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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000326-MR

ELEAD WEIRD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 10-CI-003336

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CLAYTON AND NICKELL, JUDGES.

NICKELL, JUDGE: Elead Weird has appealed from the Jefferson Circuit Court's February 9, 2012, order granting summary judgment in favor of State Farm Mutual Automobile Insurance Company on his claim for underinsured motorist ("UIM") benefits. Following a careful review, we affirm.

Weird and his passenger were injured in an automobile collision on December 24, 2007, when the vehicle he was operating was struck by an intoxicated individual. At the time of the collision, Weird was insured by State Farm under a policy of liability insurance which included UIM coverage. State Farm paid basic reparations benefits ("BRB") under its policy, the last of such payments being made on May 15, 2008. On May 11, 2010, Weird and his passenger filed a joint complaint against the tortfeasor seeking damages for their injuries. The complaint was timely under the applicable statute of limitations as set forth in KRS[1] 304.39-230.

Shortly thereafter, the tortfeasor's liability insurance carrier offered to pay its policy limits in settlement of Weird's claims. Believing his damages exceeded the value of this settlement offer, Weird moved the trial court to permit him to amend his complaint to add State Farm as a defendant so he could pursue a claim for UIM benefits. On November 15, 2010, the trial court granted the motion pursuant to CR[2] 15.01 and CR 19.01, and specifically held the amended complaint was deemed to be filed as of the date of the originally filed complaint.

Following a period of discovery, State Farm moved for summary judgment on October 12, 2011, alleging Weird's claims against it were filed outside the limitations period set forth in the insurance policy. The policy

[1] Kentucky Revised Statutes.

[2] Kentucky Rules of Civil Procedure.

language in question—which closely parrots the statute of limitations language of the Kentucky Motor Vehicle Reparations Act, KRS 304.39-230(1)—states:

> [t]here is no right of action against [State Farm] . . . under uninsured motor vehicle coverage and underinsured motor vehicle coverage unless such action is commenced not later than two (2) years after the injury, or death, or the last basic or added reparation payment made by any reparation obligor, whichever later occurs.

Based on the undisputed final BRB payment being made on May 15, 2008, State Farm argued the quoted policy language required any claims against it under the UIM coverage be brought no later than May 15, 2010. Because the amended complaint was not filed until some six months later, it was untimely.

In response, Weird contended the "relation-back" provisions of CR 15.03 were applicable and saved the amended complaint from any attack based on the statute of limitations. He claimed the failure to name State Farm in the initial complaint was due to his being unaware he would have a claim for UIM coverage, and therefore was merely a mistake. Weird also claimed State Farm had actual knowledge of the action within the limitations period sufficient to trigger the provisions of CR 15.03. Finally, Weird argued the two-year limitations period set forth in the policy was unreasonable and inconsistent with Kentucky law. Thus, he urged the trial court to deny State Farm's motion.

State Farm filed a response challenging Weird's assessment of the applicability of the saving language of CR 15.03 and defending its policy language relative to the two-year limitations period on bringing UIM claims as being

reasonable. It again urged the trial court to grant summary judgment and dismiss Weird's claims against it.

On January 5, 2012, the trial court granted summary judgment to State Farm. In its Opinion and Order, the trial court concluded the two-year limitations period contained in the policy was reasonable and valid. The trial court then determined the relation-back language contained in CR 15.03 could not save Weird's action because State Farm did not have actual knowledge of the institution of the civil action and there had been no mistake as to State Farm's identity. Weird subsequently moved to alter, vacate or amend the January 5, 2012, ruling. On February 9, 2012, the trial court entered two orders purporting to resolve Weird's motion.[3] Weird timely appealed the grant of summary judgment to State Farm.

The appeal was placed in abeyance pending the Supreme Court of Kentucky's resolution of an appeal addressing policy limitation language identical to that at issue in the instant matter.[4] The matter was returned to the active docket for resolution by order of this Court on June 2, 2016. The same order noted the trial court's two February 9, 2012, orders were inconsistent and reached opposite results. We remanded to the trial court for a determination of which of the conflicting orders controlled. On August 1, 2016, the trial court entered an order

[3] An "Order" was entered granting Weird's motion to alter, amend or vacate the January 9, 2012, order granting summary judgment to State Farm. An "Opinion and Order" was also entered which fully discussed Weird's arguments, rejected them, and denied his motion to alter, amend or vacate. Neither contained finality language.

[4] *State Farm Mutual Automobile Insurance Co. v. Riggs*, 484 S.W.3d 724 (Ky. 2016). Finality in *Riggs* was endorsed on April 7, 2016.

setting aside the February 9, 2012, "Order" granting Weird's motion; confirmed the "Opinion and Order" controlled; and amended the "Opinion and Order" to include finality language. The matter is now ripe for a decision on the merits.

Weird advances two allegations of error in seeking reversal. First, he argues the two-year limitations period contained in the policy is unreasonable and should have been rejected by the trial court. Second, he alleges the savings provisions of CR 15.03 were applicable and the trial court erred in not so finding. For both of these reasons, Weird contends the grant of summary judgment to State Farm was infirm. We disagree.

CR 56.03 provides summary judgment is appropriate when no genuine issue of material fact exists and the moving party is therefore entitled to judgment as a matter of law. Summary judgment may be granted when "as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (internal quotations omitted). "While the Court in *Steelvest* used the word 'impossible' in describing the strict standard for summary judgment, the Supreme Court later stated that word was 'used in a practical sense, not in an absolute sense.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). Whether summary judgment is appropriate is a legal question involving no factual findings, so a trial court's grant of summary judgment is reviewed *de novo*. *Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 370–71 (Ky. 2010).

Weird first argues the two-year limitations period contained in the policy constitutes an unreasonable time restriction within which to bring a UIM claim. In *Riggs*, our Supreme Court was faced with very similar arguments to those advanced by Weird and was tasked with analyzing the exact policy language at issue in this case to determine its reasonableness. The Supreme Court rejected the challenges raised and concluded the contractual time limitation closely tracked the language of the tort claims limitations period set forth in KRS 304.39-230(6). Following a detailed analysis, the restriction was deemed to be reasonable. Clearly, the holding of *Riggs* is on all fours with the instant case.

This Court is bound to follow the law as stated by the Supreme Court. *See Kindred Healthcare, Inc. v. Henson*, 481 S.W.3d 825, 828 (Ky. App. 2014) ("As an intermediate appellate court, this Court is bound by published decisions of the Kentucky Supreme Court. SCR[5] 1.030(8)(a). The Court of Appeals cannot overrule the established precedent set by the Supreme Court[.]"). Thus, based on the strength of *Riggs*, we reject Weird's challenge.

Weird next argues the savings provisions of CR 15.03 were applicable and the trial court erred in ruling to the contrary. The trial court found, and it is undisputed, Weird's amended complaint was filed more than two years after the last BRB payment was made by State Farm. Generally speaking, "[a] new party cannot be brought into a lawsuit by amended complaint when the statute of limitations governing the claim against that party has already expired." *Combs v.*

[5] Rules of the Supreme Court of Kentucky.

Albert Kahn & Associates, Inc., 183 S.W.3d 190, 194 (Ky. App. 2006) (internal footnote omitted). Thus, unless saved by CR 15.03 relating the amendment back to the original filing date of the initial complaint against the tortfeasor, the claims against State Farm were untimely and barred by the contractual two-year limitations period.

> CR 15.03 provides in pertinent part as follows:
>
> (1) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.
>
> (2) An amendment changing the party against whom a claim is asserted relates back if the condition of paragraph (1) is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (a) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Under the plain language of the rule, a party seeking to add a defendant after the limitations period has expired must satisfy three requirements: (1) the claim asserted in the amended complaint must arise out of the same conduct, transaction or occurrence set forth in the original complaint; (2) the newly added party must have had notice of the action within the limitations period; and (3) the newly added party must have known or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against him.

In *Phelps v. Wehr Constructors, Inc.*, 168 S.W.3d 395 (Ky. App. 2004), we discussed the purposes of CR 15.03 and its requirements in relation to adding new parties.

> This rule reflects the tension between the plaintiff's interest in relation back to preserve the plaintiff's claim and the defendant's interest in a limitations defense—timely notice and repose. In order to maintain a proper balance between these competing interests, if a new party is to be added after the limitations period has run, then all three requirements of CR 15.03 must be strictly construed.

Id. at 397 (citing *Reese v. General American Door Company*, 6 S.W.3d 380, 383 (Ky. App. 1998)). It is undisputed Weird satisfied the first requirement. However, we agree with the trial court that Weird did not satisfy the second and third requirements.

Weird contends State Farm had notice of the pending suit sufficient to satisfy CR 15.03(2)(a) because it had paid no-fault benefits and thus was aware of a potential UIM claim. Weird cites *Gordon v. Ky. Farm Bureau Ins. Co.*, 914 S.W.2d 331 (Ky. 1995), in support of his proposition. However, his reliance on *Gordon* is misplaced. Weird's citation comes from the opinion of Justice Liebson —concurring in result only—rather than from the majority opinion. The majority explicitly stated insufficient evidence had been presented upon which to determine whether the insurance company had actual notice of the pending suit and concluded the issue should be determined by the trier of fact on remand. Nowhere does the majority mention the stance Weird attempts to attribute to it. Thus, there

is no precedential value to the language upon which Weird relies. Simply stated, it is not the law of this Commonwealth that the payment of BRB is sufficient to give actual notice to an insurer of the institution of a civil action wherein it may be subject to liability. Weird's allegation to the contrary is incorrect. We cannot say, based on the record before us, that State Farm had notice of Weird's action sufficient to satisfy CR 15.03(2)(a).

Additionally, and pertinent to this appeal, *Phelps* includes a lengthy discussion of the "mistake" language contained in CR 15.03(2)(b). A review of that discussion is likewise fatal to Weird's position. In *Phelps*, an argument very similar to Weird's was advanced—and soundly rejected—that a known entity was not named as a party due to a lack of knowledge of liability.

> The Phelpses do acknowledge that the mistake provision in section (2)(b) must also be satisfied, but they urge us to define mistake to include "[mistake] as to a proper party against which to file a suit." But the purpose of the rule was not to allow for correction of this type of mistake. "The requirement that a new defendant 'knew' he was not named due to a mistake concerning identity presupposes that in fact the reason for his not being named was a mistake in identity." Certainly,
>
> > Nothing in the Rule or in the [Advisory Committee] Notes indicates that the provision applies to a plaintiff who was fully aware of the potential defendant's identity but not of its responsibility for the harm alleged. In fact, the Notes speak of a defendant that may properly be added under Rule 15(c) as an 'intended defendant,' and of an amendment pursuant to the Rule as 'a name-correcting amendment.'

> The Phelpses' failure to include Wehr occurred because of a lack of knowledge of Wehr's potential liability, not because of a misnomer or misidentification. We do not read the word "mistake" in CR 15.03(2)(b) to include a lack of knowledge. For purposes of CR 15.03(2)(b), ignorance does not equate to misnomer or misidentification.

Id. at 398 (internal footnotes omitted). This holding was consistent with *Reese*, wherein we concluded the "mere failure to identify a potential defendant within the limitations period . . . is not the sort of mistake contemplated by part (2)(b) of CR 15.03." *Reese*, 6 S.W.3d at 383-84 (citing *Nolph v. Scott*, Ky., 725 S.W.2d 860 (Ky. 1987)).

As in *Phelps* and *Reese*, there was no mistake here. Weird was fully aware of State Farm's existence and its identity. His failure to name State Farm as a party was not due to a misnomer or misidentification, but rather due to a failure to recognize potential liability. This is insufficient to satisfy the strict requirements of CR 15.03(2)(b). Accordingly, we concluded the trial court properly found Weird's amended complaint adding State Farm as a defendant did not comply with CR 15.03 and, as such, was time-barred. Dismissal was therefore warranted.

In conclusion, we discern no error in the trial court's grant of summary judgment. Weird's complaint was filed outside the contractual two-year limitations period and the relation-back provisions of CR 15.03 were inapplicable. Thus, summary judgment was appropriately granted and dismissal of the complaint was necessary and correct. Therefore, for the foregoing reasons, the judgment of the Jefferson Circuit Court is AFFIRMED.

CLAYTON, JUDGE CONCURS.

ACREE, JUDGE, CONCURS WITH SEPARATE OPINION.

ACREE, JUDGE, CONCURRING: I must concur based on the Supreme Court's decision in *State Farm Mutual Automobile Insurance Company v. Riggs*, 484 S.W.3d 724 (Ky. 2016). However, I remain of the opinion that *Riggs*' reasoning is flawed. In a practical sense, it effectively shortens the two-year period the legislature allotted auto accident victims to settle or file claims against their alleged tort-feasors. Furthermore, this contracted two-year period, in some cases, will not merely serve as a substitute for an otherwise applicable limitations statute (KRS 413.090(2)); it will effectively establish a repose date, extinguishing contract claims that accrue thereafter.

In point of fact, *Riggs* has limited impact. As the Court said, "the vast majority of insureds file a single suit naming both the tort-feasor and UIM insurer as defendants" and they do so within two years. *Riggs*, 484 S.W.3d at 730. And when "the UIM insurer elects to pay its insured in place of the tort-feasor and then turn its attention to the tort-feasor for subrogation[,]" the insurers do not even perceive the claim as one for breach of contract but, rather, part of the tort litigation. *Id.* at 728 n.17. Consequently, there was no need to render *Riggs* for "the vast majority." But obviously, some parties can and do find themselves in circumstances like those in the case now before us, and in *Riggs*, and in *Elkins v. Kentucky Farm Bureau Mutual Insurance Co*., 844 S.W.2d 423 (Ky. App. 1992),

and in others. *Riggs* was the opportunity to render an opinion for those parties, in those circumstances.

Kentucky adheres to and promotes the public policy of negotiating and settling disputes. KRS 454.011. The legislature gives that public policy two years to work before requiring a plaintiff to sue an alleged tort-feasor in auto accident cases. KRS 304.39-230(1). Once an auto accident plaintiff exhausts those settlement efforts, he *must* file a lawsuit no later than the last day of the second year after the accident.[6] After *Riggs*, he *may* still use all that time for settlement efforts. However, he does so at the risk of losing his contract claim for UM/UIM benefits. That seems unreasonable to me.

To avoid that risk, now that *Riggs* is the law, the auto accident plaintiff must be prepared to file suit against the tort-feasor long before expiration of the two years. That is because, while it generally seems "[t]wo years . . . is enough time . . . to discover . . . whether [the tort-feasor's insurance] coverage will be sufficient for the suffered injuries[,]" *Riggs*, 484 S.W.3d at 728, the real-world plaintiff simply will not have that much time. *Riggs* fails to take into account the settlement process's fluidity and dynamics, both human and factual.

Cases are negotiated and mediated by lawyers and adjusters and, sometimes, by the parties themselves. Settlement participants are motivated to pursue opposing outcomes. In the arena of negotiation and mediation, the control of facts (or evidence that will pass for facts) is the most powerful, if not the only,

[6] Unless BRB is paid, of course. KRS 304.39-230.

weapon. We do not require pre-litigation disclosure of insurance policy limits. Voluntarily disclosing a policy limit can be seen, justifiably, as relinquishing ground to the plaintiff in negotiation. As the mandated time for filing a lawsuit gets closer, tactics change because relative pressures on each side of the negotiation table change. The more imminent the accident victim's need to formalize the claim by filing suit, the less the tort-feasor is motivated to voluntarily provide information, including policy limits.

Furthermore, the plaintiff's medical costs are not established until long after the accident. Sometimes those costs cannot be determined before suit is filed and must be estimated as future medical expenses.

The fact that medical costs may be estimated is just as true for UM/UIM contract claims as for tort claims. However, to get the policy-limits information needed to sue under the contract, the plaintiff might have no choice but to sue the tort-feasor, and do so well before KRS 304.39-230(1) requires the tort action to be filed. Bringing the tort suit before settlement negotiations entirely break down is neither the rule nor is it preferable for anyone involved, including the courts (hence, the public policy). More importantly, parties know that suing the tort-feasor greatly affects the dynamics of negotiation which, if relationships have not been fatally damaged, will continue beyond the point of court involvement. A contract provision that works against a public policy intended to give a party two years to settle an auto accident claim seems unreasonable to me.

And this is to say nothing of the fact that a party – in this case, the UM/UIM insurer – "is not normally liable on a contract until there has been a breach[.]" *Riggs*, 484 S.W.3d at 732 (Noble, J., concurring). Most jurisdictions hold that no cause of action exists against the UM/UIM insurer until there is a denial of the demand and, therefore, breach of the contract. *Id.* at 734 n.31 (Keller, J., dissenting and joined by Venters, and Wright, JJ.) ("The most commonly held rule in UM/UIM cases is that the cause of action, because it is contractual in nature, accrues on the date the contract is breached." (Citation and internal quotation marks omitted)). Furthermore, the limitations period in the majority of jurisdictions does not start until that breach occurs. *Id.* The *Riggs* majority does not factor into the reasonableness analysis the additional time needed after discovery of the tort-feasor's policy limits for the plaintiff's demand and the insurer's denial and breach of performance under the UM/UIM contract terms. Justice Noble – and only Justice Noble – had anything to say about breach. She said in her concurring opinion that "this provision [shortening the limitations period] *waives*" the requirement that his insured, the auto accident plaintiff, allege breach in his complaint. *Id.* (Emphasis in original). If that were the law, a UM/UIM claim would be the only contract claim that could survive a motion to dismiss despite failing to allege all elements of the cause of action. A contract provision that requires a party to file a complaint before he can allege all elements

of his cause of action, risking dismissal and CR[7] 11 sanctions, seems unreasonable to me.

There will be circumstances under *Riggs* in which a breach of the contract for UM/UIM benefits will not occur until after expiration of the period in which the plaintiff must sue the UM/UIM insurer. That means the cause of action will not accrue until the contract claim is barred by the contract provision. In such cases, the contract provision will have the effect of converting a statute of limitations (KRS 413.090(2)) into a "statute of repose because it extinguishes the claim before it exists." *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 811 (Ky. 1991). In Kentucky, repose "function[s] . . . to cut off claims which have not accrued within [the stated] period." *Michels v. Sklavos*, 869 S.W.2d 728, 730 (Ky. 1994) (quoting *Tabler v. Wallace*, 704 S.W.2d 179, 184 (Ky. 1986)). When our legislature enacts a law that has this effect on jural rights (and clearly the right to sue for contract breach is a jural right), the Supreme Court does not hesitate to declare it unconstitutional. *Sargent v. Shaffer*, 467 S.W.3d 198, 212 (Ky. 2015) ("jural rights doctrine holds that the Kentucky legislature may not abrogate a plaintiff's right of recovery under causes of action in existence at the time of the adoption of our present constitution in 1892"). A contract provision that would be unconstitutional if enacted by the legislature seems unreasonable to me.

Riggs says it is "illogical to . . . require a plaintiff to sue his own insurer before discovering whether or not the tort-feasor is in fact, [uninsured or

[7] Kentucky Rules of Civil Procedure.

underinsured] motorist." *Riggs*, 484 S.W.3d at 727 (citation and internal quote marks omitted). In my view, it is more illogical to believe, in every case, that a plaintiff can make full use of the public-policy based, two-year limitations period for settling an auto accident claim, and also have enough time to discover the tort-feasor's policy limits, make demand on the UM/UIM insurer, wait for the insurer to breach, and file suit on the contract. This all seems unreasonable to me.

I concur in the majority opinion in this case, but I do so with little confidence that it yields a just result.

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