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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000183-MR

ASHLEIGH MCDOWELL — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES C. BRANTLEY, JUDGE
ACTION NO. 14-CI-00259

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, LAMBERT, AND MAZE, JUDGES.

LAMBERT, JUDGE: Ashleigh McDowell appeals from the Hopkins Circuit Court's order granting the motion for summary judgment filed by State Farm Mutual Automobile Insurance Company (State Farm). We affirm.

McDowell was involved in a motor vehicle accident when her vehicle was struck after Timothy Melton was unable to stop his truck at an intersection.

The collision occurred on March 4, 2012. Both drivers had insurance policies from State Farm. McDowell's injuries were serious: her complaint indicated that she suffered a lumbar spine fracture and had to undergo surgery and physical therapy. She missed several months of work and claimed that she was unable to withstand the pain from being on her feet all day after she returned to her employment.

McDowell received basic reparations benefits (BRB) from her carrier of $10,000.00, with the final payment made to her on January 21, 2013. On April 21, 2014, McDowell filed suit against Melton to recover her medical expenses ($118,378.95) as well as past and future pain and suffering and lost wages and earning capacity. The matter was settled on July 15, 2015, when Melton offered, and McDowell accepted, the limits of Melton's coverage ($100,000.00). An agreed order of partial dismissal of McDowell's claims was entered on October 8, 2015.

Meanwhile, McDowell, who did not have underinsured motorists (UIM) coverage under her vehicle's policy, initiated a claim as a household member under a policy covering her father's pickup truck. Accordingly, State Farm was named as a defendant by an amended complaint filed on June 1, 2015. On July 30, 2015, the parties agreed to hold the matter in abeyance pending a decision by the Kentucky Supreme Court on an identical issue, namely, *State Farm Mutual Automobile Insurance Company v. Riggs*, 484 S.W.3d 724 (Ky. 2016).

After *Riggs* was rendered, State Farm renewed its earlier motions for summary judgment.[1] The circuit court entered the order granting the motion on January 5, 2018, and McDowell appeals.

McDowell argues that summary judgment was improperly granted, urging this Court to reverse because *Riggs* is not applicable to her situation and that her suit was filed within the statute of limitations.[2] We disagree.

> On summary judgment review, the appropriate standard for our analysis is "whether the record, when examined in its entirety, shows there is 'no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.'" The evidence must be viewed to the benefit of the nonmoving party with all ambiguities resolved in its favor. In our review of the decisions below, we must "determine whether the trial court correctly found that there were no genuine issues of material fact." We review the trial court's issuance of summary judgment de novo, and any factual findings will be upheld if supported by substantial evidence and not clearly erroneous.

The Board of Regents of Northern Kentucky University v. Weickgenannt, 485 S.W.3d 299, 306-07 (Ky. 2016) (footnoted citations omitted). *See also Kincaid v.*

[1] State Farm filed motions for summary judgment on June 3, 2016, and March 22, 2017, respectively. The circuit court originally denied summary judgment relief to State Farm on July 31, 2017, but left open the possibility of entertaining a future motion. State Farm filed its third motion for summary judgment on September 12, 2017. A hearing was held on November 18, 2017, and the matter was submitted for the circuit court's decision thereafter.

[2] We note that McDowell's brief fails to comply with several directives contained in Kentucky Rule of Civil Procedure (CR) 76.12(4)(c). Counsel is advised to conform with the Rule in the future before submitting a brief.

Johnson, True & Guarnieri, LLP, 538 S.W.3d 901, 911 (Ky. App. 2017); and Kentucky Rule of Civil Procedure (CR) 56.03.

McDowell first claims that the circuit court wrongly determined that the final BRB payment made by State Farm to her on January 21, 2013, triggered the two-year statute of limitations enunciated in Kentucky Revised Statute (KRS) 304.39-230(6). That statute states, in pertinent part: "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 date of issuance of the last basic or added reparation payment made by any reparation obligor, whichever later occurs." McDowell insists that the settlement date of July 15, 2015, should have been determinative of when the time began to run, and that her amended complaint was compliant with the statute.

But this belies the fact that McDowell agreed that *Riggs* would be determinative of the outcome of the within litigation when she acquiesced in holding the matter in abeyance pending the Kentucky Supreme Court's decision in *Riggs*. As such, McDowell's claim should have been made on or before January 21, 2015, two years after the date of the issuance of her last BRB payment. The circuit court did not err in this aspect of its determination. *Riggs*, *supra*; *Weickgenannt*, *supra*.

McDowell secondly insists that her father's UIM coverage did not contain a contract limitations provision, an argument she raised after the circuit court's July 31, 2017, denial of State Farm's first and second motions for summary judgment. But this matter was addressed by State Farm prior to its third motion and was argued before the circuit court in the November 18, 2017, hearing. The circuit court was satisfied with State Farm's production of evidence in support of its third motion for summary judgment, and it ruled accordingly. We have examined the issue under the previously enunciated standard of review and can discern no error. *Weickgenannt*, *supra*.

McDowell lastly contends that her UIM claim against State Farm was a contractual rather than a motor vehicle accident claim, and therefore the two-year statute of limitations should not have applied. She cites KRS 413.090 in support of this assertion, insisting that the fifteen-year statute of limitations enunciated therein would have been satisfied by the filing of her amended complaint within that window of time.

Again, we cannot agree. "'[O]ne who sues on a contract made for his benefit must accept the contract as made.' *Northern States Contracting Co. v. Swope*, 271 Ky. 140, 111 S.W.2d 610, 614 (1937) (internal citations omitted)." *Brown v. Mitsui Sumitomo Insurance Company*, 492 S.W.3d 566, 573 (Ky. App. 2016).

> It is difficult to condemn State Farm's provision as unreasonable because, at its simplest, it encourages the prompt presentation of all the potential insurance claims relating to a single accident and forces them to progress through the court system in a more cohesive way—a way that insurance claims have proceeded through our court system for decades. This is not contrary to public policy—in fact, a strong argument could be made that it benefits the public. State Farm's provision provides an insured with "the same rights as he would have had against an insured third party"—a result that is not at all unreasonable.

Riggs, 484 S.W.3d at 731 (footnote omitted). McDowell was required to file her claim versus State Farm within two years of receiving her last BRB payment, and she failed to do that. The circuit court correctly decided this issue as well.

The judgment of the Hopkins Circuit Court is affirmed.

MAZE, JUDGE, CONCURS.

GOODWINE, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Daryl T. Dixon Paducah, Kentucky	Van F. Sims Paducah, Kentucky