

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-000268-MR

CHARLES BEALL AND MARILYN BEALL as
CO-ADMINISTRATORS of the Estate of
MICHAEL BEALL, deceased

APPELLANTS

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 06-CI-00786

OAKWOOD COMMUNITY CENTER
d/b/a COMMUNITIES AT OAKWOOD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON AND NICKELL, JUDGES; GRAVES,¹ SENIOR JUDGE.

CLAYTON, JUDGE: This is an appeal of a wrongful death claim under the Resident's Rights Act from a decision dismissing the action in Pulaski Circuit Court.

FACTUAL BACKGROUND

Appellants, Charles and Marilyn Beall, were the parents of twin boys,

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Michael and Mark. Both children suffered from severe mental retardation and were eventually housed at the Oakwood Community Center. Oakwood is owned by the Commonwealth of Kentucky and is operated by the Cabinet for Health and Family Services.

Michael also suffered from oral pharyngeal dysphasia, a condition the symptoms of which include difficulty swallowing. As a result of this diagnosis, Michael was on a diet of pureed foods. On January 14, 2005, Michael choked on a hot dog he was eating at Oakwood and died as a result. The autopsy listed Michael's death as due to "asphyxia" as a result of choking while eating food.

The Bealls brought an action in Pulaski Circuit Court under the Resident's Rights Statute as well as one for wrongful death and neglect. The Pulaski Circuit Court dismissed the action against Oakwood under the doctrine of sovereign immunity. The appellants now bring this appeal arguing that Oakwood is not protected by sovereign immunity under the Resident's Rights Statute as the General Assembly waived such a defense under KRS 216.515.

STANDARD OF REVIEW

Whether the defense of sovereign immunity applies is a question of law. The standard of review for questions of law is *de novo*. *Floyd County Board of Education v. Ratliff*, 955 S.W.2d 921 (Ky. 1997).

ANALYSIS

Sovereign immunity "is an inherent attribute of a sovereign state that precludes the maintaining of any suit against the state unless the state has given its

consent or otherwise waived its immunity.” *Yanero v. Davis*, 65 S.W.3d 510, 517 (Ky. 2001), *citing Restatement (Second) of Torts* § 895B(1).

In *Kentucky Center for the Arts Corp. v. Berns*, 801 S.W.2d 327, 331 (Ky. 1991), the Kentucky Supreme Court established a two-prong test to determine when the defense of sovereign immunity should be applied. The Court held that the institution must be under the direction and control of the central state government and it must be supported by monies which are disbursed by the authority of the Commissioner of Finance from the state treasury.

It is clear that Oakwood is a facility which should fall under the doctrine of sovereign immunity. It is operated by the Cabinet for Health and Family Services, which is a part of the central government of the Commonwealth, and receives funding from the Kentucky State Treasury. Having found that Oakwood is entitled to sovereign immunity, this Court must determine whether there has been a waiver of the doctrine as it regards Oakwood under the Resident’s Rights Statute.

In *Withers v. University of Kentucky*, 939 S.W.2d 340, 346 (Ky. 1997), the Kentucky Supreme Court held that waiver of sovereign immunity would be found “only where stated by most express language or by such overwhelming implications from text as will leave no room for any other reasonable construction.”

The appellants point to KRS 216.515 for their argument that there has been a waiver of the doctrine as it applies to Oakwood. It provides, in relevant part, as follows:

- (26) 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.

The appellants contend that this statutory language is clear and unambiguous in its granting of a private right of action to them against Oakwood. They also point to the language of 908 KAR 3:180, Section 1, Volume IV, p.1 which provides that the rights of residents at Oakwood shall be upheld as stated in the Resident's Rights Statute. This regulation was promulgated by the Cabinet for Health and Family Services.

In *Department of Corrections v. Furr*, 23 S.W.3d 615-617 (Ky. 2000), the Kentucky Supreme Court found that the Kentucky General Assembly had waived sovereign immunity under the Kentucky Civil Rights Act:

[A]pplying the *Withers* standard, the Court of Appeals reasoned: KRS 344.030(2) defines "employer" in pertinent part as "a person who has eight (8) or more employees within the state" KRS 344.010(1) defines "person" as used in KRS Chapter 344 to include "*the state, any of its political or civil subdivisions or agencies.*" The very definition of "person" as adopted by our General Assembly specifically names the state as an employer for purposes of KRS Chapter 344, thus effecting a waiver of sovereign immunity by "overwhelming implication."

In *Lexington-Fayette Urban County Board of Health v. Board of Trustees of the University of Kentucky*, 879 S.W.2d 485, 486 (Ky. 1994), the Court held that “Statutes in derogation of sovereignty should be strictly construed in favor of the state . . . and should not be permitted to divest the state or its government of any of its prerogatives, rights, or remedies, unless the intention of the legislature to effect this object is clearly expressed.”

As stated above, the appellants do not contend that there is an express waiver of sovereign immunity in the Resident’s Rights Statute, rather they argue that the waiver is implied. Summarily, they argue that the statute includes the phrases “any facility” and “any resident,” that Oakwood is the type of facility covered in the statute and that the remedies provided for in the statute are in addition to other legal and administrative remedies.

The *Withers* standard, *supra*, requires that there be no room for any other reasonable construction in order for an implication of waiver to stand. In *Furr*, there was a specific referral to governmental agencies and their inclusion in the statute. There is no such language included in the Resident’s Rights Statute regarding the definition of “long-term care facility.” While 908 KAR 3:180 provides that the Resident’s Rights Statute applies to residents at Oakwood, we hold sovereign immunity may not be waived through a regulation. The appellants contend the contrary and argue that Cabinet for Health and Family Services, Department for Mental Health and Mental Retardation Services has been granted the authority to waive sovereign immunity pursuant to the holding in *Lexington-Fayette Urban County Government v. Smolcic*, 142 S.W.3d 128, 132 (Ky. 2004).

In *Smolcic*, the Court found that waiver of sovereign immunity did not have to be directly from the General Assembly stating that it could be delegated to individuals and county governments. The Cabinet for Health and Family Services, however, is neither an individual nor a county government. Consequently, this Court must conclude that the implication of waiver is not so clear and there is not such an overwhelming implication of an intention of waiver by the General Assembly as to leave no room for doubt. Thus, this Court will affirm the dismissal of the appellants' case by the Pulaski Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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ORAL ARGUMENT FOR
APPELLANTS:

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BRIEF FOR APPELLEES:

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ORAL ARGUMENT FOR APPELLEES:

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