RENDERED: OCTOBER 12, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001301-MR

DEANA D. FULLER, as Administratrix of the ESTATE OF DERRICK FULLER; DEANA D. FULLER, individually; EBONI FULLER, by and through DEANA D. FULLER as Mother and Next Friend; KINNEDY FULLER, by and through DEANA D. FULLER, as Mother and Next Friend; KEVONA FULLER, by and through DEANA D. FULLER, as Mother and Next Friend; and IMONI FULLER, by and through DEANA D. FULLER, as Mother and Next Friend — APPELLANTS

v. — APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 10-CI-008114

ENTERPRISE RENT-A-CAR COMPANY OF KENTUCKY, LLC AND JAMES T. KELLY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND THOMPSON, JUDGES.

COMBS, JUDGE: Deana Fuller, as Administratrix of the Estate of Derrick Fuller, individually, and as mother and next friend of her four minor children, appeals the order of the Jefferson Circuit Court which dismissed her claims against Enterprise Rent-a-Car Company of Kentucky, LLC. After our review, we affirm.

On February 28, 2010, Derrick Fuller, a pedestrian, was struck and killed by an automobile driven by James Kelly. Deanna Fuller alleges that Kelly had fallen asleep at the wheel. It is undisputed that Kelly had rented the car from Enterprise. In his rental contract, Kelly declined to purchase Enterprise's tort liability insurance and instead elected to be covered by his personal insurance policy.

Fuller filed her complaint in Jefferson Circuit Court on November 22, 2010, naming both Kelly and Enterprise as defendants. On December 15, 2010, Enterprise filed a motion to dismiss based on failure to state a claim. At some point during the pendency of the motions, Enterprise paid basic reparation benefits (BRB's) to Fuller. However, the claims for tort liability remained the subject of litigation.

On May 31, 2011, the trial court entered an order granting Enterprise's motion to dismiss. On June 29, 2011, Fuller filed a motion asking the court to amend the order to include language that it was a final and appealable order. The court entered the amended order including the requested language on July 12, 2011. This appeal follows.

We first note that Fuller's brief does not comply with the requirements for briefs as set out by Kentucky Rule[s] of Civil Procedure (CR) 76.12. The cover of

the brief lacks the certificate required by the mandatory language of CR 76.12(6), which provides as follows:

> Except for briefs on appeals from the Court of Appeals to the Supreme Court, the statement shall further certify that the record on appeal has been returned to the clerk of the trial court or that it was not withdrawn by the party filing the brief.

Additionally, the brief was not signed. *Id.* CR 76.12(4)(b)(vii) requires that the first document in the Appendix be the Order from which the appeal is taken. In this instance, that Order is the last document in the Appendix. While the rule would permit us to strike the brief based on these several deficiencies, we nonetheless believe that it is in the best interest of judicial economy as well as efficiency for the sake of the litigants for us to examine the merits of the case nonetheless. We will proceed with our analysis. CR 76.12(8)(a).

When a court includes materials that are outside the pleadings in its consideration of a motion to dismiss, we treat it as if it had been a motion for summary judgment. CR 12.02. In this case, the record contains such materials in the form of exhibits. Therefore, our standard of review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

Fuller first argues that Kentucky law does not allow Enterprise, as the owner of the car, to shift its tort liability to the renter/driver. We disagree.

Fuller urges us to apply *Kentucky Farm Bureau Mut. Ins. v. Shelter Mut. Ins. Co*., 326 S.W.3d 803 (Ky. 2010). That case holds that "where both the vehicle owner and non-owner driver are separately insured, the vehicle owner's insurance shall be primary." *Id*. at 811. However, as the Supreme Court itself later pointed out, the holding in *Shelter* is ***only*** applicable in cases involving excess coverage; *i.e.,* when the insurance policies of both parties claim to provide ***only*** excess coverage. *Progressive Max Ins. Co. v. National Car Rental Systems, Inc*., 329 S.W.3d 320, 323 (Ky. 2011).

The sole issue in the case before us is tort liability insurance rather than excess coverage. *Shelter* recognized that insurance coverage is subject to modification by contractual agreements as long as it comports with the statutory scheme of the Motor Vehicle Reparation Act (MVRA). *Shelter, supra*. The MVRA at Kentucky Revised Statute[s] (KRS) 304.39-110 mandates that insurance be carried for tort liabilities. It allows "the requirement of security for payment of tort liabilities [to] be met by a contract." KRS 309.39-110(2). This language is known as an "escape clause." *Rees v. U.S. Fidelity and Guar. Co*., 715 S.W.2d 904, 906 (Ky. 1986). In *Rees*, the court held that the escape clause permits contractual shifting of tort liability – but not of BRB's. *Id.*

Fuller further argues that the Kentucky Administrative Regulations (KAR) dictate that Enterprise, as a self-insured entity, is solely responsible for tort liability insurance. 806 KAR 39:050(2) provides that applicants for self insurance must agree "to pay all tort liability and basic reparation benefits incurred and required by

KRS Chapter 304, Subtitle 39[.]" As we pointed out, KRS 304.39-110 permits contractual shifting of tort liability, as acknowledged by our Supreme Court in *Rees*. KRS 304.39-080 requires self-insured entities to pay "tort liabilities ***or*** basic reparation benefits, ***or*** both[.]" (Emphasis added). By employing the disjunctive *or*, KRS 304.39-080 allows for contractual flexibility while still complying with the mandate of KRS 304.39-110 that coverage for BRB's cannot be shifted or avoided.

As the trial court noted, Congress in 2005 enacted a law (the Graves Amendment) which exempts car rental companies from tort liability. 49 U.S.C.A. § 30106(a)(1). However, Fuller argues that the Graves Amendment is inapplicable because it provides that it does not supersede any state laws that deal with financial responsibility or liability insurance requirements of the law. 49 U.S.C.A. § 30106(b). While this may be a valid analysis, it does not apply to the particular facts of this case and is not pertinent to our resolution of the matter. Kentucky's statutory scheme does not mandate that car rental companies be solely responsible for tort liability insurance and allows for contractual shifting of liability for them to create their own exemption. Essentially, the Graves Amendment was a federal codification of the already existing Kentucky law on this issue.

There is no question that Kelly signed a contract with Enterprise that shifted tort liability from Enterprise to Kelly's insurance. That contract is permitted by Kentucky law. Enterprise paid the BRB's, which it could not and did not attempt

to void. Thus, Enterprise satisfied its only liability. Therefore, the court did not commit error in dismissing Fuller's claims against Enterprise.

We affirm the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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