

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-002320-MR

LISA DICKEY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 10-CI-00891

LIBERTY MUTUAL INSURANCE
COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, MOORE AND VANMETER, JUDGES.

VANMETER, JUDGE: Lisa Dickey appeals from the Fayette Circuit Court order granting Liberty Mutual Insurance Company's ("Liberty Mutual") motion for a judgment on the pleadings and denying Lisa's motion for partial summary judgment. For the following reasons, we affirm.

On July 4, 2005, Lisa was involved in a motor vehicle accident. Pursuant to her insurance policy with Liberty Mutual, Lisa received Personal Injury Protection (“PIP”) benefits. On March 23, 2007 and April 16, 2007, Lisa was treated for injuries resulting from the accident at Bauman Physical Therapy (“Bauman”). Liberty Mutual issued a check on October 5, 2007 to cover those expenses. The check was received by Bauman on October 12, 2007. Lisa received additional treatment on October 9, 2009 by Clayton Elswick, D.C. Liberty Mutual denied payment for the treatment, claiming the statute of limitations on Lisa’s benefits had expired. On February 16, 2010, Lisa brought the underlying action seeking to recover costs of Dr. Elswick’s treatment from Liberty Mutual under her PIP claim.

Liberty Mutual filed a motion for a judgment on the pleadings on the basis that the two-year statute of limitations under KRS¹ 304.39-230 had expired. Liberty Mutual claimed the statute of limitations began on October 5, 2007, when it issued the check to Bauman, and the payment sought by Lisa for treatment on October 9, 2009 is more than two years from the date of the last payment of benefits.² Lisa argued the date of last payment of benefits is the date Bauman received the check, October 12, 2007. The trial court ruled in favor of Liberty Mutual. This appeal followed.

¹ Kentucky Revised Statutes.

² While Liberty Mutual also disputes that the October 5, 2007 payment was for Lisa’s PIP benefits, but was rather paid for Lisa’s Uninsured Motorists, the trial court determined the date of the last payment of benefits to be October 5, 2007, and if we assume the facts alleged by Lisa to be true, we must also assume the October 5, 2007, payment was for PIP benefits. Furthermore, since we agree with the trial court that the statute of limitations had expired, we decline to address this issue.

On appeal, Lisa argues the trial court erred by holding her claim for PIP benefits was barred by the statute of limitations. Specifically, Lisa maintains that the date of the last payment of benefits is the date Bauman received the check from Liberty Mutual. We disagree.

A party may move for a judgment on the pleadings pursuant to CR³ 12.03 by conceding as true the allegations made by the adverse party. *City of Pioneer Vill. v. Bullitt County ex rel. Bullitt Fiscal Court*, 104 S.W.3d 757, 759 (Ky. 2003) (citation omitted). A court should grant the judgment “if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief.” *Id.* (citation omitted).

KRS 304.39-230(1), a provision of the Motor Vehicle Repairs Act, states that if reparation benefits have been paid, an action for further benefits “may be commenced not later than two (2) years after the last payment of benefits.” This court previously held that the date of payment made by the PIP provider is the date the PIP provider issued the check. *Wilder v. Noonchester*, 113 S.W.3d 189, 191 (Ky.App. 2003) (citing *Lawson v. Helton Sanitation, Inc.*, 34 S.W.3d 52, 57 (Ky. 2000)).

Lisa maintains *Wilder* is not controlling and relies on KRS 355.4A-401 to argue that the date of receipt of payment is the date of payment for purposes of the statute of limitations. However, KRS 355.4A-401 applies to “direct fund transfers, commonly known as ‘wire transfers’ between banking institutions, rather than

³ Kentucky Rules of Civil Procedure.

payment of medical bills by drafts issued by insurers.” *See Wilder*, 113 S.W.3d at 191.

In the case at bar, the record demonstrates that Liberty Mutual issued its last check to Bauman on October 5, 2007 to cover Lisa’s treatment costs. Thus, Lisa’s claim for PIP benefits to cover her treatment on October 9, 2009 is more than two years from her last benefits payment and, thus, her claim is time-barred.

The order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

W. Douglas Kemper
Robert L. Steinmetz
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