RENDERED: AUGUST 2, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000462-MR

CHERYL CHANEY, INDIVIDUALLY;
CHERYL CHANEY, CO-ADMINISTRATOR
OF THE ESTATE OF DANIEL SCOTT ROSE,
DECEASED; FRED ROSE, INDIVIDUALLY;
FRED ROSE, CO-ADMINISTRATOR OF
THE ESTATE OF DANIEL SCOTT ROSE,
DECEASED — APPELLANTS

v.

APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 10-CI-00265

SAFE AUTO INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

CLAYTON, JUDGE: This is an appeal from the Estill County Circuit Court finding summary judgment in favor of the Appellee, Safe Auto Insurance

Company (Safe Auto). Based upon the following, we will affirm the decision of the trial court.

BACKGROUND INFORMATION

This action arose from an accident which took place on June 4, 2010, in Estill County, Kentucky. On that date, Earnest Isaacs was operating a 65 TMV wheel loader and crossed Cow Creek Road into the path of Daniel Rose in his pick-up truck. Daniel was killed in the resulting collision. On September 9, 2010, the co-administers of Rose's estate, Cheryl Chaney and Fred Rose, brought an action against Isaacs, Earnest Isaacs's Lumber Company, Inc. and Safe Auto.

As part of the action, Chaney and Rose asserted that an automobile policy had been issued to Chaney, which was in effect on the date of the accident and covered Daniel. They asserted that Safe Auto was liable under the uninsured/underinsured portion of the policy. On September 23, 2011, Safe Auto filed for summary judgment asserting that the vehicle being driven by Isaacs at the time of the accident was not a "motor vehicle" under either Kentucky law or their policy. The trial court agreed and granted Safe Auto's motion for summary judgment. Chaney and Rose then brought this appeal.

STANDARD OF REVIEW

In reviewing the granting of summary judgment by the trial court, an appellate court must determine 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." Kentucky Rules of Civil Procedure (CR) 56.03.

"[A] trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only [when] it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. [While] [t]he moving party bears the initial burden of [proving] that no genuine issue of material fact exists . . . the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Community Trust Bancorp, Inc. v. Mussetter*, 242 S.W.3d 690, 692 (Ky. App. 2007).

Since summary judgment deals only with legal questions as there are no genuine issues of material fact, we need not defer to the trial court's decision and must review the issue *de novo*. *Lewis v. B&R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001). With this standard in mind, we will review the issues before us.

DISCUSSION

Pursuant to the Kentucky Motor Vehicle Reparations Act (KMVRA), KRS 304.39-010, *et seq*.,:

> Every insurer shall make available upon request to its insureds underinsured motorist coverage, whereby subject to the terms and conditions of such coverage not inconsistent with this section the insurance company agrees to pay its own insured for such uncompensated

> damages as he may recover on account of injury due to a motor vehicle accident because the judgment recovered against the owner of the other vehicle exceeds the liability policy limits thereon, to the extent of the underinsured police limits on the vehicle of the party recovering.

KRS 304.39-320(2). Chaney and Rose contend that the definition of "motor vehicle" in the policy with Safe Auto is at odds with the KMVRA definition. KRS 304.39-020(7) provides the following definition:

> "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 person or property upon the highways, 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.

Chaney and Rose argue that the 65 TMV wheel loader Isaacs was operating is a "motor vehicle" under the above definition. They assert that the definition excludes construction equipment only if: (1) the equipment is used only on the site of construction; and (2) the equipment is not practical for the transportation of person or property upon the highway.

In determining that the vehicle was not a "motor vehicle" under the statute, the trial court found as follows:

The vehicle at issue in this case . . . is a large, heavy-duty piece of machinery that would be at home on a construction site. It weighs nearly 26,000 pounds and has been fitted with a utility fork attachment but may just as easily be fitted with a general purpose bucket or extendable boom. . . . The manufacturer's manual paints a picture of a rugged machine that can handle any tasks in a harsh, outdoor environment. . . . The loader has many of the trappings of an automobile such as headlamps, tail lamps, a parking brake, side and rearview mirrors, a seatbelt, a cab enclosed with safety glass, AM/FM radio, and air conditioning. . . . Simply because the loader was outfitted with a utility fork does not necessarily make it a forklift for purposes of determining whether it should be excluded from uninsured/underinsured coverage.

It does not appear to this Court that EILC's loader can be classified as a forklift for purpose of excluding it from Safe Auto's uninsured/underinsured motorist coverage and the MVRA requirements. However, the question of whether the loader is excluded from the definition of "motor vehicle" of "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," KRS 304.39-020(7), would seem to apply to the loader at issue. . . .

Though the loader is clearly construction equipment, nowhere is it explained what makes a vehicle impractical for use on the highways. Per the manufacturer's specifications, loaders like EILC's will travel no faster than twenty-five miles per hour. [Citation omitted.] It seems to this Court that those limitations would make it impractical for transporting persons or property on the public highways. KRS 304.39-020(7). The Court of Appeals in *O'Keefe* said of forklifts that they are "capable of operating on the public highways, [but are] not primarily designed to do so." *O'Keefe v. N. Am. Refractories*, 78 S.W.3d 760, 762 (Ky. App. 2002). This loader is clearly capable of driving on public roads (and in fact do so). However, since it lacks such critical equipments as a speedometer, it would appear that the

> manufacturer did not design it for use on the highway. The loader in issue is primarily designed to lift and haul heavy loads short distances at slow speeds on an undeveloped job site, not travel on a public highway. Accordingly, EILC's loader should be classified as construction equipment, is therefore not a motor vehicle under the MVRA, and is excluded from coverage under Safe Auto's uninsured/underinsured motorist policy.

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We agree with the trial court's analysis. The vehicle is designed to carry heavy loads for short distances per the manufacturer. Consequently, the vehicle can be operated at only about twenty-five miles per hour. It is not a vehicle to transport passengers nor is it an over-the-road vehicle to haul property. It is a piece of construction equipment which is slow moving and clearly falls within the exceptions to KRS 304.39-020(7).

Chaney and Rose also contend that the trial court should not have granted summary judgment. They argue that the trial court subjectively labeled the vehicle as "construction equipment" and, consequently, impractical for transportation of property or persons upon the roadway. While they point to Isaacs' testimony that he hauled lumber in the vehicle, it is clear that the trial court did not err in determining that the weight of the evidence was that the vehicle was not meant for transportation of persons or property upon the public roadway. Thus, we affirm the decision of the trial court.

ALL CONCUR.

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