

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002111-MR

EVELYLN M. ZINK

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 07-CI-01026

THE ESTATE OF JAMES R.
PIERSON, (DECEASED); AND
PROGRESSIVE CASUALTY
INSURANCE COMPANY

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; THOMPSON, JUDGE; HARRIS,¹ SENIOR
JUDGE.

¹ Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

HARRIS, SENIOR JUDGE: Evelyn M. Zink appeals from orders of the Kenton Circuit Court dismissing her negligence action for failure to revive the action as required by KRS 395.278 and because a direct action will not lie against appellee, Progressive Casualty Insurance Company. Zink argues that: (1) KRS 395.278 and Kentucky Rules of Civil Procedure (CR) 25.01 do not apply to her cause of action because the defendant died before suit was filed; (2) KRS 304.39-230(6) applies to the circumstances of her case; (3) CR 15 permits the relation back of her amended complaint to her original complaint; (4) she was entitled to maintain a direct action against Progressive; (5) she was permitted to stack basic reparation benefits; and (6) she was entitled to receive a response to her discovery request before the trial court considered the motion to dismiss. After reviewing the record and briefs, we affirm in part, reverse in part, and remand for further proceedings.

On April 29, 2005, Zink was crossing the intersection of Dixie Highway and Main Street in Erlanger, Kentucky. As she was crossing the intersection, Zink was struck by an automobile driven by Pierson, which was insured by Progressive. Subsequently, Zink and Progressive entered into settlement negotiations. The negotiations were unsuccessful and Zink filed suit against Pierson on April 6, 2007.

The summons against Pierson was returned with the notation that Pierson was deceased. Zink's counsel confirmed that Pierson had died on October

15, 2006, for reasons unrelated to this case, and notified Progressive of Pierson's death on June 7, 2007. Suzanne Pierson was appointed administratrix of James Pierson's estate on November 1, 2006. Zink and Progressive continued settlement negotiations until mid-December 2007. On December 17, 2007, Zink filed an amended complaint naming the Estate of James R. Pierson and Progressive as separate defendants.

The Estate filed a motion to dismiss the complaint on the ground that Zink had failed to timely revive her action pursuant to KRS 395.278 and CR 25.01. Progressive also sought dismissal of the claims against it on the basis that direct action claims are prohibited by Kentucky law. Following the motions to dismiss, Zink filed a motion to substitute Suzanne Pierson as administratrix of the estate as a party, which was not ruled on by the trial court.

On June 9, 2008, the Kenton Circuit Court entered an order dismissing the claim against the estate for the failure to timely revive the action pursuant to KRS 395.278. On June 16, 2008, the Kenton Circuit Court entered an amended order dismissing the claim, which corrected clerical errors with regard to various dates. On October 6, 2008, the trial court entered an order denying Zink's motion to alter, amend or vacate. The trial court again found that the action was not timely revived. The trial court also determined that the cause of action against Progressive should be dismissed because Kentucky law does not permit direct action claims. The court further held that the pending discovery requests would not have affected its consideration of the motions to dismiss. Zink appealed to this

Court from the June 16, 2008, amended order dismissing the claim and the October 6, 2008, order denying the CR 59.05 motion to alter, amend, or vacate.

Zink first argues that the reviver statute (KRS 395.278) and CR 25.01 do not apply to her claim because the defendant died before suit was filed. We agree.

KRS 395.278 states:

An application to revive an action in the name of the representative or successor of a plaintiff, or against the representative or successor of a defendant, shall be made within one (1) year after the death of the deceased party.

CR 25.01(1) states:

If a party dies *during the pendency* of an action and the claim is not thereby extinguished, the court, within the period allowed by law, may order substitution of the proper parties. If substitution is not so made the action may be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party, and, together with the notice of hearing, shall be served on the parties as provided in Rule 5, and upon persons not parties as provided in Rule 4 for the service of summons. Upon becoming aware of a party's death, the attorney(s) of record for that party, as soon as practicable, shall file a notice of such death on the record and serve a copy of such notice in the same manner provided herein for service of the motion for substitution. [Emphasis added.]

Pierson died on October 15, 2006. Zink did not file suit until April 6, 2007. Upon the return of service, she learned of Pierson's death. Therefore, because the suit was filed after Pierson's death, there was no action to revive. Similarly, the plain language of CR 25.01 does not apply to the circumstances of

this case because Pierson did not die during the pendency of the action; he died prior to the filing of suit. We find that the trial court erred by dismissing the claim against the estate of Pierson pursuant to KRS 395.278.

Zink has raised additional issues regarding the applicable statute of limitations, relation back under CR 15.03, and stacking basic reparation benefits. We are not directed to where these issues were raised below, nor were these issues ruled upon by the trial court. Therefore, these issues are not properly before us, and we decline to consider them here.

Next, Zink argues that the trial court erred by dismissing her direct action claim against Progressive. Kentucky prohibits direct actions by an injured plaintiff against the tortfeasor's insurer to recover for injuries caused by the tortfeasor. *State Auto Mut. Ins. Co. v. Empire Fire & Marine Ins. Co.*, 808 S.W.2d 805, 807 (Ky. 1991). This rule was in effect prior to the enactment of the Motor Vehicle Reparations Act (MVRA) and has since been consistently upheld. *Id.*; *Cuppy v. General Acc. Fire & Life Assur. Corp.*, 378 S.W.2d 629 (Ky. 1964). We decline Zink's invitation to overturn years of precedent established by our Supreme Court. The trial court properly dismissed the direct action claim against Progressive.²

Finally, Zink argues that the trial court erred by ruling on the motions to dismiss before she received a response to outstanding discovery. Zink cites

² We note that the prohibition on direct actions does not impact the right of an injured party to maintain a claim relating to the payment of basic reparation benefits (BRB) or personal injury protection (PIP) payments. See KRS 304.39-210; *Kentucky Farm Bureau Mut. Ins. Co. v. Troxell*, 959 S.W.2d 82 (Ky. 1997).

Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co., 579 S.W.2d 628 (Ky. App. 1979), in support of this proposition. *Hartford* is distinguishable from the case at bar because that case dealt with a summary judgment rather than a motion to dismiss based on limitations. The requested discovery would have had no bearing on the issues upon which the trial court ruled and which we have addressed in this opinion.

Accordingly, we affirm the order of the trial court dismissing the direct action claim against Progressive. We reverse the orders of the trial court dismissing the claim against the estate pursuant to KRS 395.278, and remand for further proceedings consistent with this opinion.

ALL CONCUR.

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