

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001005-MR

KIERSTYN FOOTE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NOS. 17-CI-006862 AND 17-CI-003652

TODD DAVIS, ADMINISTRATOR OF
THE ESTATE OF BOBBY S. MOORE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, MAZE, AND TAYLOR, JUDGES.

MAZE, JUDGE: Kierstyn Foote appeals the Jefferson Circuit Court's order granting summary judgment in favor of Todd Davis, administrator of the estate of Bobby Moore. The trial court found that Foote's claims were time barred under

KRS¹ 304.39-230(6) and *Gailor v. Alsabi*, 990 S.W.2d 597 (Ky. 1999). For reasons set forth below, we agree with the trial court’s interpretation of *Gailor* and KRS 304.39-230(6). Accordingly, we affirm.

I. Factual Background

On June 2, 2014, an automobile accident occurred between Foote and Moore. On August 29, 2014, the last Basic Reparation Benefit was paid. Moore died on January 14, 2016. There were two complaints that were filed by Foote. The first one on July 14 against Moore personally, and the second on December 27 against Moore’s Estate, both in 2017. The Estate moved for summary judgment on the grounds that Foote’s claims were not brought within the 2-year statute of limitations under KRS 304.39-230(6). The trial court agreed and granted summary judgment. This appeal follows.

II. Analysis

KRS 304.39-230(6) provides; “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.” The injury and the last basic reparation payment in this case were both completed in 2014 and suit was not filed until 2017, clearly time barring the claim. Nonetheless,

¹ Kentucky Revised Statutes.

Foote argues her claim is timely under KRS 396.011(1), which provides:

“All claims against a decedent’s estate which arose before the death of the decedent, excluding claims of the United States, the State of Kentucky and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, **if not barred earlier by other statute of limitations**, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, **unless presented within six (6) months after the appointment of the personal representative, or where no personal representative has been appointed, within two (2) years after the decedent’s death.**” (Emphasis added).

Foote’s argument that KRS 396.011(1) saves her claim, despite its express statement that it applies only to claims “not barred earlier by other statute of limitations” was rejected in *Gailor*. The fact pattern of our case largely mirrors that of *Gailor*, and the same rules can be used to decipher the validity of Foote’s present claim.

In *Gailor*, the Appellee was involved in an automobile accident with another driver on June 3, 1991. Basic Reparation Benefits were paid; the last payment occurring on February 4, 1992. The next day, February 5, 1992, the other driver died. A claim against the other driver was filed on February 3, 1994, but it was a nullity because it was filed against a deceased party. Appellee’s attorney did not learn of the other driver’s death until April 6, 1994. He did not move that the

public administrator be appointed to the deceased driver's estate until September 22, 1994, and the appointment was made on November 17 of the same year. Finally, on January 19, 1995, the Appellee filed an amended complaint substituting the public administrator as the rightful party. The Kentucky Supreme Court specified that KRS 304.39-230(6) is the general rule to utilize for injuries arising out of automobile accidents and that these actions must be brought either two (2) years after the date of injury or two (2) years after the last payment of Basic Reparation Benefits. The Court held the claim was time barred because the amended complaint was filed outside the limitations period in KRS 304.39-230(6). The fact that the Appellee brought the claim against the estate within 6 months of the appointment of a personal representative afforded no relief.

Foote argues *Gailor* is not the correct case to use as precedent because it does not directly discuss tolling upon the death of a tortfeasor pending appointment of a personal representative. This argument is not valid because it is simply not a legitimate option. In our current case, the injury and the last basic reparation payment were both completed in 2014 and suit was not filed until 2017, clearly time barring the claim. A discussion regarding tolling is simply unnecessary because Foote's claim was already time barred when the alleged tolling event occurred.

Foote also argues that it would be “too harsh” not to toll the statute of limitations in this situation. “Statutes of limitation are arbitrary and unfair, but they represent a policy decision made by the legislative branch of government that after the passage of specified periods of time, claims are not viable. The policy-making branch of government has determined that the value in prevention of stale claims outweighs the detriment inflicted upon a tardy litigant.” *Faris v. Stone*, 103 S.W.3d 1, 4 (Ky. 2003) (footnotes omitted).

Conclusion

Foote has failed to meet the statute of limitations set forth in KRS 304.39-230(6). The failure to submit the claim during this period has time barred the claim. Foote had no disability that prevented her from filing a claim during the proper statute of limitations that would require tolling. Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kirk Hoskins
Louisville, Kentucky

BRIEF FOR APPELLEE:

Michael E. Krauser
Louisville, Kentucky