

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001077-MR

JEFFREY C. BRUNER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 09-CI-01488

FALLON VENABLE

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: TAYLOR, Chief Judge; ACREE and COMBS, Judges.

COMBS, JUDGE: Jeffrey C. Bruner appeals a judgment of the Fayette Circuit Court entered on May 27, 2010. In a case involving a vehicular accident, Bruner contends that the trial court erred by granting the appellee a \$10,000.00 credit for no-fault benefits when he did not collect those benefits from his insurer. Finding no error, we affirm.

On June 9, 2008, Bruner sustained serious personal injuries when an automobile driven by Fallon Venable, the appellee, collided with his motorcycle. As a result of the collision, Bruner incurred more than \$31,000.00 in medical and related expenses. Both Venable and Bruner were properly insured. However, Bruner had not purchased the optional personal injury protection (PIP) coverage offered by his insurer, Geico. On March 20, 2009, Bruner filed this personal injury action against Venable.

Following presentation of the evidence and a period of deliberation, a jury awarded Bruner and his wife more than \$250,000.00. In its judgment, the trial court reduced the jury's verdict against Venable by \$10,000.00 for the no-fault benefits that would have been payable by Geico had Bruner purchased PIP benefits from his insurer. Bruner contends that Venable is liable in tort for the full amount of his medical expenses -- including the initial \$10,000.00 -- that would otherwise have been payable by Geico had he purchased the optional PIP coverage. We disagree.

Kentucky Revised Statute[s] (KRS) 304.39-060 (2) (a) "abolishes" tort liability with respect to bodily injury to the extent that basic reparation benefits (BRB) "are payable" under any policy of insurance or any other method of security that complies with the Kentucky's Motor Vehicle Reparations Act (MVRA), KRS Chapter 304. KRS 304.39-020(2) provides for payment of basic reparation benefits not to exceed \$10,000.00 to reimburse for loss suffered through injury arising out of the operation, maintenance, or use of a motor vehicle.

Pursuant to KRS 304.39-060(1), any person who operates a motor vehicle on the public roadways of the Commonwealth is deemed to have accepted the provisions of Kentucky's MVRA and to have consented to the limitations of his or her tort rights and liabilities. However, KRS 304.39-060(9) specifically permits the owner of a motorcycle to refuse to consent to the tort limitations. It provides, in part, as follows:

Any owner or operator of a motorcycle . . . may file a rejection as described in subsections (4) and (5) of this section [a form prescribed by the Department of Insurance and filed before the subject motor vehicle accident], **which will apply solely to the ownership and operation of a motorcycle** but will not apply to injury resulting from the ownership, operation or use of any other type of motor vehicle. (Emphasis added.)

Bruner concedes that he did not reject the tort limitations imposed upon him by the MVRA. Nevertheless, he argues that he is being unfairly penalized by the reduction of the verdict since he was not entitled to claim basic reparation benefits from Geico. This argument is misplaced.

Unlike other motor vehicles in Kentucky, proper security for a motorcycle does not have to include basic reparation benefits.¹ There is no dispute that Bruner did not elect to pay an extra premium for this BRB coverage. Thus, he was not entitled to claim BRB because he failed to pay an extra premium for that coverage. KRS 304.39-040(4).

Nevertheless, Bruner argues that he should not be bound by the tort limitations associated with the payment of BRB because that coverage is

¹ As an insurer writing liability insurance coverage for motorcycles in Kentucky, Geico is required to make BRB coverage available for purchase by its insured.

“optional” for owners and operators of motorcycles and because he complied with the MVRA by having coverage as required by the provisions of KRS 304.39-110(1)(a) and (b). He fails to cite any relevant legal support for this contention.

Regardless of the fact patterns addressed by the courts, the provisions of Kentucky’s MVRA have never been construed so as to require that BRB actually be paid before the tort limitations are held to apply. *See Bohl v. Consolidated Freightways Corp. of Delaware*, 777 S.W.2d 613 (Ky.App.1989); *Carta v. Dale*, 718 S.W.2d 126 (Ky.1986); *Speck v. Bowling*, 892 S.W.2d 309 (Ky.App.1995); *Gussler v. Damron*, Ky.App., 599 S.W.2d 775, 778 (1980); *Stone v. Montgomery*, 618 S.W.2d 595, 596-98 (Ky.App. 1981).

In *Thompson v. Piasta*, 662 S.W.2d 223, 226 (Ky.App.1983), we observed as follows:

The words used in the statute are clear and unambiguous and clearly express the legislative intent stated, that tort liability is abolished for damages because of bodily injury to the extent that basic reparations benefits are “payable.” There is no room for statutory construction and the statute must be accepted as it is written. Where no exception is made to positive statutory terms[,] the presumption is the legislature intended to make none. It is not the province of the court to introduce exception by construction. The Legislature made no exception to the word “payable” requiring actual payment of the benefits as a condition precedent to the abolishment of tort liability to the extent that the benefits were “payable.”

Citations omitted. We concluded that actual payment of BRB’s to an insured party was immaterial and that the critical issue was whether they were “payable”:

. . . such party is not entitled to an award from the defendant in a trial on liability for any item of damages

for which such benefits are payable under the “no fault” provisions of KRS Chapter 304, Subtitle 39.

Id.

In *Miller v. Barr*, 737 S.W.2d 182, 184 (Ky.App.1987), we specifically addressed whether the “optional” aspect of BRB coverage for the owners or operators of motorcycles was a relevant consideration in determining whether basic reparations benefits were “payable.” We concluded that it was not. We reasoned as follows:

Our review of the amendment [permitting insurers of motorcycle owners or operators to collect an additional premium for the optional BRB coverage] in relation to the original Act persuades us that motorcycles were not removed from the provisions limiting tort rights and tort liability.

The definition of “motor vehicle” remained unchanged and includes motorcycles. KRS 304.39-020(7). The abolition of tort liability remained unchanged. KRS 304.39-060(2)(a). Furthermore, the limitations on liability of an insured driver also remained unchanged. KRS 304.39-060(2)(b). We cannot accept that the intent was to permit an uninsured motorcyclist to reduce a secured person’s protection against such claims by his failure to purchase coverage.

Id.

Bruner seeks to distinguish *Miller*. He contends that our holding in that case was based on the inclination to penalize those who had failed to comply with the MVRA’s minimum security requirement. We disagree. Our review of the case law indicates that where motorists have impliedly consented to be bound by the

Act's provisions, courts applying Kentucky's MVRA have tended to treat insured and uninsured motorists as equally as possible.

Bruner also contends that the trial court's reduction of the verdict results in a windfall to Venable. Again, we disagree. As a motorcyclist, Bruner enjoyed a unique statutory opportunity to reject the tort limitations imposed upon others by the provisions of the MVRA **solely with respect to the ownership and operation of his motorcycle.** (This rejection would not have applied to injury arising from the ownership, operation, or use of any of his other motor vehicles.) He chose not to exercise his right to do so. Consequently, there was no liability whatsoever for the first \$10,000.00 of his medical and related expenses. Since Venable was not liable for this amount, the opportunity for a windfall was simply nonexistent.

The Fayette Circuit Court correctly concluded that Venable was entitled to a deduction of \$10,000.00 from the jury's verdict. The judgment is affirmed.

ACREE, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

TAYLOR, CHIEF JUDGE, DISSENTS.

ACREE, JUDGE, CONCURRING: Respectfully, I concur in the result reached but write separately because this issue is adequately and directly addressed in one sentence Kentucky precedent. "[T]he plain and literal language of KRS 304.39-040(3) excludes operators and owners of motorcycles from receiving basic reparation benefits *from any source* unless purchased as optional coverage."

Miller v. Barr, 737 S.W.2d 182, 183-84 (Ky. App. 1987) (emphasis supplied)

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