleton v. R.G. Barry Corp.,* 465 N.E.2d 1298 (Ohio 1984) (per curiam)(emphasis added)). Particularly relevant here: "A party cannot transform one cause of action into another through clever pleading or an alternate theory of law in order to avail itself of a more satisfactory statute of limitations." *Callaway v. Nu–Cor Automotive Corp.,* 849 N.E.2d 62, ¶ 14 (Ohio App. 2006)(citing *Love v. Port Clinton,* 524 N.E.2d 166 (Ohio 1988)(emphasis added)).

A New Jersey federal district court agreed in an action brought under New Jersey's Nursing Home Responsibilities and Rights of Residents Act:

> Plaintiff argues that her self-characterized claim for "neglect and mistreatment," ... is premised on the rights afforded via the NHRRRA and should therefore be subject to the six-year statute of limitations provided by N.J.S.A. § 2A:14–1 "for any tortious injury to the rights of another not stated in sections 2A:14–2 and 2A:14–3." However, N.J.S.A. § 2A:14–2 explicitly provides for a two-year statute of limitations for wrongful acts, neglect, or default—which are exactly the harms Plaintiff alleges in her description of her claims as for "neglect and mistreatment." Her characterization of the resultant damages as arising from the NHRRRA rather than in personal injury is inapposite to the essence of the action which arises from bruising on or around January 2009. Again, the Court has already dismissed Plaintiff's breach of contract claim for similar reasons. Upon reconsideration, the Court finds that the two-year statute of limitations applies to the outstanding NHRRRA claim as well, and Defendants are therefore entitled to dismissal of the Second Count as a matter of law

Andreyko v. Sunrise Sr. Living, Inc., 993 F. Supp. 2d 475, 481 (D.N.J. 2014) (emphasis added).

In other words, although the complaint may state an action to be one lying in tort, such a characterization is not controlling; rather, the court determines from the complaint whether the action properly sounds in tort or sounds in another cause. *See O'Mell, supra. See also Medical Liability Mut. Ins. v. Alan Curtis, LLC*, 519 F.3d 466, 473-74 (8th Cir. 2008) ("[i]t is well settled that **the gist of the action** as alleged in the complaint determines which statute of limitations applies")(citing *Shelter Ins. Co. v. Arnold,* 940 S.W.2d 505, 506 (Ark. 1997)(emphasis added)). *See also Ernest F. Loewer, Jr. Farms v. National Bank of Arkansas*, 870 S.W.2d 726, 727-28 (Ark. 1994)(facts alleged in complaint indicated claim was for conversion despite party's characterization as contract action); *and also O'Bryant v. Horn,* 764 S.W.2d 445, 445-46 (Ark. 1989)(attaching bill of sale to complaint did not covert action for fraud, misrepresentation or negligence into a contract action). This Court previously agreed where the "gist" of the cause is for personal injury:

> In *Resthaven Memorial Cemetery v. Volk,* 286 Ky. 291, 150 S.W.2d 908 (1941).... this Court held that "injury to the person," within the statute requiring an action for an injury to the person be brought within one year after accrual of right, refers to those cases where personal injury is the gist of the action such as actions for assault and battery and the like. Ky.Stat., § 2516, the forerunner to KRS 413.140.

Craft v. Rice, 671 S.W.2d 247, 250 (Ky. 1984).

Appellant's Complaint advances a claim for physical injuries to Mrs. Gordon's person. KRS § 413.140(1) provides that claims for injuries to the person of the plaintiff "shall be commenced within one (1) year after the cause of action accrued." Kentucky's

survival statute, KRS §413.180, extends that time for up to two years under the following circumstances:

> (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 ... if commenced within one (1) year after 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."

Appellant specifically alleged that Mrs. Gordon suffered "pressure sores, urinary tract infections, upper respiratory infections, infections, falls, bruising, skin tears, fracture, weight loss, dehydration, subdural hematoma, and death." *See* RA at 9. Here, the statute of limitations on Appellant's claims ran, at the latest, two years after Mrs. Gordon's death on May 18, 2010. Appellant's failure to bring an action to recover for Mrs. Gordon's alleged injuries by that date renders this lawsuit time-barred.

Moreover, the nature of the relief that Appellant seeks demonstrates that his is clearly an action for monetary damages arising from bodily injury. *See* RA at 11-12. KRS §216.515(26) states that an action for deprivation or infringement of rights under KRS §216.510, *et seq.*, may be brought for two purposes: (1) to enforce such rights; and (2) to recover actual and punitive damages. Mrs. Gordon no longer resides at HHCC and, therefore Appellant is not seeking "to enforce" Mrs. Gordon's rights under this statute. Rather, Appellant seeks judgment for actual and punitive damages for "significant medical expenses, suffered embarrassment, physical impairment and death and incurred funeral expenses." *See* RA at 11. As evidenced by the face of his Complaint, Appellant's allegations under KRS §216.510 *et seq.* are in reality and clearly "[a]n action for an

injury to the person of the plaintiff" and are barred by the one-year statute of limitations set forth in KRS § 413.140(1)(a).

Appellant contends that the Kentucky Resident's rights statute created a new category of liability, because the rights listed in KRS §216.515 did not exist at common law. However, actions for injury to the person have long existed at common law. Sometimes statutes are used to put a sharper point on the duty owed (e.g., governing the movement of motor vehicles), but that does not alter the nature or underpinnings of the liability or damages. Even a statutory enlargement of common-law liability does not equate to a statutorily created theory of liability unknown at common law.

Appellant's Complaint asserts that Mrs. Gordon suffered injury to her person. More specifically, Appellant alleges that Mrs. Gordon suffered "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 infections; d) infections; e) falls; f) bruising g) skin tears; h) fracture; i) weight loss; j) dehydration; k) subdural hematoma; and l) death." *See* RA at 9. Further, Appellant asserted 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] as alleged below." *See* RA at 10. These are all "injuries to the person" of Mrs. Gordon.

Kentucky's highest Court spoke to this precise situation in *Resthaven Memorial Cemetery v. Volk,* 150 S.W.2d 908 (Ky. 1941):

> In Wood v. Downing's Adm'r, 110 Ky. 656, 62 S.W. 487, 489, 23 Ky.Law Rep. 62, also and action for damages against a physician for malpractice, the court

> referred to the Menefee case, supra, with approval, and again held that the phrase **"an action for an injury to the person of the plaintiff," refers to those cases where the personal injury is the gist of the action, such as assault and battery,** and the like. Also, in Western Union Telegraph Co., v. Witt, 110 S.W. 889, 891, 33 Ky.Law Rep. 685, an action for damages for mental pain and suffering endured by the plaintiff because of the defendant's failure to deliver a telegram informing him of the death of his sister, the court said: "The damages for the failure to deliver a telegram are not an injury to the person in the meaning of section 2516 [now KRS 413.140(1)(a)], supra. This section contemplates a physical injury to the person. Ordinarily actions brought under this section sound in tort, and are not distinctly based upon a contractual relation, although the tort may have its origin in such relation. To illustrate, when a common carrier undertakes to transport a passenger, a contract relation is entered into, and yet, if the passenger is injured, a tort has also been committed that is an injury to the person. And, **as the injury to the person rather than the breach of the contract is usually the foundation of the claim for damages, it has been held that this statute applies to actions to recover damages for injuries to the person, although the injury results primarily from the breach of the contract by the carrier in failing to safely transport the passenger."**
>
> ....
>
> Also, in determining the applicable section of the statute of limitations, section 2515 [now KRS 413.120(7)] of the statutes must be taken into consideration. This section enumerates actions that must be brought within five years after accrual of right, among which is "an action for the injury to the rights of the plaintiff, not arising on contract, and **not hereinafter enumerated." Then the following section (2516) enumerates certain actions which must be brought within one year**, which also might be considered as an injury "to the rights" of a person which were originally included in section 2515 and **would still be within that category but for their specific exclusion therefrom by section 2516, among which is an injury to the person of the plaintiff.**

Id. at 911 (emphasis added).

For more than three years Appellant sat on his rights while the statutes of limitation for personal injury and wrongful death expired. Kentucky law has never before, and should not now, be interpreted to tolerate such flagrant legal maneuvering to ameliorate tardiness and delay.

For these reasons, this Court should affirm the Court of Appeals' holding that Appellant's claims against Appellees must be dismissed.

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT KRS §413.140(1) APPLIES TO ACTIONS FOR INJURY TO THE PERSON, WHETHER ARISING UNDER COMMON LAW OR STATUTE

There are two kinds of civil actions: tort and contract. There are two kinds of tort actions: injury to person and injury to property. In Kentucky, where the injury claimed is to the person, ***regardless of how asserted***, KRS §413.140(1) controls and limits the time period to one year[3] in which to bring an action, even if the duties are created in whole, or in part, by statute.

The Court of Appeals correctly reached this same conclusion in this case:

> The common law right to prosecute a personal injury cause of action pre-dated the enactment of KRS 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, 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 counsel candidly acknowledged this at oral argument.

See Opinion dated Aug. 9, 2013 at pp. 8-9.

Another Kentucky Court of Appeals' panel, also determining the issue of which statute of limitations properly applied to a personal injury action allegedly brought under KRS 216.515, agreed:

> 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.

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[3] KRS §413.180, extends that time for up to two years for survival actions under certain circumstances discussed *infra*. The extension would not have saved Appellant, who waited over three years after Mrs. Gordon's death to file.

Allen v. Extendicare Homes, Inc., No. 2012-CA-000050-MR, 2012 WL 6553823, at *4 (Ky. Ct. App. Dec. 14, 2012).

The rationale behind statutes of limitation is wrapped in the concept of equity, serving an extremely important rule in civil jurisprudence. In short, statutes of limitation balance due process considerations of both plaintiffs and defendants. Neither fairness nor equity should limit unreasonably the period in which plaintiffs may bring their claims against defendants. Likewise, it is neither fair nor equitable to grant plaintiffs open-ended periods to bring a claim against potential defendants. Witnesses are lost, memories fade, evidence is destroyed over the course of time, and the parties can never obtain peace of mind in finality. *See, e.g., Fannin v. Lewis*, 254 S.W.2d 479 (Ky. 1952)(statutes of limitation rest upon sound public policy tending to societal peace and welfare). As such, "provisions of statutes of limitations should not be lightly evaded." *Emberton*, 299 S.W.3d at 572 (*citing Fannin*, 254 S.W.2d at 481).

> Limitations statutes are by nature arbitrary and so sometimes seem to operate harshly. This harshness, of course, does not authorize courts to disregard the strict duties such statutes impose. On the contrary, the statutory duty to develop and file one's case diligently has been interpreted as absolute except in the most compelling of circumstances.

Reese v. Gen. Am. Door Co., 6 S.W.3d 380, 383 (Ky. App. 1998).

Statutes of limitation prevent stale claims and preclude plaintiffs from sleeping on their rights. *See Ammerman v. Bd. of Educ., of Nicholas County*, 30 S.W.3d 793, 800 (Ky. 2000)("it is imperative that plaintiffs' claims be filed promptly and that limitations periods be observed, 'thereby enhancing the likelihood of accurate determinations and removing debilitating uncertainty about legal liabilities.'"(quoting *Galloway v. General Motors Service Parts Operations,* 78 F.3d 1164, 1165 (7th Cir.1996)). However,

Appellant proposes he be permitted to do exactly that: when his personal injury and wrongful death claims were barred by the one-year statute of limitations for "injury to the person of the plaintiff," KRS §413.140(1)(a), he simply re-characterized it as a "resident's rights violation" action and contended that the five-year statute of limitations for liability created by statute, KRS 413.120(2), applied instead. Stale claim problem solved.

But, in fact, Appellant's Complaint states a cause of action ***for injuries to the person*** of Lula Belle Gordon. Appellant should not be permitted to proceed under false pretenses merely by copying statutory language (with no relation to his factual allegations) into his Complaint. The questions posed here loom critically over an entire industry providing care to the fastest growing segment of our population (residents over 85) and also those with physical or mental restrictions. As revealed by the 2012 Long Term Care Study published by AON Risk Solutions (attached hereto as Appendix 4, also attached to Appellees' Court of Appeals' Appellants' Brief at Appx. 4), this Court is well aware that Kentucky's long term care industry is being battered and devastated because of Kentucky's unique constitutional provisions:

> Because state laws and the state judiciaries establish and interpret the rules on torts, state loss rates vary considerably. **Kentucky has the highest loss rate in this study at $5,350 per bed** while Texas has the lowest at $330 per bed.
>
> Kentucky's constitution prevents the enactment of limits on tort damages. This presents a fertile ground for torts. With the specter of an unlimited judgment looming, providers may be willing to settle for higher amounts to avoid trial. In 2010, a Kentucky jury awarded nearly $43 million dollars in a nursing home liability case. Of that, $41 million of the judgment were punitive and non-economic damages. .... With this backdrop, it is no surprise that liability costs in Kentucky continue to increase.

See Appendix 4, page 4 (emphasis added). Appellant's proposition here -- opening the door to time-barred personal injury claims under the guise that they are somehow "actions upon a liability created by statute" -- would severely exacerbate this problem and create upheaval in Kentucky tort law.

A. Kentucky's Residents Rights Statute Does Not Create A New Category of Injury

Initially, Appellant misconstrues the nature and purpose of KRS §216.515. This statute serves to outline the rights of individuals admitted to licensed, long-term care facilities operating in Kentucky. The history of this and other residents' rights statutes demonstrate as their purpose to improve care, not change tort law. These statutes codify common law, define a standard of care to be provided to nursing home residents and clarify that residents do have those enumerated rights in addition to, and cumulative with, other existing legal and administrative remedies.

Long ago Kentucky's highest Court addressed the issue of what constituted a "liability created by statute":

> The question raised by the plea of the statute of limitations is not so easily disposed of. The appellee insists that the case either falls within the second clause of section 2, article 3, chapter 63, of the Revised Statutes, or section 8 of the same article and chapter. Section 2 provides that "an 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 next after the cause of action accrued." Was the liability on which this suit is based created by statute? We think not. It is true that an action can only be maintained against an heir or devisee upon a writing like that sued on by virtue of the statute, but the word "liability," it seems to us, refers to the subject of the action, and not to the party who is sought to be charged by it. The cause of action is referred to, and not the person against whom it may be prosecuted. The liability in this case is the debt created by the contract, and all that has been done by the statute is to give a remedy on a contract or liability already existing against the heir or devisee, who becomes subject to be sued not alone because of the statute, but because the descent has been cast upon him or he has accepted the devise.

Trustees of Kentucky Female Orphan School v. Fleming, 10 Bush. 234 (1874) (emphasis original). The Court addressed the issue again, in *Southern Contract Co.'s Assignee v. Newhouse,* 66 S.W. 730, 732 (Ky. 1902) stating:

> The liability of the heir or devisee, so called, as fixed by statute, is not the creation of a new debt or obligation, but the creation of an additional remedy for the collection of an old liability. It is not "a liability created by statute," in the language of section 2515, art. 3, of the statute. Trustees v. Fleming, 10 Bush, 239. The very words of section 2528 indicate that the liability is deemed to remain that of the testator or decedent.

And with deference to CR 76.28(4)(c), the Court of Appeals has also previously addressed this issue of what constitutes a "liability created by statute":

> To determine whether KRS 413.140(1)(a) or KRS 413.120(2) applies to an action brought under KRS 258.275(1), we are guided by two Court of Appeal's decisions: *Stivers v. Ellington,* 140 S.W.3d 599 (Ky.App.2004) and *Toche v. American Watercraft,* 176 S.W.3d 694 (Ky.App.2005).
>
> In *Stivers,* this Court was faced with the legal issue of whether KRS 413.140(1)(a) (the one-year statute) or KRS 413.120(2) (the five-year statute) was the applicable statute of limitations in an action brought under the Colorado Ski Safety Act of 1979 (the Act). The Court observed that Colorado courts viewed violations of the Act as constituting negligence per se. Our Court then held the Act **did not create any new liability but rather provided a statutory standard of care in a common law negligence action.** Thus, we applied the one-year statute.
>
> In *Toche,* this Court was likewise faced with the legal issue of whether KRS 413.140(1)(a) or KRS 413.120(2) was the applicable statute of limitations in an action brought under KRS 235.300, titled "Civil liability for negligent operation." In determining that KRS 413.140(1)(a) applied, this Court concluded that KRS 235.300 **did not create a new theory of liability and that a claim thereunder was a personal injury claim under common law.**
>
> Considering *Stivers* and *Toche,* we conclude that the five-year statute of limitations found in KRS 413.120(2) only applies where a statute creates a new theory of liability unknown at common law; otherwise, the one-year statute of limitations found in KRS 413.140(1) is applicable.

Adkins v. Johnston, No. 2006-CA-000008-MR, 2006 WL 3759549, at *2 (Ky. App. Dec. 22, 2006)(emphasis added).

Other jurisdictions agree with Kentucky that a liability created by statute does not exist but for the statute:

> In order for a statutory cause of action to be "an action * * * upon a liability created by statute" under R.C. 2305.07, that cause of action must be one that would not exist but for the statute. Any statutory "modification, alteration or conditioning" of a common-law cause of action which falls short of creating a previously unavailable cause of action does not transform that cause of action into "an action * * * upon a liability created by statute."

See McAuliffe v. W. States Imp. Co., 651 N.E.2d 957, 960 (Ohio 1995). *Accord, Travelers Express Co., Inc. v. Cory*, 664 F.2d 763 (9th Cir. 1981); *Thomas v. Pick Hotels Corp.*, 224 F.2d 664 (10th Cir. 1955); *Hocking Valley RR. Co. v. New York Coal Co.*, 217 F. 727 (6th Cir. 1914); *Mehl v. ICI Americas, Inc.*, 593 F.Supp. 157 (S.D. Ohio 1984); *Connelly v. Balkwill*, 174 F.Supp. 49 (N.D. Ohio 1959), affirmed 279 F.2d 685 (6th Cir. 1960); *Bryden v. Wilson Mem. Hosp.*, 136 A.D.2d 843 (N.Y. 1988); *Haag v. Dry Basement, Inc.*, 732 P.2d 392 (Kan. App. 1987). *See also*, 51 AMERICAN JURISPRUDENCE 2d (1970) 659, Limitation of Actions, Section 82 ("Clearly, an action is not based upon a liability created by statute if the right is one which would exist at common law in the absence of statute."); 54 CORPUS JURIS SECUNDUM (1987) 108, Limitations of Actions, Section 73(a) ("A statutory period of limitation for an action on a liability created by statute, other than a penalty or forfeiture, as prescribed by many statutes, applies only where the liability is one which would not exist but for the creative statute.").

KRS §216.515 is actually an amalgamation of various causes of action existing at common law and arising under tort, contract and other statutes including: actions arising on contract, *see, e.g.*, subsections (1)-(4); actions for personal injury, *see, e.g.*, subsection (6); actions for violations of civil rights, *see. e.g.*, subsections (5) and (14); and actions for violations of privacy rights, *see, e.g.*, subsections (11), (12), and (15). Had the

Legislature included one specific statute of limitations for actions arising under all subsections, it would either severely increase or severely decrease the time for the resident to bring certain of these actions at common law.

For instance, Appellant advocates the five-year statute of limitations in KRS §413.120(2) be applied to all KRS §216.515 claims. However, to adopt his position would **reduce by ten years** the resident's time in which to bring an action arising upon written contract and, concurrently, **expand by four years the** time in which to bring actions for personal injury. This application would create an inequitable result, especially where the statute's own language denies that it shall be an exclusive remedy for the resident: "The remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to the resident and the cabinet." KRS §216.515(26). By this language, the legislature signaled its intention that KRS §216.515(26) actions do not limit or subsume the common law actions nor provide the sole remedy available to residents. Thus, KRS §216.515(26) actions are **not** "liabilities created by statute" as stated in KRS §413.120(2), and that statute of limitations does not apply.

B. Neither KRS §413.120(2) Nor Any Five-Year Statute of Limitations Has Been Applied in Cases Where Injury Is to the Person of the Plaintiff

Appellant also argues incorrectly that the Kentucky Supreme Court has applied KRS §413.120(2) to "cases involving injury to the person." Appellant's Brief at p. 9. His statement is belied by all Kentucky case law, including the case he cites in support, *Vandertoll v. Commonwealth*, 110 S.W.3d 789 (Ky. 2003). *Vandertoll* does not cite to a single Kentucky case where the court applied a five–year statute of limitations to an

alleged "injury to the person," even where the cause of action was created by statute (actions to enforce award of workers' compensation benefits, civil rights claims, affirmative action claims, wrongful discharge claims and adverse possession claims – all actions unknown at common law). *See Vandertoll*, 110 S.W.3d at 795. Rather, *Vandertoll* specifically distinguishes bodily injury claims from those based upon statutorily created rights. *See id.* Importantly, Appellant cites no case where a Kentucky court, or any other court, applied the five-year statute of limitations to a stated KRS §216.515/Residents' Rights violation.

In 1912, Kentucky's highest Court considered what statute of limitations should apply to claims arising upon liability created by Kentucky's new wrongful death statute, an action not available at common law. The Court reasoned that the one-year "injury to person" statute applied even though the wrongful death statute was a new liability created by statute and silent on the limitation of action:

> We have not heretofore been required to decide whether the limitation prescribed by section 2516 [one-year SOL precursor to KRS 413.140(1)(a)], supra, should be applied to an action brought, as in the instant case, under section 4, Kentucky Statutes; ... [citations omitted]. In each of these cases a recovery was sought by the administrator for the death of the decedent, under section 6, Kentucky Statutes, which section, like that upon which appellant's action is based, is silent as to the time of bringing the action. The principal question involved was whether the five-year limitation, prescribed by section 2515 [5-year SOL precursor to KRS 413.120], should be applied, or that of one year, prescribed by section 2516. **We held that the limitation prescribed by the latter section should apply.**
>
> **The meaning of these decisions is that the words, "an injury to the person of the plaintiff," found in section 2516 of the statute of limitations, apply to injuries causing the death of the person, for which his administrator may sue, as allowed by section 6, Kentucky Statutes; and, if so, they must also apply to injuries causing the death of a person, for which his widow or child may sue, as allowed by section 4, Kentucky Statutes.** In other words, the plaintiff, whether administrator, widow, or child, so far as the right to sue and recover is concerned, stands in the place of the injured person or person killed. As said in L. & N. R. R. Co. v. Brantley's Adm'r, 106 Ky. 849, 51 S. W. 585, 21 Ky. Law Rep. 473: "From necessity and the reason of the thing, the statute of one year

> was applied in the Carden Case, although logically, as must be admitted, the cause of action did not accrue until after the death of the intestate, and it never accrued to the deceased at all, but to the personal representative." If, "from necessity and the reason of the thing," the statute of one year had to be applied in the Carden, Simrall and Kelley Cases, upon the same grounds must it be applied to a suit by the widow for the death of her husband.

Irwin v. Smith, 150 Ky. 147, 150 S.W. 22, 23-24 (1912). This makes sense, too, because the death and survivor claims are brought in the same action with the same operative facts.

KRS §413.120(2) and its predecessor statutes have existed for more than a century, and courts have applied this statutory gap filler to a variety of rights created by statute. Appellees attach, as Appendix 5 hereto, what they believe to be an exhaustive list of cases applying the five-year statute of limitations in KRS §413.120(2)[4]. Noticeably absent from this lengthy list of situations is any sort of claim that seeks damages for ***injury to the person***. Rather the claims applying KRS §413.120(2) concern such issues as enforcement of liens, worker's compensation benefits, repurchasing condemned property, tax collection efforts, and stock holder rights, to name a few. *See* Appendix 5.

A statutory enlargement of common-law liability, such as provided by KRS §216.515, does ***not*** equate to a statutorily created theory of liability unknown at common law. Kentucky law is clear: personal injury claims – even those made because of alleged violations of KRS §216.515 -- are governed by the one-year statute of limitations found in KRS §413.140(1). It follows that KRS §413.120 does <u>not</u> apply to Appellant's claim because his claim is premised upon alleged bodily injury to Mrs. Gordon and, thus, is governed by the personal injury statutes of limitation in KRS §413.140(1)(a).

[4] Appellees presented a similar list in their Court of Appeals' Brief of Appellant, as Appendix 5. The list attached hereto has been updated to include newer and additional cases.

Several Kentucky cases have also considered the propriety of applying KRS §413.140(1)(a) (the one-year statute) versus KRS §413.120(2) (the five-year statute) to a cause of action premised upon a statute. *See, e.g., Toche v. American Watercraft Assoc.*, 176 S.W.3d 694, 698 (Ky.App. 2005); *Stivers v. Ellington*, 140 S.W.3d 599, 600 (Ky.App. 2004); *Robinson v. Hardaway*, 169 S.W.2d 823, 824 (Ky. 1943). *See also Adkins v. Johnston*, 2006 WL 3759549 (Ky.App. 2006). **In every case**, the courts have held that, where bodily injury is involved and the statute did not create a new cause of action, the one-year statute of KRS §413.140(1)(a) is the appropriate statute of limitations. *See Toche*, 176 S.W.3d at 698; *Stivers*, 140 S.W.3d at 600; *Robinson*, 169 S.W.2d at 824; *Adkins*, 2006 WL 3759549 at *3.

Toche, 176 S.W.3d 694, involved a claim for personal injuries arising under KRS §235.300, which provides that "[t]he operator of a vessel or motorboat shall be liable for any injury or damage occasioned by the negligent operation of such vessel or motorboat." The *Toche* court found the one-year statute of limitations still applied despite the fact that the claim arose under the statute, because the statute "merely codified common law liability and does not create a new theory of liability. [The plaintiff's] claim **is still a basic personal injury claim** under common law." *Id.* at 698 (emphasis added). While *Toche's* facts are distinguishable from the case at bar, its analysis is precisely apt for the situation presented.

Stivers, 140 S.W.3d 599, involved a snowboarder injured when she collided with a skier in Colorado. The plaintiff argued that the five-year limitations period of KRS §413.120 governed plaintiff's negligence action on the grounds that the Colorado statute "created" liability by defining the duty of downhill skiers. *Id.* at 697. This Court

disagreed: "[T]he Colorado Ski Safety Act did not create any new liability, but merely substituted the legislature's determination of the standard of care for the common-law standard of care in such negligence actions." *Id.* at 600.

In *Robinson*, 169 S.W.2d 823, the plaintiff suffered injury in an automobile collision caused by the negligence of defendant's minor son. The plaintiff argued that the five-year statute of limitations of KRS §2515 (now KRS §413.120) applied because plaintiff sought recovery under a Kentucky statute that created liability on the part of the defendant father who had signed his son's application for a license. *Id.* The *Robinson* court disagreed, holding that the one-year personal injury statute of limitations applied. "The action is, in its final analysis, an action for injury to the person." *Id.* at 824.

Finally, with deference to CR 76.28(4)(c), Appellant believes *Adkins*, 2006 WL 3759549 at *1, to be instructive. In *Adkins*, the plaintiff sued defendant based on KRS §258.275(1), which provides that a dog owner is liable for any injury caused by his dog. Prior to the statute, a dog owner was liable at common-law only if he knew of the dog's vicious propensities. *Id.* at *2. The plaintiff contended that the applicable statute of limitations was the five-year provision of KRS §413.120, because KRS §258.275(1) created the new liability. *Id.* The *Adkins* court disagreed holding KRS §258.275 did not create a new theory of liability unknown at common law. *Id.* at *3. Rather, the statute supplanted and, in so doing, enlarged the common law liability in certain circumstances. *Id.* (i.e., created another theory of recovery).

Appellant cannot legitimately argue that entitling his claims as violations of KRS §216.515 somehow creates a "cause of action," separate and distinct from personal injury or common law negligence, both of which are unquestionably subject to a one-year

statute of limitations. Quite to the contrary, the allegations in his Complaint belie that argument. Appellant supports his claims of KRS §216.515 violations by alleging that HHCC's wrongful conduct caused Mrs. Gordon to suffer "pressure sores, urinary tract infections, upper respiratory infections, infections, falls, bruising, skin tears, fracture, weight loss, dehydration, subdural hematoma, and death." *See* RA at 9. These are all injuries to the person of Mrs. Gordon.

Moreover, any allowance for recovery of damages in addition to those for personal injury, such as attorney fees, is of no consequence as long as the specific claim is for personal injuries. *See, e.g., O'Mell,* 194 F.2d at 455. In that respect, KRS §216.515(26) is not unlike the motorboat liability statute in *Toche,* 176 S.W.3d at 696. Under that statute, the motorboat operator could be held liable for any "injury **or damage** occasioned by the negligent operation of such vessel." *Id.* In determining which statute of limitations applied, the *Toche* court focused on the plaintiff's specific claim – which was for personal injury – and applied the one-year statute of limitations. *Id.*

Likewise in *Robinson*, 169. S.W.2d 823, the court held a one-year statute of limitations applied under a statute creating liability to the signatory on a minor's driver's license application for "**any damages** by such negligence" of the minor driver. *Id.* at 824. While the statute addressed both liability for personal injury and property damage, warranting two different limitations periods, the claims in *Robinson* amounted to bodily injury claims and, therefore, the one-year personal injury statute of limitations applied. *Id.*

As shown in *Toche* and *Robinson*, courts should consider the nature of the damages that Appellant claims arose as a result of HHCC's alleged violations of KRS

§216.515. Here, Appellant claims he is entitled to recover damages arising from bodily injuries to, and the death of, Mrs. Gordon. Therefore, the one-year statute of limitations applies to his claims under KRS §216.515 and Appellant's action is time-barred.

Here, Appellant's claims arose in the distant past, more than three years before he filed his lawsuit. To permit his action to proceed as alleged would circumvent applicable law and frustrate Kentucky's public policy, not to mention effectively and completely eviscerate Kentucky's statute of limitations for injuries to the person. There is no reason to allow Appellant's claims to proceed -- under any attempted characterization. Naming a claim as a "statutory violation" does not make it one. Appellant's Complaint clearly alleges an action to recover monetary damages for personal injuries and wrongful death. As such, over three years later, it is most certainly time-barred by KRS 413.140(1)(a) and KRS 413.180. The Court of Appeals correctly dismissed Appellant's action against HHCC.

C. KRS §413.120(7) Governing Injury to Rights Not on Contract and Not Otherwise Enumerated Does Not Apply to KRS §216.515 Actions

Appellant also argues, vaguely, that KRS §216.515 actions may fall under KRS §413.120(7) as "injury to the rights of plaintiff, not arising on contract *and not otherwise enumerated.*" (Emphasis added). This Court previously defined this language to mean "a right not otherwise enumerated *in the limitation statute.*" *See Craft v. Rice,* 671 S.W.2d 247, 249 (Ky. 1984) (emphasis added). As stated above, sections of the statute specifically concern rights arising on contract, while at the same time other statutes of limitations "otherwise enumerate" the various rights listed in KRS §216.515. *See, e.g.,* KRS 413.120(4) (actions for trespass to real or personal property); and KRS 413.140(1)(a) (actions for injury to person of plaintiff).

More specific statutes of limitation preempt a general statute. In *Litsey v. Allen,* 371 S.W.3d 786 (Ky. App. 2012), the plaintiff argued that KRS 413.120(7) should apply to her claims for malpractice and intentional infliction of emotional distress against her physician, but the Court of Appeals rejected this, reasoning:

> Litsey reasons that where the conduct was intended only to cause extreme emotional distress, it may be pursued independently of assault or negligence claims and is controlled by the five-year limitation period of KRS 413.120(7), as recognized in *Craft v. Rice,* 671 S.W.2d 247 (Ky.1984). Dr. Allen argues, and the trial court agreed, that the claim is governed by the more specific one-year statute, KRS 413.140(1)(e), governing claims against medical providers. KRS 413.120(7) is a general limitation statute applying to "[a]n action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated." **However, "[a] specific statute of limitation preempts a general statute of limitation where there is a conflict."** *Boyd v. C & H Transp.,* 902 S.W.2d 823, 824 (Ky.1995). The limitation period of KRS 413.140(1)(e) applies to all claims against physicians "for negligence or malpractice[.]"

Litsey, 371 S.W.3d at 789-90.

At a minimum, KRS 413.120(7) does not apply to injuries to the person of the plaintiff. It also does not apply to contract-based actions brought under KRS §216.515 subsections (1)-(4). Thus, Appellant's theory as to KRS §413.120(7)'s across-the-board applicability must also fail.

D. Appellant Erroneously Relies on Other Jurisdictions' Distinguishable Statutory Schemes and Case Law

Appellant contends that other states' laws indicate that KRS §216.515 creates statutory rights unknown at common law, citing case law and statutes from Arkansas, Wisconsin, West Virginia, New York, Georgia, Florida and Oklahoma. By analogy, then, he suggests that KRS §413.120(2) must apply. However, he makes an "apples and oranges" argument.

Because of the vast differences in the language of residents' rights acts, as well as statutes of limitations schemes, a state-to-state comparison in these contexts becomes difficult, if not impossible to compare and reconcile. His comparisons are unavailing, primarily because the statutes of limitation and characterizations of actions for those limitations statutes vary wildly from state to state. Moreover, many of the states that recognize the action as "separate and distinct under the statute" still apply their own statute of limitations for injuries to the person or medical injury statutes.

For example, in an Oklahoma case considering the proper statute of limitations to be applied to their nursing home rights claims, the Oklahoma Court of Appeals explained:

> Whitaker contends this case is not a traditional medical liability action, but rather one for breach of contract, and that Nursing Home is not a "health care provider" subject to the two-year statute of limitations set forth in 76 O.S. § 18.
> ¶ 6 Nursing Home cites to statutory provisions and definitions indicative of legislative intent to include nursing homes within the category of "health care provider." A review of the Petition's allegations clearly reveals claims arising from alleged substandard care related to the health care needs of the deceased and the affidavit attached thereto actually characterizes the Defendant Nursing Home as a "health care provider(s) against whom the action is brought" and includes allegations of "professional negligence." **Whitaker would have us ignore her own characterization of the Nursing Home as a "health care provider" in order to avoid application of the two-year statute of limitations.**
> ¶ 7 **Our highest court has labeled a personal injury action brought against a nursing home arising out of alleged negligent care as "health-care litigation."** *See Harder v. Clinton,* 1997 OK 137, ¶ 11, 948 P.2d 298, 304. **The Court describes a violation of the Nursing Home Care Act as synonymous with "breached duty," and "[t]he so-called rights enumerated in the Act shape the standard of care to govern in the nursing home setting.**" *Morgan v. Galilean Health Enterprises, Inc.,* 1998 OK 130, ¶ 9, 977 P.2d 357, 362. In *Harder,* the Court noted the similarity of duty that a hospital owes to its patients with that a nursing home owes to its residents—"to provide care at a reasonable standard, taking into consideration the resident's known mental and physical condition." *Harder,* 1997 OK 137, ¶ 11, 948 P.2d at 304. Considering that our Legislature has specifically included nursing facilities in the category of "health care provider;" that case law equates negligence actions arising from alleged substandard resident care against nursing homes with "health care litigation;" and that Whitaker's

> substantive allegations and the relevant evidentiary attachments clearly reflect this case arises out of alleged substandard health care services, we find no error in the trial court's determination that Nursing Home is a health care provider and therefore subject to the two-year statute of limitations of § 18.

Whitaker v. Hill Nursing Home, Inc., 210 P.3d 877, 879-80 (Ok. App. 2009)(footnotes omitted)(emphasis added).

Other statutory differences make comparisons nearly impossible. For instance, Appellant cites *Koch v. Northport Health Services of Arkansas*, 205 S.W.3d 754 (Ark. 2005) in support of his position that Arkansas recognizes a residents' rights claim as distinct from ordinary negligence claims. However, Arkansas' statute for enforcement of the residents rights act, Ark. Code Ann § 20-10-1209, directs the residents' rights claim be brought as an action under yet another statute, Ark. Code Ann § 16-114-201, which specifically concerns claims for "medical injury" defined as:

> (1) "Action for medical injury" means all actions against a medical care provider, whether based in tort, contract, or otherwise, to recover damages on account of medical injury as defined in this section.

Arkansas actions for medical injury must be brought within two years. *See* Ark. Code Ann § 16-114-203. Not only is it difficult to determine which statute the Arkansas court relied upon in referring to the claim as a distinct "statutory action," Kentucky's scheme simply makes comparisons irrelevant.

Most importantly, Appellant cites no case from any other jurisdiction that stands for the position that the limitations period for a resident's rights claim alleging bodily injury shall be extended beyond that state's "injury to the person" or "medical injury" limitations period to a limitations period governing "actions upon liability created by statute." His analogy fails.

III. APPLICATION OF THE 5-YEAR STATUTE OF LIMITATIONS IS PRECLUDED BY THE KENTUCKY CONSTITUTION'S PROHIBITION AGAINST SPECIAL LEGISLATION AND THE EQUAL PROTECTION CLAUSE[5]

Section 59(5) of the Kentucky Constitution states that "[t]he General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely: .....Fifth: To regulate the limitation of civil or criminal causes." Section 59(29) of the Kentucky Constitution also prohibits local and special acts "[i]n all other cases where a general law can be made applicable" and states under such circumstances that "no special law shall be enacted." The Kentucky Supreme Court has recognized that Section 59 of the Kentucky Constitution prohibits "local or special" acts and has stated that the primary purpose of Section 59 is to prevent special privileges, favoritism and discrimination, and assure equality under the law. *Yeoman v. Commonwealth,* 983 S.W.2d 459, 466 (Ky. 1998). "A special law is a legislation which arbitrarily or beyond reasonable justification discriminates against some persons or objects and favors others." *Id. (citing Board of Educ. of Jefferson County v. Bd. Of Educ. of Louisville,* 472 S.W.2d 496, 498 (Ky. 1971)).

Kentucky's highest court formulated the test for whether legislation is special in *Schoo v. Rose*, 270 S.W.2d 940 (Ky. 1954). There, the court stated that in order for legislation to be permissible under Section 59 of the Kentucky Constitution "(1) [i]t must apply equally to all in a class, and (2) there must be distinctive and natural reasons inducing and supporting the classification." *Id.* at 941.

KRS §413.140(1)(e) provides that "an action against a physician, surgeon, dentist, or hospital licensed pursuant to KRS Chapter 216, for negligence or malpractice" shall be

[5] Appellees preserved this issue for review by raising it in the Circuit Court, in their Motion to Dismiss and Memorandum in Support (*see* RA at 114-115 and RA at 127) and again in their Court of Appeals' Brief of Appellant at pp. 17-20.

brought within one year after the cause of action accrues. This statute also time-bars Appellant's action brought ostensibly under KRS §216.515. Failure to recognize or acknowledge otherwise would amount to improperly classifying long-term care facilities, like Appellee HHCC, differently than other health care providers and in violation of Section 59 of the Kentucky Constitution. Notably, KRS §413.140(1)(e) does not specifically identify long-term care facilities by name, but **long-term care facilities in Kentucky are licensed and regulated under KRS Chapter 216** and are similarly situated to physicians, surgeons, dentists and hospitals licensed under KRS Chapter 216. Thus, exempting long-term care facilities from KRS §413.140(1)(e) would mean that KRS §413.140(1)(e) is special legislation in violation of Section 59 of the Kentucky Constitution.

Kentucky courts have recognized the force of Section 59 of the Kentucky Constitution for over a century. In 1898, Kentucky's highest courts found two separate statutes of limitation to be unconstitutional under subsection five of Section 59 of the Kentucky Constitution in *Gorley v. City of Louisville*, 47 S.W.263 (Ky. 1898) and *City of Louisville v. Kuntz*, 47 S.W. 592 (Ky. 1898), respectively. In *Kuntz*, the court noted that "[t]he legislature has power to make law fixing the time when an action must be brought, but they must be general in the character, as the constitution prohibits the legislature from discriminating in favor of or against individuals or classes, when it declares that there shall be no special legislation on the subjects enumerated in section 59." *Id.* at 593. Subsequently, Kentucky's highest courts have repeatedly used Section 59 to find various Kentucky statutes invalid. *See City of Louisville v. Louisville Taxicab & Transfer Co.*, 238 S.W.2d 121 (Ky. 1951); *Schoo v. Rose,* 270 S.W.2d 940 (Ky. 1954); *Com. v.*

McCoun, 313 S.W.2d 585 (Ky. 1958); *City of Louisville v. Klusmeyer*, 324 S.W.2d 831 (Ky. 1959). *See also*, *Univ. of Cumberlands v. Pennybacker,* 308 S.W.3d 668, 683 (Ky. 2010)(KRS §164.7901, establishing scholarship program to attend pharmacy school only at "private four (4) year institution of higher education with a main campus located in an Appalachian Regional Commission county in the Commonwealth" constituted special legislation, violating Section 59).

In *Tabler v. Wallace*, 704 S.W.2d 179 (Ky. 1985), the Kentucky Supreme Court examined a statute that mandated that an action against architects, engineers and builders for damages or injury related to a construction deficiency of a subject building could only be brought against them if commenced within five years of the completion of the building. As part of its analysis, the court noted that among others, landowners, product manufacturers and suppliers that are generally involved in building construction were not protected under the statute. *Id.* at 186. As such, the court found that other similarly situated groups did not share in the legislative windfall of the architects, engineers and builders. *Id.* at 187. Therefore, the statute was found to be in fundamental conflict with Kentucky Constitution Section 59(5) and was invalidated. *Id.* at 188. More recently, this Court held KRS §241.075, which mandated liquor license restrictions applying only to businesses in certain parts of first-class cities and consolidated local governments, to be unconstitutional as violative of Sections 59 and 60 of the Kentucky Constitution. *See Louisville/Jefferson Cnty. Metro Gov't v. O'Shea's-Baxter, LLC*, 438 S.W.3d 379, 386 (Ky. 2014).

Further, "hospital" is defined in KRS Chapter 216 as "a place including nursing and convalescent homes and all institutions for the care of the sick, devoted primarily to

providing, for more than twenty-four (24) hours, obstetrical or other medical or nursing care for two (2) or more nonrelated individuals." HHCC is an institution that provides medical or nursing care for two or more individuals. Thus, it requires a state license as does a hospital. Therefore, Appellee HHCC is in the same class as the other providers listed in KRS §413.140(1)(e) and there is no reason for any distinction or exemption. Consequently, it should be afforded the same protection. Simply put, constitutionally Appellant cannot have five years to sue a nursing home for a pressure sore but only one year to sue an acute care hospital for a pressure sore.

Additionally, should KRS §413.140(1)(e) not apply to long-term care facilities, it would also violate the guarantees of equal protection of the Fourteenth Amendment of the Constitution of the United States of America and Section Three of the Kentucky Constitution. Appellees expressly reserve their right to make further argument in this regard in the future if this Court should determine to be appropriate.[6]

IV. ANY CLAIM UNDER KRS § 216.515 CAN ONLY BE ASSERTED AGAINST THE FACILITY, APPELLEE KINDRED NURSING CENTERS LIMITED PARTNERSHIP D/B/A HARRODSBURG HEALTH CARE CENTER[7]

In Kentucky as elsewhere, medical care shall only be administered by people and entities licensed to do so. Only Appellee Kindred Nursing Centers Limited Partnership d/b/a Harrodsburg Health Care Center ("HHCC") holds a license to operate the nursing facility as required by KRS §216B. While not addressed by the Court of Appeals as moot, the circuit court correctly dismissed all claims against everyone except the facility license holder, Appellee HHCC.

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[6] Appellees again preserved this argument in their motion to dismiss, RA at 129-130 as well as their Court of Appeals' Brief of Appellant at p 20, fn 4.

[7] Appellees preserved this argument in their motion to dismiss, RA 114-134, as well as in their Court of Appeals' Brief of Cross-Appellees at pp. 5-15.

Kentucky statutes are to be "written in nontechnical language and in a clear and coherent manner using words with common and everyday meanings." *See* KRS §446.015. Furthermore, the General Assembly has charged the courts to interpret statutes with a liberal construction aimed toward maintaining their legislative intent: "All statutes ... shall be liberally construed with a view to promote their objects and carry out the intent of the legislature...." *See* KRS §446.080. If possible, a statute should be construed so as to effectuate the plain meaning and unambiguous intent expressed in the law. *See Dayton Power and Light Co., v. Dept. of Revenue, Finance and Admin. Cabinet, Com.*, 405 S.W.3d 527, 529 (Ky. App. 2012); *see also*, *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth of Kentucky, Transp. Cab.*, 983 S.W.2d 488, 492 (Ky.1998).

KRS §216.515(26) directs 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." (Emphasis added). KRS §216.510 by its self-described title contains the "definitions for KRS §216.515 through §216.530." Subsection (1) defines "Long-term care facilities" as:

> (1) "Long-term-care facilities" means those health-care facilities in the Commonwealth which are defined by the Cabinet for Health and Family Services to be family-care homes, personal-care homes, intermediate-care facilities, skilled-nursing facilities, nursing facilities as defined in Pub. Law 100-203, nursing homes, and intermediate-care facilities for the intellectually and developmentally disabled.

See id. The Kentucky Administrative Regulations contain the Cabinet for Health and Family Services' definitions for family-care homes (902 KAR 20:041), personal-care homes (902 KAR 20:036), intermediate-care facilities (902 KAR 20:051), skilled-nursing facilities (902 KAR 20:026), nursing homes (902 KAR 20:048), and intermediate-care facilities for the intellectually and developmentally disabled (902 KAR 20:086).

Additionally, the Public Law 100-203 definition of nursing facilities is contained at Sec. 1919 of 42 U.S.C. 1396r.

Appellant argues that he chose to bring his claims against HHCC and the other Appellees as violations of Kentucky's long-term facility resident's rights statute, KRS §216.515, only, not as claims in negligence for personal injury or wrongful death. *See* RA at 1-12; *see also* RA at 164-177. Having chosen this route, he is permitted to seek only the recovery as expressly allowed by that statute.

As shown above, the basic requisite for all terms defined to be "facilities" by KRS §216.510(1) for purposes of KRS §216.515, under which Appellant brought his action, is a "residential accommodation" or "an establishment with permanent facilities including inpatient and/or resident beds." *See id.* Therefore, for purposes of KRS §216.515(26), only HHCC as the licensed health care facility itself is a "facility" as defined by KRS §216.510(1). Appellant does not dispute that the remaining Kindred Appellees are not residential or inpatient facilities. No amount of "piercing of the corporate veil" can turn a non-facility corporation -- with no permanent residential facilities to include resident beds -- into a "facility" as that word is defined by statute or is licensed by the Commonwealth. Consequently, none of the other Kindred Appellees can be liable under KRS §216.515(26), even if those claims were not time-barred, and the circuit court properly dismissed all claims against them.

Even valid and timely residents' right claims can only be pursued against Appellee HHCC, the license holder for the nursing home facility in question. Other jurisdictions agree. For instance, the Arkansas Supreme Court, in *Health Facilities Management Corp. v. Hughes,* 365 Ark. 237, 227 S.W.3d 910 (2006), held that a

resident's rights claim can only be maintained against the facility licensee, and not a facility manager. *Accord, Smith v. Heather Manor Care Ctr., Inc.*, 2012 Ark. App. 584, 6, 424 S.W.3d 368, 374 (2012), *reh'g denied* (Dec. 5, 2012).

V. APPELLANT LACKS STANDING AND IS NOT THE REAL PARTY IN INTEREST[8]

The Court of Appeals erred in agreeing with the circuit court that Appellant had standing, pursuant to KRS §411.140, to assert claims on behalf of Mrs. Gordon under KRS §216.515.

Without a proper plaintiff there is no controversy to be judicially determined. *See McCool v. O'Brien*, 143 S.W.2d 843 (Ky. 1942). Lack of standing, or the ability of the person to assert a particular claim, is a defense which must be timely raised or else will be deemed waived. *Harrison v. Leach*, 323 S.W.3d 702 (Ky. 2010); *see also, Shaw v. Strauch's Adm'r*, 294 Ky. 558, 172 S.W.2d 50 (1943). Standing focuses on whether a particular party has the legally cognizable ability to bring a particular suit. *Id.*

KRS §216.515(26) provides, "[a]ny resident whose rights as specified in the section are deprived or infringed upon shall have a cause of action against any facility responsible for the action. **The action may be brought by the resident or his guardian.**" (Emphasis added). KRS §216.510 (2) defines a "resident" as "any person who is admitted to a long-term-care facility as defined in KRS §216.515 to 216.530 for the purpose of receiving personal care and assistance." Obviously, Appellant is neither a "resident" nor the "guardian" of Mrs. Gordon. The statute's words are simple, stated in the present tense and contain no exceptions. The statute's express language prohibited Appellant from bringing this action.

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[8] Appellees preserved this error for review in the record. *See* Motion to Dismiss and Memorandum in support, at RA at 130, as well as Appellees' Court of Appeals' Brief of Appellant at pp. 20-22. It is also preserved in the circuit court's order, RA at 193.

The circuit court, over HHCC's express objection, held that Appellant had standing to bring the action "in accordance with KRS §411.140," contrary to the express language of KRS §216.515 requiring that the "resident or his guardian" bring the action for statutory violations. *See* RA at 193. The circuit court made this holding in stark contrast to its finding that Appellant's claims were **not** claims for personal injury: KRS §411.140 permits the personal representative to sue on behalf of his/her decedent only in cases **"for personal injury or for injury to real or personal property."** *See* KRS §411.140 (emphasis added). *See also* RA at 193. The circuit court, however, saw no inconsistency in holding that Appellant did not state claims for personal injury but could still bring his lawsuit under the statute that grants the personal representative that right only in cases of personal injury, or injury to real or personal property. The Court of Appeals did not reach this error.

KRS §411.140 makes no provision for the personal representative to sue for statutory violations. *See, e.g., Dayton Power and Light Co.,* 405 S.W.3d at 529 (statute should be construed so as to effectuate the plain meaning and unambiguous intent expressed in the law). By contrast, other states do include express provisions for personal representatives of the resident to bring claims under their resident rights acts. *See, e.g.,* Section 400.023(1) of Florida Statues: "The action may be brought by the resident or his or her guardian, by a person or organization acting on behalf of the resident with the consent of the resident or guardian, *or by the personal representative of the estate of the deceased resident* when the cause of death resulted from the deprivation or infringement of the decedent's rights." (Emphasis added). *See also,* Arkansas Statute Annotated §20-10-1209: "(2) The action may be brought by the resident or his or her guardian *or by the*

personal representative of the estate of a deceased resident." Obviously, Kentucky's Legislature could have chosen to include a similar provision. It chose not to do so.

Furthermore, Appellant is not the "Real Party in Interest" intended to benefit from KRS §216.515. The Legislature clearly intended KRS §216.515 to apply during the resident's lifetime, as shown by the statute's express language: "The action may be brought in any court of competent jurisdiction **to enforce such rights and to recover** actual and punitive damages for any deprivation or infringement on the rights of a resident." (Emphasis added). The express use of the mandatory conjunctive "and" in the statute's language leaves no doubt that 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. This is because a remedy for her alleged wrongful death already existed at common law.

Here, Appellant as Mrs. Gordon's Administrator is not a guardian attempting "to enforce" Mrs. Gordon's resident's rights during her lifetime and while a resident; rather, he seeks only to obtain monetary damages following her death. CR 17.01 requires that every action shall be brought in the name of the real party in interest. Consequently, Appellant -- as neither the resident *nor* the guardian seeking to enforce the resident's rights -- is not the real party in interest intended to benefit from the statute, and he had no standing to bring this claim under KRS §216.515. This Court should reverse the circuit court's finding to the contrary.

VI. THE DOCTRINE OF LACHES BARS APPELLANT'S ACTION[9]

The doctrine of laches also bars Appellant's action under the facts as they exist in this case. The laches doctrine serves to bar claims in circumstances where a party engages in unreasonable delay to the prejudice of others, rendering it inequitable to allow that party to reverse a previous course of action. *Plaza Condominium Assoc., Inc. v. Wellington Corp.*, 920 S.W.2d 51, 54 (Ky. 1996). It is based, in part, on the injustice that will result from the enforcement of a neglected right. *Id.*

Specifically, the doctrine of laches "operates to preclude an otherwise timely action if an unreasonable delay in bringing the action results in prejudice to the opposing party." *Greer v. Arroz*, 330 S.W.3d 763, 766 (Ky. App. 2011). Citing from earlier Kentucky cases, the *Greer* court explained:

> "Laches" in its general definition is laxness; an unreasonable delay in asserting a right. In its legal significance, it is not merely delay, but delay that results in injury or works a disadvantage to the adverse party. Thus there are two elements to be considered. As to what is unreasonable delay is a question always dependent on the facts in the particular case. Where the resulting harm or disadvantage is great, a relative brief period of delay may constitute a defense while a similar period under other circumstances may not. What is the equity of the case is the controlling question. Courts of chancery will not become active except on the call of conscience, good faith, and reasonable diligence. The doctrine of laches is, in part, based on the injustice that might or will result from the enforcement of a neglected right.

Greer, 330 S.W.3d at 766 (citations omitted). In *Greer*, the plaintiffs alleged that the defendant, who purchased the plaintiff's real property at a commissioner's sale, wrongfully exercised control over their personal property that was left on the real property. The facts established that the plaintiffs had failed to take any action to recover their personal property despite a foreclosure action filed in March 2004, a default

[9] Appellees preserved this error for review in the circuit court motion to dismiss, RA at 131, as well as in their Court of Appeals' Brief of Appellant at pp. 22-24. *See also*, RA at 193.

judgment accompanied by an order of sale in August 2004; a notice of master commissioner sale served in September 2004; a notice of judicial sale served in August 2005, and a notice of the master commissioner sale set for September 2005 was served the month before; and a sale to defendant on September 27, 2005. In dismissing the action for conversion filed by the plaintiffs on September 26, 2007, the *Greer* court held that plaintiffs' delay in seeking the return of their personal property was unreasonable in view of the notices of the pending sale and available judicial remedies: "Instead they sat idle as the real property was sold and possession of it transferred to Greer." *Id.* at 766. The court held that their action was barred under the doctrine of laches.

In *Williams v. Alvista Healthcare Ctr., Inc.,* 642 S.E.2d 232, 236 (Ga. App. 2007), the Georgia Court of Appeals held:

> Stanford died on June 26, 2002, and the children filed their first complaint on June 24, 2004, amending the complaint to name the two individual defendants on June 25, 2004. The statute of limitation for wrongful death required the children's claim to be filed within two years after Stanford's death, i.e., by June 26, 2004. See OCGA § 9-3-33. On March 24, 2005, the two individual defendants moved to dismiss on the grounds that they had not been served. As of the date of the dismissal hearing, December 5, 2005, the two individual defendants had not been served, and at the hearing plaintiffs' counsel gave no reason for the delay. As this hearing came more than seventeen months after the suit was filed, and more than eight months after the defendants had moved for dismissal on laches grounds, we discern no abuse of the trial court's discretion in dismissing the claims against the two individual defendants who were not served. See *Zeigler v. Hambrick* ("[t]his Court has consistently used the phrase 'as quickly as possible' to describe due diligence in perfecting service").

Here, Appellant's claims are barred by the doctrine of laches because he unreasonably waited more than three years to file his personal injury action. Kentucky statutes and case law are clear in the time period prescribed for bringing an action for personal injury and/or wrongful death. To allow Appellant to bring his claims now, under the guise and form of KRS §216.515 violations, would severely prejudice HHCC

because it has continued operations as usual for the past several years unaware that it would have to defend against claims concerning Mrs. Gordon. In other words, absent notice to the contrary, HHCC did not know to preserve evidence surrounding Mrs. Gordon's care, which now has likely been destroyed in the regular course of business. Moreover, many of HHCC's putative witnesses are long gone or their memories' faded. Simply put, Appellant neglected his claims and it would be inequitable to allow him to pursue them now. Therefore, his claims should be barred by the doctrine of laches as well.

CONCLUSION

The Court of Appeals correctly reversed the Mercer Circuit Court with instructions to dismiss Appellant's action. Under all possible applicable statutes of limitations, Appellant's claims are time-barred. The Complaint seeks money damages for injury to the person of Mrs. Gordon. Kentucky law provides that actions for injury to the person are governed by the one-year statute of limitations, even where the duties are created in whole, or in part, by statute.

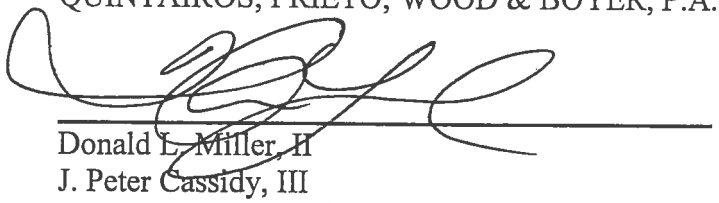
No Kentucky court has ever applied the five-year statute of limitations in KRS §413.120 where the injury alleged is to the person of the plaintiff. Further, if interpreted consistent with Appellant's assertions, the Kentucky Residents' Rights Statute amounts to impermissible special legislation prohibited by the United States and Kentucky Constitutions. In addition, Appellant is not the proper party in interest to bring a suit under the Kentucky Residents Rights Statute. Moreover, if for any reason this Court allows Appellant to pursue his claims as violations of KRS §216.515, that statute permits those claims can only be brought against the "facility" responsible – defined by the

statutes as the license holder -- and not the other corporate Appellees. Finally, the doctrine of laches bars Appellant's action as prejudicing Appellees.

For all of the foregoing reasons, Appellees respectfully request that this Court affirm the Court of Appeals' dismissal of Appellant's Complaint against Appellees with prejudice as violative of the applicable statute of limitations in KRS § 413.140(1)(a).

Respectfully submitted,

QUINTAIROS, PRIETO, WOOD & BOYER, P.A.



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