

RENDERED: DECEMBER 11, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001128-MR

JUDY GRAHAM

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 08-CI-00123

BARRY HEINE,
INDIVIDUALLY AND
AS NEXT FRIEND OF
JOSHUA R. HEINE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Judy Graham brings this appeal from a May 15, 2008,
summary judgment of the McCracken Circuit Court dismissing her tort action as
time-barred by the statute of limitations. We affirm.

On January 29, 2008, Graham filed a complaint against Barry Heine, individually and as next friend of Joshua R. Heine (collectively referred to as Heine) for damages arising from an automobile accident that occurred September 2, 2005. Graham claimed that Joshua, a minor, negligently drove his motor vehicle into a motor vehicle operated by Graham. Graham allegedly suffered personal injuries for which she sought damages.

Heine filed a motion for summary judgment alleging that the tort action was untimely filed under Kentucky Revised Statutes (KRS) 304.39-230(6). Graham responded by arguing the action was timely filed. By summary judgment entered May 15, 2008, the circuit court concluded that Graham's tort action was filed outside the statute of limitations and granted Heine a summary judgment. This appeal follows.

Graham contends the circuit court erroneously rendered summary judgment dismissing her tort action as time barred under KRS 304.39-230(6).¹ Summary judgment is proper where there exist no material issues of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). And, all facts are to be viewed in a light most favorable to the nonmoving party. *Id.*

KRS 304.39-230(6) sets forth the applicable statute of limitations:

¹ As the circuit court considered "matters outside the pleadings," it properly treated the motion as a summary judgment under Kentucky Rules of Civil Procedure 56. *Ferguson v. Oates*, 314 S.W.2d 518 (Ky. 1958); *La Vielle v. Seay*, 412 S.W.2d 587 (Ky. 1967).

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.

Under KRS 304.39-230(6), Graham had either two years from the date of her injury (accident) or two years from the date of the last basic or added reparation (BRB) payment, whichever is later. As noted, the accident occurred on September 2, 2005, and Graham filed the instant action on January 29, 2008, which is beyond two years from the date of the accident. However, Graham believes that her action was timely filed, arguing that the last BRB payment was made on March 20, 2008.

Upon review of the record, it is undisputed that Graham was covered by an automobile insurance policy with Kentucky Farm Bureau at the time of the accident. The insurance policy contained \$10,000 in BRB coverage. On January 5, 2006, a BRB payment was made that completely exhausted Graham's \$10,000 policy limit of BRB coverage under the policy. Thereafter, in 2008, after Heine's motion for summary judgment was filed, Graham "refunded" Kentucky Farm Bureau \$246.90 it had previously paid to her for lost income under the BRB coverage. Per Graham's instructions, Kentucky Farm Bureau then paid \$246.90 to Granett Chiropractic Center as a BRB payment. This "BRB payment" was made on March 20, 2008.

Viewing the facts most favorable to Graham, it appears that Kentucky Farm Bureau erroneously paid Graham \$246.90 as lost income from her BRB

coverage.² Rather than reimbursing Graham for lost income, she wanted Garnett Chiropractic Center to be paid such sum. Upon discovering the error, Graham reimbursed Kentucky Farm Bureau the \$246.90 and directed Kentucky Farm Bureau to issue a BRB payment of \$246.90 to Garnett Chiropractic Center. Kentucky Farm Bureau then issued the \$246.90 as a BRB payment on March 20, 2008.

Under KRS 304.39-230(6), the limitation period is triggered upon payment of the “last” BRB. We believe the “last” BRB payment was made by Kentucky Farm Bureau on January 5, 2006, when Graham’s BRB coverage was depleted. To hold otherwise would allow the statute of limitations in KRS 304.39-230(6) to be unfairly manipulated by a BRB payee. It is conceivable that a BRB payee could simply “reimburse” the reparation obligor for a prior BRB payment in order to artificially extend the statute of limitations period. Such was certainly not the intent of the General Assembly when enacting KRS 304.39-230(6). Thus, we hold that the January 5, 2006, BRB payment was the last BRB payment made within the meaning of the statute of limitations in KRS 304.39-230(6).

Graham next alleges that Heine “should be estopped from asserting the statute of limitations as a defense.” In support thereof, Graham specifically argues:

² It is undisputed that Judy Graham’s counsel discovered the error while inspecting the BRB worksheet supplied by Kentucky Farm Bureau. Counsel’s inspection was undertaken for the admitted purpose of extending the statute of limitations period and was only undertaken after Barry Heine filed the motion for summary judgment.

Judy retained the undersigned to represent her in connection with this bodily injury claim on or about August 29, 2007. The undersigned sent a letter of representation to the liability insurance carrier on or about August 30, 2007. Prior to the undersigned's getting involved, the liability adjuster assigned to the claim specifically advised [Graham] that she did not need to worry about getting this matter resolved as the statute did not run until February 2008. After the carrier's acknowledgement of the undersigned's representation of [Graham], the undersigned contacted the carrier regarding this claim. The liability adjuster specifically advised the parties should be able to get this matter resolved as the statute did not run until February 2008. Accordingly, the carrier had advised both plaintiff and the undersigned the statute ran in February 2008. (Citations omitted.)

Graham's Brief at 13.

We view *Gibson v. EPI Corp.*, 940 S.W.2d 912 (Ky. App. 1997), as dispositive. Therein, the Court of Appeals held:

[T]he plaintiff is presumed to know that an action will be barred in one year by the statute of limitations, and has no right to rely upon representations of an insurance adjuster who is her adversary. . . . Mere negotiations looking towards an amicable settlement do not afford a basis for estoppel to plead limitations.

Id. at 913 (quoting *Burke v. Blair*, 349 S.W.2d 836, 838 (Ky. 1961)). Under the holding of *Gibson*, a plaintiff may not rely upon an insurance adjuster's representations as to the statute of limitations and, thus, an action based upon estoppel will not lie. *Gibson*, 940 S.W.2d 912. As such, we view this allegation to be without merit.

In sum, we conclude that Graham untimely filed her tort action under KRS 304.39-230(6) and that the circuit court properly rendered summary judgment dismissing same.

For the foregoing reasons, the summary judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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