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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000850-MR

LINDA DAVIS — APPELLANT

v.

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 18-CI-00224

PROGRESSIVE DIRECT
INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND KRAMER, JUDGES; BUCKINGHAM,[1] SPECIAL JUDGE.

KRAMER, JUDGE: Linda Davis appeals from the Wayne Circuit Court's grant of summary judgment to Progressive Direct Insurance Company, entered April 29, 2019. After careful consideration, we affirm.

[1] Retired Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

BACKGROUND

On May 15, 2017, Davis was operating her motorcycle on a rural road in Barren County, Kentucky, when she encountered a horse-drawn buggy operated by Danny Gingerich. According to Davis's brief, the horse "spooked and jumped into the oncoming lane of traffic," causing Davis to wreck her motorcycle. Davis alleged she suffered significant bodily injuries as a result of the collision. On the date of the incident, Davis held a motorcycle insurance policy through Progressive, which included $50,000 in uninsured motorist coverage; Gingerich, the driver of the horse-drawn buggy, held no insurance policies of any kind.

After the collision, Davis filed for benefits from Progressive. Relevant to this appeal, Progressive denied Davis's claim for uninsured motorist benefits on grounds that Gingerich's horse-drawn buggy was not a motor vehicle. Davis subsequently filed a complaint in Wayne Circuit Court for declaratory judgment. She argued Gingerich's horse-drawn buggy should be considered an "uninsured motor vehicle" because it is "designed for use on the roadways[,]" and, therefore, Progressive should be required to pay benefits under that provision of her insurance policy.

The parties submitted dueling motions for summary judgment to the trial court, along with supporting memoranda. Additionally, Progressive attached a copy of Davis's policy as an exhibit to its motion. After considering the matter

and hearing arguments of counsel, the trial court granted summary judgment to Progressive. This appeal followed.

STANDARD OF REVIEW

A trial court properly awards summary judgment when "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR[2] 56.03. Summary judgment should be granted only if it appears impossible the nonmoving party will be able to produce evidence at trial warranting a judgment in his or her favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). Furthermore,

> a trial judge must view the evidence in the light most favorable to the nonmoving party . . . . The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists and then the burden shifts to the party opposing summary judgment to produce at least some affirmative evidence showing that there is a genuine issue of material fact requiring trial.

First Federal Sav. Bank v. McCubbins, 217 S.W.3d 201, 203 (Ky. 2006) (citations omitted). We review a trial court's summary judgment ruling *de novo*. *Baptist Physicians Lexington, Inc. v. New Lexington Clinic, P.S.C.*, 436 S.W.3d 189, 194

[2] Kentucky Rule of Civil Procedure.

(Ky. 2013). Finally, "[t]he party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment." *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001).

ANALYSIS

Davis contends the trial court incorrectly awarded summary judgment to Progressive on two grounds. First, she asserts the trial court erroneously concluded the horse-drawn buggy did not qualify as a motor vehicle under the Motor Vehicle Reparations Act (MVRA), KRS[3] 304.39-010 *et seq.* Second, Davis asserts the trial court erroneously concluded the horse-drawn buggy was not a motor vehicle under the language of her insurance policy. We discern no merit in either argument.

Davis first argues the horse-drawn buggy is considered a vehicle under the MVRA, citing as support our opinion in *O'Keefe v. North American Refractories*, 78 S.W.3d 760 (Ky. App. 2002). In *O'Keefe*, we examined the definition of a "motor vehicle" provided in KRS 304.39-020(7) and held the MVRA does not consider a forklift to be a motor vehicle. *Id*. at 762. Davis contends *O'Keefe* stands for the proposition that the "primary litmus test for

[3] Kentucky Revised Statute.

qualification as a motor vehicle . . . [is] that the vehicle in question regularly transports persons or property on public highways."[4] Davis uses this interpretation of *O'Keefe* as a springboard to argue a horse-drawn buggy should also be considered a motor vehicle—because it, too, is used for regular transport on public highways.

We reject Davis's application of *O'Keefe* to the facts of this case. First, Kentucky statutes and caselaw recognize that non-motorized vehicles might be on public roads. *See, e.g.*, KRS 189.080; *Rosenbaum v. Safeco Ins. Co. of America*, 432 S.W.2d 45 (Ky. 1968).

Next, although Davis correctly asserts *O'Keefe* analyzes whether certain vehicles may be considered "motor vehicle[s]" under the MVRA in terms of whether they are "primarily designed" to operate on public highways, *O'Keefe*, 78 S.W.3d at 762, she downplays an essential part of the MVRA's definition: all of the vehicles contemplated in *O'Keefe* were *self-propelled*. As defined by the MVRA,

> "Motor vehicle" means any vehicle which transports persons or property upon the public highways of the Commonwealth, *propelled by other than muscular power* except road rollers, road graders, farm tractors, vehicles on which power shovels are mounted, such other construction equipment customarily used only on the site of construction and which is not practical for the transportation of persons or property upon the highways,

[4] Appellant's brief at 8.

> such vehicles as travel exclusively upon rails, and such vehicles as are propelled by electrical power obtained from overhead wires while being operated within any municipality or where said vehicles do not travel more than five (5) miles beyond the said limits of any municipality. Motor vehicle shall not mean moped as defined in this section or an electric low-speed scooter as defined in KRS 189.010.

KRS 304.39-020(7) (emphasis added).[5]

The question in *O'Keefe* concerned whether a forklift should be treated similarly to construction equipment vehicles, which are specifically excluded from being categorized as motor vehicles for MVRA purposes because they are "not practical for the transportation of persons or property [up]on the highways[.]" *O'Keefe*, 78 S.W.3d at 762 (quoting KRS 304.39-020(7)). *O'Keefe* had no need to consider the "propelled by other than muscular power" portion of the statute, distinguishing it from the present case.

Anticipating this argument, Davis contends the MVRA's "propelled by other than muscular power" language is vague, on the grounds that it does not specify a *horse's*, rather than a *human's* muscles. This ambiguity, Davis argues, should lead us to liberally construe coverage in favor of the insured. We disagree. "The mere fact that the appellants attempt to muddy the water and create some

[5] Aside from language recently added by the General Assembly to exclude "electric low-speed scooter[s]," this statutory definition is identical to the one we considered in *O'Keefe*. 2019 Ky. Acts ch. 22, § 10 (effective Jun. 27, 2019).

question of interpretation does not necessarily create an ambiguity." *Sutton v. Shelter Mut. Ins. Co.*, 971 S.W.2d 807, 808 (Ky. App. 1997). The MVRA states its purpose is "[t]o correct the inadequacies of the present reparation system, recognizing that it was devised and our present Constitution adopted prior to the development of *the internal combustion motor vehicle*." KRS 304.39-010(8) (emphasis added). The plain meaning behind the "propelled by other than muscular power" language within the MVRA is to define a motor vehicle by virtue of it being self-propelled by an internal engine. Davis's detour into whether the excluding factor of "muscular power" is meant to be horse or human has no relevance here.

Next, Davis asserts her insurance policy with Progressive is ambiguous in that it does not exclude a horse-drawn buggy from its definition of a motor vehicle. Progressive outlines its uninsured motorist coverage in Part III of Davis's policy:

> If you pay the premium for this coverage, we will pay for damages that an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury:
>
> 1. sustained by an insured person;
> 2. caused by an accident; and
> 3. arising out of the ownership, maintenance, or use of an uninsured motor vehicle.

Later in this section, under "Additional Definitions," Progressive defines an "uninsured motor vehicle" as "a land motor vehicle or trailer of any type . . . whose owner or operator can be identified and to which . . . no bodily injury liability bond or policy applies at the time of the accident[.]" The crux of Davis's argument is that the buggy in this case qualifies as a "trailer of any type" and is, therefore, a motor vehicle.

For its part, Progressive points to the "General Definitions" section of the policy, which states a "trailer" is "a non-motorized trailer designed to be towed on public roads by a motorcycle." Progressive also cites an opinion rendered by Kentucky's previous high court, *Rosenbaum*, 432 S.W.2d 45, which held a collision with a horse-drawn farm wagon could not trigger application of the uninsured motorist provision of the appellant's insurance policy.

Although Davis argues "trailer" as defined in the General Definitions should not apply to the "trailer of any type" language in the Additional Definitions section, this reading contradicts the first page of the General Definitions section, which states, "[t]he following definitions apply *throughout the policy*." (Emphasis added.) We also agree with Progressive in concluding *Rosenbaum* is dispositive on this issue. The *Rosenbaum* court reasoned that an insured motorist purchasing uninsured motorist coverage expects to be covered in a collision with another automobile and not a horse-drawn wagon:

> It is reasonably clear that the primary inducement for 'uninsured motorist' coverage is the providing of protection in the situation where injury is inflicted by a vehicle of a type on which liability insurance customarily is carried. In other words, the idea is that a person can buy, from his own insurer, protection against the failure of the other fellow to carry normal liability coverage. Surely there has not been much concern about insuring oneself against the failure of other people to carry insurance on things which normally are not insured.
>
> The appellant cites no case in which the word 'automobile', in any context, has ever been construed to include a horse-drawn wagon. We cannot believe that Safeco intended to become the pioneer in such a development, or that the appellant had any such belief when he purchased the policy.

Id. at 47.

Applying *Rosenbaum*, Progressive's uninsured motorist policy would not include a collision with a horse-drawn buggy because an insured could not reasonably expect such coverage. *Rosenbaum*'s reasoning is clear: there is no indication Progressive intended to cover events of this type in its uninsured motorist policy, nor "that [Davis] had any such belief when [s]he purchased the policy." *Id*.; *see also True v. Raines*, 99 S.W.3d 439, 443 (Ky. 2003) (citation omitted) (discussing the "reasonable expectation doctrine," which is "based on the premise that policy language will be construed as laymen would understand it").

We emphasize "[t]erms used within insurance contracts 'should be given their ordinary meaning as persons with the ordinary and usual understanding

would construe them.'" *Sutton*, 971 S.W.2d at 808 (quoting *City of Louisville v. McDonald*, 819 S.W.2d 319 (Ky. App. 1991)). At the heart of Davis's case, she attempts to argue that a horse-drawn buggy is a "motor vehicle," when a person of "ordinary and usual understanding" would dismiss the notion due to the *absence of a motor*. We decline to part ways with the ordinary and usual understanding on this question.

CONCLUSION

For the foregoing reasons, we affirm the Wayne Circuit Court's order entered on April 29, 2019, granting summary judgment to Progressive.

ALL CONCUR.

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