

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2012-CA-000660-MR

BONITA BEAUMONT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BARRY WILLETT, JUDGE  
ACTION NO. 11-CI-006183

ZERU MULUKEN

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: COMBS, MOORE, AND TAYLOR, JUDGES.

MOORE , JUDGE: Bonita Beaumont appeals the Jefferson Circuit Court's dismissal of her personal injury claims against Muluken Zeru in this automobile accident case. At issue is whether Beaumont's complaint was timely filed under Kentucky Revised Statutes (KRS) 304.39-230(6), which specifies in pertinent part

that a tort action must be filed within two years after the last payment made by a reparations obligor.

On April 24, 2008, Beaumont was injured when Zeru ran a stop sign and collided with her vehicle. She received personal injury protection (PIP)<sup>1</sup> benefits from her reparations obligor, The Cincinnati Insurance Companies (Cincinnati Insurance). These benefits commenced on May 15, 2008, and continued for over one year.

On July 29, 2010, Beaumont's attorney wrote to Cincinnati Insurance, asking for the date of the last PIP payment made by the company on Beaumont's behalf. Cincinnati Insurance responded by letter that its records showed a final payment of \$400 to Kentucky Orthopedic Rehab Team, LLC, on September 25, 2009.

Within two years of that date, on September 21, 2011, Beaumont filed a complaint against Zeru in Jefferson Circuit Court, seeking damages for injuries arising from the automobile accident. Zeru argued that the action was untimely, and produced a PIP exhaustion letter from Cincinnati Insurance to Jewish Hospital, enclosing partial payment for a bill. The letter stated that the payment represented the remaining balance in Beaumont's PIP coverage. The date of that letter was August 13, 2009.

---

<sup>1</sup> The terms "personal injury protection" (PIP) benefits and "basic reparations benefits" (BRB) are used interchangeably to describe "no-fault" benefits under Kentucky law. *Coleman v. Bee Line Courier Service, Inc.*, 284 S.W.3d 123, 124, n. 1 (Ky. 2009).

The records of Cincinnati Insurance showed that the check sent on September 25, 2009, to Kentucky Orthopedic Rehab Team, LLC, was the reissue of a check originally sent on March 17, 2009, to Springhurst Physical Therapy. Springhurst is the legally assumed name of Kentucky Orthopedic. The check was reissued after Springhurst contacted Cincinnati Insurance, claiming that the check had been lost.

Zeru filed a motion for summary judgment requesting dismissal on statute of limitations grounds. The circuit court entered an order granting Zeru's motion and dismissed the action with prejudice. This appeal followed.

The pertinent provision of the Kentucky Motor Vehicle Reparations Act, (KMVRA) provides that “[a]n 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.” KRS 304.39-230(6). Thus, if the last payment made was the August 13, 2009, check to Jewish Hospital, Beaumont's action is barred as untimely; if it was the reissue of the check on September 25, 2009, her action may proceed.

Beaumont argues that the two-year period should be calculated from the date the bank honors the insurer's check. She contends that this approach is in keeping with the principles of the Uniform Commercial Code (UCC), which provides that “[a] check or other draft does not of itself operate as an assignment of funds in the hands of the drawee available for its payment, and the drawee is not liable on the

instrument until the drawee accepts it.” KRS 355.3-408. Beaumont also relies on a pre-UCC opinion which states that “[t]o constitute in law a payment by check, the check must be accepted and actually paid by the bank upon which it is drawn.” *Breathitt County Bd. of Educ. v. Cockrell*, 38 S.W.2d 660, 662 (Ky. App. 1931).

Beaumont acknowledges that the adoption of such an approach would directly conflict with well-established precedent, which states that payment for purposes of KRS 304.39-230(6) occurs when the insurer issues the check. “[T]he date the PIP provider made the last payment to the medical service provider begins the running of the two-year statute of limitations. In other words, the date the PIP provider issued the check is the date the PIP provider ‘made’ the payment.” *Wilder v. Noonchester*, 113 S.W.3d 189, 191 (Ky. App. 2003) (internal citations omitted).

We see no reason to abandon this precedent. We are bound by the principle of stare decisis, which ensures that the law will “develop in a principled and intelligible fashion” rather than “merely change erratically.” *Chestnut v. Commonwealth*, 250 S.W.3d 288, 295 (Ky. 2008). Adopting the approach advocated by Beaumont would place an additional burden upon the trial courts by requiring them to delve into banking records to ascertain when a check was actually paid.

In the alternative, Beaumont argues that the replacement check issued on September 21, 2009, to Kentucky Orthopedic Rehab, was the last check “made” for purposes of calculating the limitations period, since it was the check which

actually depleted the PIP limits. An almost-identical argument was addressed and rejected by a panel of this Court in an unpublished opinion, *Wehner v. Gore*, 2006 WL 2033894 (Ky. App. 2006) (2005-CA-000689-MR). In that case, the claimant Wehner's reparations obligor, State Farm Insurance Company, paid the last PIP payment to Nicholasville Road MRI on December 13, 2000. This last payment exhausted Wehner's PIP benefits. The check to MRI was either not received or lost, and MRI asked State Farm to reissue the check. State Farm issued a new check on August 13, 2001. Wehner filed her complaint on July 14, 2003, more than two years after the first check to MRI was issued. In reliance on *Wilder*, the opinion held that her suit was untimely, because

the date a check is received or deposited has nothing to do with the *date* of final payment. Final payment is the date the last check is cut, dated, or "made." That date was December 13, 2000. The August 13, 2001, check was not a check "made" for additional services, but a replacement check between MRI and State Farm.

Although we are not bound by the holding of this unpublished opinion, we see no reason to deviate from its reasoning. Although it is unfortunate that Cincinnati Insurance provided the date of the reissued check as the date of final payment in responding to Beaumont's attorney's inquiry, the PIP ledger shows a total amount paid of \$10,400, which should have prompted further inquiry into the sequence of payments.

The order of dismissal is therefore affirmed.

TAYLOR, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: The reasoning of the majority opinion is persuasive in its reliance on *Wehner v. Gore* – albeit an unpublished opinion. Nonetheless, I must dissent because there is an additional factor in the case before us that distinguishes it from all other pertinent precedent. That element is the affirmative representation *by letter dated July 29, 2010*, by Cincinnati Insurance that the last PIP payment had been made by the issuance of the check of September 25, 2009, to Kentucky Orthopedic Rehab Team, LLC.

Beaumont timely filed her lawsuit in legitimate reliance on the date that could only be provided by Cincinnati Insurance. Date of payment is not involved (and need not be) since the question posed and answered was date of issuance of the final check. That is the sole question before us.

Sound and time-honored principles of estoppel should apply to prevent Cincinnati Insurance from denying this critical representation. The case should be permitted to proceed.

BRIEFS FOR APPELLANT:

Edward C. Airhart  
Darren Mayberry  
Louisville, Kentucky

BRIEF FOR APPELLEE:

W. Douglas Kemper  
Marilyn Osborn Patterson  
Louisville, Kentucky