

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002039-MR

MARGARET MOORE

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 05-CI-00607

CLARK J. GROSS

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * **

BEFORE: DIXON, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Margaret Moore brings this appeal from an August 31, 2006, judgment of the Fayette Circuit Court granting summary judgment in favor of Clark J. Gross. We reverse and remand.

On August 16, 2002, Margaret Moore was involved in an automobile accident with Clark J. Gross. Moore was injured in the accident and subsequently received medical treatment. It is uncontroverted that the first two basic reparations benefits (BRB) were paid on behalf of Moore on September 17, 2002. On October 15,

2002, and December 10, 2002, two additional BRB payments were made. Then, sometime prior to September 27, 2004, the insurance carrier received a claim for the final BRB payment.¹ Pursuant to that claim, the final BRB payment was issued on January 20, 2005.

On February 9, 2005, Moore filed a complaint in the Fayette Circuit Court. Gross subsequently filed a motion for summary judgment. Therein, Gross claimed that Moore's action was time-barred by application of the two-year statute of limitations contained in Kentucky Revised Statutes (KRS) 304.39-230. The circuit court ultimately agreed and granted Gross's motion for summary judgment. This appeal follows.

Moore contends that the circuit court erroneously granted Gross's motion for summary judgment dismissing her complaint as time-barred by KRS 304.39-230. Summary judgment is proper when there exists no material issue of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Questions of law are reviewed *de novo* on appeal. *Gosney v. Glenn*, 163 S.W.3d 894 (Ky.App. 2005). In this appeal, the relevant facts are undisputed and resolution of this appeal centers upon application of KRS 340.39-230.

KRS 304.39-230(1) states, in relevant part:

If basic or added reparation benefits have been paid for loss arising otherwise than from death, an action for further benefits, other than survivor's benefits, by either the same or another claimant, may be commenced not later than two (2) years after the last payment of benefits.

¹ According to the deposition of Eric Manaska, a claims adjuster for the insurance carrier, it received the final claim for payment of basic reparations benefits (BRB) before September 27, 2004.

KRS 304.39-230(1) clearly provides that when BRB payments have been made, an “action” for further benefits must be commenced not later than two years after the last BRB payment. It has been recognized that such an “action” under KRS 304.39-230(1) includes a claim or request by an insured for payment of BRB from an insurance carrier.² *Milby v. Wright*, 952 S.W.2d 202 (Ky. 1997). Thus, under the above provision of KRS 304.39-230(1), a request for BRB payment by an insured must be submitted to the insurance carrier within two years after the last payment of such benefits. *Id.*

In the case *sub judice*, it is undisputed that a BRB payment was issued on behalf of Moore on December 10, 2002. Pursuant to KRS 304.39-230(1), Moore had until December 10, 2004, to request further payment of BRB from the insurance carrier. And, the record indicates that Moore submitted a request to the insurance carrier for an additional BRB payment sometime before September 27, 2004. It appears that the insurance carrier paid the BRB claim on January 20, 2005. Thus, an action for payment of BRB was commenced by Moore at least two months prior to expiration of the two-year statute of limitations contained in KRS 304.39-230(1).

² We view the Supreme Court's legal analysis in *Milby v. Wright*, 952 S.W.2d 202 (Ky. 1997) as controlling herein. However, for the benefit of clarity, we observe that the facts of *Milby* are distinguishable from the facts in the case *sub judice*. In *Milby*, the last BRB payment was made on March 5, 1990, and the next claim for BRB payment was not received by the insurance carrier until April 8, 1992. Consequently, the April 8, 1992, claim was untimely made more than two years after the last BRB payment (March 15, 1990). By contrast, in this case, a BRB payment was made on December 10, 2002, and Moore submitted another request for BRB payment before September 27, 2004, which was within two years after the last BRB payment (December 10, 2002).

Having determined that Moore timely commenced an action for payment of BRB under KRS 304.39-230(1), we must now determine whether her complaint was timely filed in circuit court under KRS 304.39-230(6).

KRS 304.39-230(6) provides:

An action for tort liability not abolished by KRS 304.39-060 may be commenced not later than two (2) years after the injury, or the death, or the last basic or added reparation payment made by any reparation obligor, whichever later occurs.

Subsection (6) clearly provides that an action in tort (not abolished by KRS 304.39-060) may be commenced not later than two years after the injury, after the death, or after the last BRB payment, whichever later occurs. *See Crenshaw v. Weinberg*, 805 S.W.2d 129 (Ky. 1991).³ In this case, the final BRB payment was made on January 20, 2005. As Moore filed her complaint on February 9, 2005, it was filed well within the two-year statute of limitations provided by KRS 304.39-230(6).

In sum, we are of the opinion that Moore timely requested an additional BRB payment before September 27, 2004, and that such payment was made on January 20, 2005, by the insurance carrier. As such, we hold that Moore's complaint filed on February 9, 2005, was timely filed within two years of the last BRB payment, January 20, 2005.

³ The circuit court erroneously held that “any tort action arising from the August 16, 2002 automobile accident was extinguished on December 10, 2004, the two-year anniversary of the last Basic Reparations Benefit payment” However, under *Crenshaw v. Weinberg*, 805 S.W.2d 129 (Ky. 1991), the statute of limitations is clearly tolled by BRB payments, and an action in tort may be commenced within two years of the last BRB payment made pursuant to a timely filed claim for BRB payment.

For the foregoing reasons, the summary judgment of the Fayette Circuit Court is reversed and this cause remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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