

RENDERED: JUNE 17, 2005; 2:00 P.M.  
TO BE PUBLISHED

MODIFIED: JULY 15, 2005; 2:00 P.M.

## Commonwealth Of Kentucky

### Court of Appeals

NO. 2004-CA-000784-MR

BRIAN M. SCHMIDT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE  
ACTION NO. 02-CI-007148

HAROLD C. LEPPERT, JR. AND  
NATIONWIDE MUTUAL INSURANCE COMPANY

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \*

BEFORE: BUCKINGHAM, KNOPF, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Brian M. Schmidt brings this appeal from a March 17, 2004, summary judgment of the Jefferson Circuit Court allowing appellees to recover basic reparation benefits paid pursuant to Kentucky's Motor Vehicle Reparations Act. We affirm.

The material facts of this case are undisputed. In May 2001, Schmidt, an Indiana resident, was operating a motor

vehicle in Kentucky and negligently caused his motor vehicle to collide with a vehicle driven by Harold C. Leppert, Jr., a Kentucky resident. The accident caused Leppert to sustain injuries and to incur medical expenses in the amount of \$4,201.85. Leppert's motor vehicle insurance carrier, Nationwide Mutual Insurance Company (Nationwide), paid these expenses under its contract to pay basic reparation benefits (BRB). Schmidt's motor vehicle was insured by American Family Insurance Company (American Family). American Family is not authorized to sell insurance in this Commonwealth and does not do business in Kentucky. The motor vehicle insurance policy issued to Schmidt by American Family provided liability coverage but did not provide coverage for BRB.

The instant action was initiated by Nationwide and Leppert against Schmidt in an effort to recoup the \$4,201.85 in BRB paid by Nationwide for Leppert's medical expenses arising from the accident. Kentucky Revised Statutes (KRS) 304.39-070(2). As the material facts were undisputed, all parties moved for summary judgment, and the circuit court subsequently entered summary judgment in favor of Leppert and Nationwide. The court awarded Leppert and Nationwide the sum of \$4,201.85 plus interest. This appeal follows.

Schmidt contends the circuit court committed error by entering summary judgment in favor of Leppert and Nationwide.

Summary judgment is proper where there exist no material issues of fact and movant is entitled to judgment as a matter of law. Ky. R. Civ. P. (CR) 56; Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). The material facts are undisputed, and we are presented with an issue of law - the interpretation of certain provisions of the Kentucky Motor Vehicle Reparations Act (MVRA) as codified in KRS Chapter 304.39.

Schmidt initially contends that Nationwide and Leppert may not recover the BRB paid because Schmidt qualifies as a "secured person," within the meaning of KRS 304.39-070.<sup>1</sup> We disagree.

KRS 304.39-070 provides, in relevant part, as follows:

(1) "Secured person" means the owner, operator or occupant of a secured motor vehicle, and any other person or organization legally responsible for the acts or omissions of such owner, operator or occupant.

(2) A reparation obligor which has paid or may become obligated to pay basic reparation benefits shall be subrogated to the extent of its obligations to all of the rights of

---

<sup>1</sup> Brian M. Schmidt also relies upon State Farm Mutual Automobile Insurance Co. v. Harris, 850 S.W.2d 49 (Ky.App. 1992) for the proposition that Schmidt's automobile had "security" within the meaning of Kentucky Revised Statutes (KRS) 304.39-020(17); thus, Schmidt qualified as a "secured person" under KRS 304.39-070. We, however, view Harris as distinguishable. In that case, the Court of Appeals was faced with the precise issue of whether an out of state motorist, without basic reparation insurance coverage, should be allowed to recover from the Kentucky Assigned Claims Bureau. In this appeal, we are not presented with such an issue; rather, the issue herein centers upon whether Nationwide Mutual Insurance Company and Harold C. Leppert, Jr. may recover paid basic reparation benefits from Schmidt.

the person suffering the injury against any person or organization other than a secured person.

(3) A reparation obligor shall have the right to recover basic reparation benefits paid to or for the benefit of a person suffering the injury from the reparation obligor of a secured person as provided in this subsection, except as provided in KRS 304.39-140(3). The reparation obligor shall elect to assert its claim (i) by joining as a party in an action that may be commenced by the person suffering the injury, or (ii) to reimbursement, pursuant to KRS 304.39-030, sixty (60) days after said claim has been presented to the reparation obligor of secured persons. The right to recover basic reparation benefits paid under (ii) shall be limited to those instances established as applicable by the Kentucky Insurance Arbitration Association as provided in KRS 304.39-290.

Under subsection 2, a reparation obligor (Nationwide) may not seek reimbursement of BRB from a "secured person."

Under subsection 1, a secured person is defined as "the owner, operator or occupant of a secured motor vehicle . . . ."

Although the term "secured motor vehicle" is not defined in the MVRA, it does provide a definition for the term "security," as meaning "any continuing undertaking complying with this subtitle, for payment of tort liabilities, basic reparation benefits, and all other obligations imposed by this subtitle."

KRS 304.39-020(17). By juxtaposing KRS 304.39-070(1) and KRS 304.39-020(17), we interpret the term "secured motor vehicle" as a vehicle covered by valid insurance for the payment of tort

liability, basic reparation benefits, and all other obligations imposed by the MVRA.

In the case at hand, Indiana's insurance scheme differs from Kentucky's MVRA and does not provide for payment of BRB. Thus, Schmidt's automobile was not covered by a motor vehicle insurance policy that provided coverage for basic reparation benefits. Accordingly, we are of the opinion that Schmidt was not a secured person within the meaning of KRS 304.39-070(1).

Schmidt also argues that KRS 304.39-060 operates to extinguish his liability for the paid BRB. KRS 304.39-060 reads, in relevant part, as follows:

(1) Any person who registers, operates, maintains or uses a motor vehicle on the public roadways of this Commonwealth shall, as a condition of such registration, operation, maintenance or use of such motor vehicle and use of the public roadways, be deemed to have accepted the provisions of this subtitle, and in particular those provisions which are contained in this section.

. . . .

(4) Any person may refuse to consent to the limitations of his tort rights and liabilities as contained in this section. Such rejection must be in writing in a form to be prescribed by the Department of Insurance and must have been executed and filed with the department at a time prior to any motor vehicle accident for which such rejection is to apply. Such rejection form together with a reasonable explanation

thereof shall be furnished by the reparation obligor with each policy to each prospective insurance applicant. Such rejection form shall affirmatively state in bold print that acceptance of this form of insurance denies the applicant the right to sue a negligent motorist unless certain requirements contained in the policy of insurance are met. Rejection by a person who is under legal disability shall be made on behalf of such person by his legal guardian, conservator or his natural parent. The failure of such guardian or a natural parent of a person under legal disability to file a rejection, within six (6) months from the date that this subtitle would otherwise become applicable to such person, shall be deemed to be an affirmative acceptance of all provisions of this subtitle. Provided, however, any person who, at the time of an accident, does not have basic reparation insurance but has not formally rejected such limitations of his tort rights and liabilities and has at such time in effect security equivalent to that required by KRS 304.39-110 shall be deemed to have fully rejected such limitations within meaning of this section for that accident only.

. . . .

(6) Every insurance company when issuing an automobile policy to a resident of this Commonwealth must inform the buyer in writing in a form to be prescribed by the insurance commissioner of his right to reject the limitations of his tort rights and liabilities under this subtitle in the manner provided in subsections (4) and (7) of this section.

(7) Any rejection shall result in the full retention by the individual of his tort rights and his tort liabilities. Any person injured by a motor vehicle operator who has such rejection on file may claim his full damages, including nonpecuniary damages, or,

if such injured person has not rejected his own tort limitations, he may also claim basic reparation benefits from the appropriate security on the vehicle as established under KRS 304.39-050. If such provider of security is other than the one providing security for the operator who has rejected the limitations, such provider shall be subrogated to the rights of the injured person to the extent of reparation benefits paid against the owner and operator of the vehicle.

(8) No person who has rejected the tort limitations under this section, except as provided in subsection (9) of this section or KRS 304.39-140(5), may collect basic reparation benefits.

Because Schmidt did not have BRB coverage but had liability coverage, Schmidt argues that he is deemed to have fully rejected the tort limitations of the MVRA by operation of KRS 304.39-060(4). We are somewhat baffled by this argument. We have determined that Schmidt is not a secured person under the statute. Likewise, Schmidt failed to execute a written rejection of his tort rights and liabilities pursuant to KRS 304.39-060(4). The fact that he is a non-resident does not equate to rejection of the MVRA. We are mindful that non-residents who operate motor vehicles on Kentucky highways do so subject to the Commonwealth's motor vehicle laws, including the MVRA. Ashby v. Money, 717 S.W.2d 223 (Ky. 1986), *overruled on other grounds by* Troxell v. Trammell, 730 S.W.2d 525 (Ky. 1987).

Thus, we do not believe that Schmidt should be "deemed" to have rejected the tort limitations of the MVRA. Even if we were so inclined, we interpret KRS 304.39-060(7) as allowing recovery of paid BRB. The relevant portion of subsection 7 states:

If such provider of security is other than the one providing security for the operator who has rejected the limitations, such provider shall be subrogated to the rights of the injured person to the extent of reparation benefits paid against the owner and operator of the vehicle.

KRS 304.39-060(7). Under the statute's plain language, the provider of security (Nationwide) is subrogated to the extent of reparation benefits paid against the owner of the vehicle (Schmidt). As such, we reject the contention that KRS 304.39-060 shields Schmidt from liability for the BRB paid to Leppert.

Schmidt finally argues that a release executed by Leppert bars the instant action against Schmidt. We have searched the record and are convinced that this issue was not presented to the circuit court. Additionally, Schmidt's prehearing statement did not identify the issue as being raised on appeal. As the circuit court did not rule upon the issue and Schmidt failed to specify the issue in his prehearing statement, we decline to address it. See Sallee v. Sallee, 142 S.W.3d 697 (Ky.App. 2004); Combs v. Knott County Fiscal Court, 283 Ky. 456, 141 S.W.2d 859 (1940); CR 76.03(8).

For the foregoing reasons, the summary judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Mary Jo Wetzell  
D. Keith Pulliam  
Kightlinger & Gray, LLP  
New Albany, Indiana

ORAL ARGUMENT FOR APPELLANT:

D. Keith Pulliam  
Kightlinger & Gray, LLP  
New Albany, Indiana

BRIEF FOR APPELLEES:

Robert E. Barnett  
Kenneth E. Dunn  
Barnett, Porter & Dunn  
Louisville, Kentucky

BRIEF FOR AMICUS CURIAE,  
AMERICAN FAMILY INSURANCE  
GROUP:

Jeffrey R. Bick  
Indianapolis, Indiana

ORAL ARGUMENT FOR APPELLEES:

Robert E. Barnett  
Barnett, Porter & Dunn  
Louisville, Kentucky