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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000537-MR

NANCY A. FROST AND
GLEN F. FROST — APPELLANTS

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE DAVID E. MELCHER, JUDGE
ACTION NO. 09-CI-03107

BRYAN D. DICKERSON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND NICKELL, JUDGES; LAMBERT,[1] SENIOR JUDGE.

NICKELL, JUDGE: Nancy A. Frost and Glen F. Frost appeal from a Boone Circuit Court order dismissing Nancy's action for damages and Glen's action for loss of consortium in this personal injury case stemming from an automobile

[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 Statutes (KRS) 21.580.

accident. At issue is whether the "discovery rule" tolls the limitations period for bringing a tort action under Kentucky's Motor Vehicle Reparations Act ("MVRA"), KRS 304.39-230. We hold that it does not, and, therefore, we affirm.

On June 13, 2007, Nancy Frost was injured when her car was rear-ended by a vehicle that had been struck by an automobile driven by Bryan Dickerson. Following the accident, Nancy received basic reparation or PIP benefits[2] from her insurance carrier. The last PIP payment was made on November 13, 2007. Nancy had also pursued additional payments from Dickerson's insurance carrier as evidenced by letters from her counsel dated September 24, 2007, and March 28, 2008, which are part of the record.

In August 2007, approximately two months after the accident, Nancy had begun suffering from various physical afflictions including vertigo, dizziness, Raynaud's phenomenon (whitening and blackening of the fingers accompanied by painful swelling) and projectile vomiting. Her physicians were unable to diagnose the cause of her illness until about two years later on September 16, 2009, when Nancy received a letter from a physician, Dr. Luis Pagani, opining that her symptoms were likely the result of the car accident. The Frosts filed suit against Dickerson shortly thereafter on December 30, 2009. Dickerson moved to dismiss the complaint, claiming it was filed outside the applicable two-year limitations period under the MVRA. The Frosts responded by arguing that the discovery rule

[2] The terms "basic reparation benefits" (BRB) and "personal injury protection" (PIP) benefits 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).

should be applied to toll the running of the limitations period for both their claims. The trial court refused to apply the discovery rule to Nancy's motor vehicle accident claim or Glen's associated loss of consortium claim, and dismissed the complaint. This appeal followed.

We consider first the appropriate standard of review. Under CR[3] 12.02 and CR 12.03 "a motion [to dismiss for failure to state a claim upon which relief can be granted] in which matters outside the pleadings are considered is to be treated as a motion for summary judgment." *Cabinet for Human Resources v. Women's Health Servs., Inc.*, 878 S.W.2d 806, 807 (Ky. App. 1994). In granting Dickerson's motion to dismiss, the trial court considered documents outside the pleadings, namely, attachments to Dickerson's motion consisting of the Kentucky Uniform Collision Report relating to the June 13, 2007, accident, the BRB payment summary from Nancy's insurer, and correspondence from the Frosts' attorney to Dickerson's insurance carrier. Consideration of these documents, which are expressly referenced in the trial court's order, converts the motion into one for summary judgment.

In reviewing a grant of summary judgment, our inquiry focuses on "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); CR 56.03. "The interpretation of a contract or statute is a question of law for the courts and is

[3] Kentucky Rules of Civil Procedure.

subject to *de novo* review." *Smith v. Bethlehem Sand & Gravel Co., LLC*, 342 S.W.3d 288, 291 (Ky. App. 2011).

In this case, the trial court ruled as a matter of law that under KRS 304.39-230(1), a party suffering a loss has two years from the date thereof or two years from the last BRB payment to bring suit. It concluded this action was barred because the Frosts were aware of Dickerson's identity, and received the last BRB payment on November 13, 2007, yet failed to file suit until December 30, 2009. The court further held that the discovery rule had "not been applied to motor vehicle accident cases to extend the statute of limitations on the allegation that the extent of the injury and the causal connection of some of the injury were unknown." Finally, the court held that Glen's action for loss of consortium was barred because it was not covered by the MVRA, and was not brought within the one-year limitations period of KRS 413.140(a), which governs personal injuries.

The Frosts argue that the trial court employed the wrong section of KRS 304.39-230 in dismissing their complaint. We agree, but affirm because the right result was reached albeit for the wrong reason. *Kentucky Farm Bureau Mut. Ins. Co. v. Shelter Mut. Ins. Co.*, 326 S.W.3d 803, 812 n. 3 (Ky. 2010); *Hale v. Combs*, 30 S.W.3d 146, 150 (Ky. 2000). The trial court erred as a matter of law in employing subsection (1), which sets forth the "time bar for seeking no fault benefits[.]" *Crenshaw v. Weinberg*, 805 S.W.2d 129, 130 (Ky. 1991). It provides as follows:

> If no basic or added reparation benefits have been paid for loss arising otherwise than from death, an action therefor may be commenced not later than two (2) years after the injured person suffers the loss and either knows, or in the exercise of reasonable diligence should know, that the loss was caused by the accident, or not later than four (4) years after the accident, whichever is earlier. 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).

Nancy is not seeking further no-fault reparation benefits. Her complaint alleges liability in tort. The limitation for tort actions is governed by section (6), which provides as follows:

> 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.

KRS 304.39-230(6).

The Frosts argue that the discovery rule should be applied to toll the running of the limitations period since Nancy did not know until she received the letter from Dr. Pagani on September 16, 2009, that her severe symptoms were attributable to the accident. "Under the 'discovery rule,' a cause of action will not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only that he has been injured but also that his injury may have been caused by the defendant's conduct." *Wilson v. Paine*, 288 S.W.3d

284, 286-87 (Ky. 2009) (citing *Hazel v. General Motors Corp*., 863 F.Supp. 435, 438 (W.D.Ky. 1994). The Frosts urge the Court to apply the distinction made in *Wiseman v. Alliant Hosps., Inc.*, 37 S.W.3d 709 (Ky. 2000), a medical negligence case, between *harm*, defined as "the existence of loss or detriment in fact of any kind to a person resulting from any cause[,]" and *injury*, defined as "the invasion of any legally protected interest of another." *Wiseman* at 712. The Frosts contend that although Nancy was aware that she had been harmed, she was not aware that she had been injured in the legal sense until she received medical confirmation of the causal link between the accident and her medical condition via the September 16, 2009, letter from Dr. Pagani.

The Frosts concede that the discovery rule has never been applied to a personal injury action under the MVRA, but argue that such an extension would be in keeping with the trend of opinions from the Supreme Court of Kentucky, which have extended the rule to medical malpractice cases, *Tomlinson v. Siehl*, 459 S.W.2d 166 (Ky. 1970); injury from latent disease caused by exposure to asbestos, *Louisville Trust Co. v. Johns-Manville Products Corp.*, 580 S.W.2d 497 (Ky. 1979); and legal malpractice cases, *Conway v. Huff*, 644 S.W.2d 333 (Ky. 1982). They further argue that extending the rule in this case would be equitable and would serve the MVRA's purpose of reducing litigation by rewarding those claimants with latent injuries who wait to file suit until they have established a causal connection between an accident and their injuries.

Although the Frosts' arguments are compelling, we decline to extend the discovery rule to tort actions under the MVRA because we have no statutory authority to do so. The statute of limitations set forth in KRS 304.39-230(6) makes no provision for the application of the discovery rule, unlike section (1), which expressly states that an action for reparation benefits "may be commenced not later than two (2) years after the injured person suffers the loss and either knows, or in the exercise of reasonable diligence should know, that the loss was caused by the accident[.]" Had the legislature intended the discovery rule to apply in the tort context, it could have included similar language in section (6).

Moreover, we are bound to follow the precedent established by our Supreme Court. As this Court noted in refusing to extend the discovery rule in the case of a student sexually assaulted by a church employee, "[t]he courts in this Commonwealth have been reluctant to extend the discovery rule and have applied it narrowly . . . . To extend that rule to cover the facts of this case would be beyond that allowed by Kentucky courts to this date." *Roman Catholic Diocese of Covington v. Secter*, 966 S.W.2d 286, 289 (Ky. App. 1998). As this Court further observed in the same opinion, "we will follow established precedent and not make new policy." *Id*. at 289 (citing *Louisville Trust Co.,* at 499 ("The Court of Appeals had no alternative but to decide the case as it did.")).

As to Glen's loss of consortium claim, it is also time-barred under the one-year limitations period of KRS 413.140(a) because it would have accrued simultaneously with Nancy's claim. *See Tomlinson*, 459 S.W.2d at 168.

For the foregoing reasons, we affirm the trial court's order dismissing the Frosts' complaint and granting summary judgment to Dickerson.

ALL CONCUR.

BRIEFS FOR APPELLANTS:	BRIEF FOR APPELLEE:
Thomas C. Smith Covington, Kentucky	Stephen D. Wolnitzek Covington, Kentucky