

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001219-MR

HOPE MILLS

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
ACTION NO. 10-CI-00058

CLARENCE SMITH

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

ACREE, JUDGE: Hope Mills protests that the Bell Circuit Court improperly applied Kentucky's borrowing statute, KRS 413.320, in concluding her Motor Vehicle Reparations Act (MVRA)² claim was time-barred. Finding no manifest injustice, we affirm.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

² KRS 304.39-010 *et seq.*

Facts and Procedure

Mills was riding in a car driven by her father, defendant *sub judice* Clarence Smith, in Claiborne County, Tennessee, on May 16, 2007, when his car was allegedly forced from the road, resulting in a single-vehicle accident.³ Mills was injured. She received basic reparation benefits (BRBs) from Smith's insurance provider, Kentucky Farm Bureau.

On February 11, 2010, Mills filed suit in Bell County, Kentucky, asserting her injuries resulted from her father's negligent operation of the vehicle and requesting damages in excess of \$10,000. The parties agree that Mills filed her complaint within the statute of limitations established by the MVRA. The parties also agree that if Tennessee's statute of limitations controls, the complaint was not timely filed. Tennessee Code Annotated (TCA) §28-3-104.

Smith filed a motion for summary judgment asserting the complaint was untimely. By operation of Kentucky's borrowing statute, Smith contended, Tennessee's one-year statute of limitations should govern Mills' complaint. The circuit court agreed and entered judgment in favor of Smith. This appeal followed.

Standard of review

A circuit court properly sustains a motion for summary judgment when the record "shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. In the

³ Both Mills and Smith resided in Kentucky during all periods relevant to the dispute.

instant case, the circuit court's ruling was purely a matter of law which we review *de novo*.

However, Mills' failure to comply with important rules of appellate procedure makes a thorough review difficult. Her brief fails to comply with the requirement that she make ample reference to the record in both the statement of the case, CR 76.12(4)(c)(iv), and in the arguments themselves. CR 76.12(4)(c)(v). Equally or more significant is Mills' failure to include a statement of preservation at the beginning of each argument heading which "show[s] whether the issue was properly preserved for review and, if so, in what manner." *Id.* Under these circumstances, we will reverse the circuit court's entry of summary judgment only upon a finding of manifest injustice. *See Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990). Manifest injustice is defined as "[a] direct, obvious, and observable error in a trial court[.]" Black's Law Dictionary (2010).

Kentucky's borrowing statute applies to claims brought under the MVRA

The MVRA limits the time for filing a complaint, in relevant part, as follows: "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." KRS 304.39-230(1).

Tennessee law requires actions for personal injury to be brought within one year of accrual of the cause of action. TCA §28-3-104(1).

Kentucky's borrowing statute provides as follows:

When a cause of action has arisen in another state or country, and by the laws of this state or country where the cause of action accrued the time for the commencement of an action thereon is limited to a shorter period of time than the period of limitation prescribed by the laws of this state for a like cause of action, then said action shall be barred in this state at the expiration of said shorter period.

KRS 413.320. Because the accident occurred in Tennessee, the cause of action arose there. If the borrowing statute applies, then Tennessee's statute of limitations renders Mills' complaint time-barred.

Mills first argues that because the MVRA was passed after the borrowing statute was enacted, the MVRA's statute of limitations must supersede KRS 413.320. Accordingly, she claims, because her complaint was brought before her claim expired under the MVRA, her action is not time-barred.

Mills is correct that Kentucky's borrowing statute was enacted before the MVRA. KRS 413.320 assumed its present form in 1942,⁴ and the MVRA became effective in 1975.

Despite the historical accuracy of Mills' position, it is founded upon a flawed premise; there is simply no rule of statutory construction that a subsequent

⁴ Prior to the 1942 amendment, the statute, codified as Carroll's Kentucky Statutes 2542, provided,

When a cause of action has arisen in another state or country between residents of such state or country or between them and residents of another state or country, and by the laws of the state or country where the cause of the action accrued an action cannot be maintained thereon by reason of the lapse of time, no action can be maintained thereon in this state.

Ley v. Simmons, 249 S.W.2d 808, 809 (Ky. 1952).

statute supersedes a previous one absent some reason to believe the legislature intended that effect.⁵ Mills has cited no legal authority which supports her proposed rule of statutory construction.

Instead, in construing statutes, this Court is bound to presume the General Assembly is aware of all other statutes in operation. *Haven Point Enterprises, Inc. v. United Kentucky Bank, Inc.*, 690 S.W.2d 393, 395 (Ky. 1985); *Manning v. Kentucky Board of Dentistry*, 657 S.W.2d 584, 587 (Ky. App. 1983) (“It is presumed that the legislature is acquainted with the law on the subjects on which it legislates and is informed of previous legislation and construction that it has previously received.”). We must therefore presume the General Assembly was aware of the borrowing statute, and its effect on causes of action which arise outside Kentucky when it passed the MVRA. As a result, we must also presume that the legislature intended that the borrowing statute apply to supplant the statute of limitations enunciated in the MVRA.

Further, Kentucky courts have applied the borrowing statute to bar causes of action brought under the MVRA. *See, e.g., Ellis v. Anderson*, 901 S.W.2d 46 (Ky. App. 1995). There is simply no reason to believe the borrowing statute does not apply to MVRA cases.

⁵ *See, e.g., Tipton v. Brown*, 277 Ky. 625, 126 S.W.2s 1067, 1071 (1939) (“It is an elementary rule of construction that the repeal of an existing law by implication is not favored by the courts, and a legislative enactment will never be interpreted as inferentially repealing a prior statute or part thereof unless the repugnancy is so clear as to admit of no other reasonable construction. This universal rule means that the courts will construe the acts if possible so that both shall be operative and effective if that can be done without contradiction or absurdity. If any part of the existing law can be reconciled or harmonized with the provisions of the new act it will not be deemed as having been repealed.” (quoting *Schultz v. Ohio County*, 226 Ky. 633, 11 S.W.2d 702, 704 (1928))).

Mills also contends that because she did not “reject” the MVRA in accepting BRB payments from Smith’s insurer, the two-year statute of limitations must apply to this case, despite the borrowing statute.

The MVRA constitutes a limitation of tort rights of an injured party. KRS 304.39-060(2)(a) (providing that tort liability is “abolished” for personal injury claims to the extent the injuries are compensable by BRB payments).⁶ As such, it affords a sort of trade-off: while individuals injured in a motor vehicle accident waive some of their tort rights, they also receive reparations for their injuries more readily. *See Manie v. Croan*, 977 S.W.2d 22, 23 (Ky.App. 1998) (citing *Fann v. McGuffey*, 534 S.W.2d 770 (Ky. 1975)). One of the benefits the MVRA provides an injured party is an extended statute of limitations, rather than the one-year limit imposed upon those who suffer other types of personal injury. KRS 413.140(1).

An individual “may refuse to consent to the limitations of his tort rights and liabilities” by filing written notice of the refusal and filing it with the Office of Insurance. KRS 304.39-060(4). Apparently, it is Mills’ position that because she filed no such rejection, she is entitled all the protections of the MVRA, including the longer statute of limitations.

This argument is misguided. Whether Mills chose to accept the provisions of the MVRA’s limitation on her tort rights or to reject it and proceed under principles of common law simply has no bearing upon the applicability of Kentucky’s borrowing statute. Because her cause of action arose in another state,

⁶ Tort liability is further limited in subpart (2)(b) of that statute.

she is bound by that state's shorter statute of limitations. The circuit court's entry of summary judgment in favor of Smith is not the product of manifest injustice.

Mills' argument that Smith waived the limitations defense is not before us

Mills finally protests that Smith is not permitted to assert a statute of limitations defense because his insurer's payment of BRBs either constituted waiver of the defense or should estop him from raising it. This issue appeared nowhere in the Prehearing Statement Mills filed with this Court, and Mills has not filed a motion to submit the matter for our consideration. Accordingly, we will not entertain the argument. CR 73.06(8). ("A party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion.")

Conclusion

For all the foregoing reasons, the order of the Bell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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