RENDERED: JUNE 15, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001222-MR

DAVID THAXTON AND
PATRICIA THAXTON — APPELLANTS

v.

APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 14-CI-00102

ALLSTATE INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: The issue presented in this appeal is whether the rights and duties under an insurance policy are to be interpreted under Ohio or Kentucky law. David Thaxton and his wife, Patricia Thaxton (collectively "Thaxton"), contend Kentucky law should apply to their claims for underinsured motorist ("UIM") coverage under their Allstate Insurance Company automobile liability policy. On

the contrary, Allstate argues Ohio law is plainly applicable. Of primary interest to the parties, pursuant to Ohio law—and the language of Thaxton's insurance policy—UIM coverage is subject to offset in the amount of payments received from another automobile liability insurance policy; Kentucky law does not require such offsets. Agreeing with Allstate that Ohio law controlled, the Fleming Circuit Court entered a Declaration of Rights and Summary Judgment. Thaxton disagreed with the trial court's conclusion and appealed. Following a careful review, we discern no error and affirm.

The facts underlying this action are undisputed and were set forth by the trial court in its judgment as follows:

> 1. This case arises out of a motor vehicle accident that occurred on or about September 18, 2011 in Fleming County, Kentucky. The Thaxtons were driving a 2000 Corvette along Kentucky Highway 32 when they allege they were struck from behind by a vehicle driven by Chrispine Panzo Itehua.
>
> 2. Following the accident, the Thaxtons presented their licenses to the investigating officer at the scene, who then recorded their Ohio address of 821 West Third Street, Dayton, Ohio, as listed on their licenses, on the police report.
>
> 3. The Thaxtons claim to have moved from Ohio to West Liberty, Kentucky[,] in approximately 2001, yet they maintained Ohio drivers' licenses at least through 2011, when the accident occurred. The Thaxtons continued to renew their drivers' licenses in Ohio after they moved to Kentucky.

4. Both before and after the accident, and after the Thaxtons claim to have moved to Kentucky, the Thaxtons purchased and registered vehicles in Ohio.

5. The 2000 Corvette, owned by Mr. Thaxton, was purchased from a dealer in Indiana approximately two months before the accident, and was registered both to Mr. Thaxton and to Mr. Thaxton's Ohio car dealership. The Corvette had a license plate reflecting that it was owned by Mr. Thaxton's Ohio dealership.

6. Mr. Thaxton operated his dealership in Dayton, Ohio[,] for a few days each week, staying either at the lot or with a relative in Ohio. Mr. Thaxton stayed in Kentucky when the lot was not open. Mr. Thaxton closed the Ohio dealership shortly before the accident.

7. According to Ms. Thaxton, when the parties purchased the 2000 Corvette, she called the Allstate office in Ohio to add the Corvette to the Thaxtons' existing auto policy.

8. The Thaxtons garaged the Corvette in Kentucky. After the accident, Mr. Thaxton purchased a 2004 Corvette in North Carolina as a replacement for the 2000 Corvette, and registered the 2004 Corvette in Ohio. The 2004 Corvette was added to the parties' Ohio auto policy.

9. Ms. Thaxton procured a Kentucky insurance policy on her business in Kentucky from an agent in Kentucky, yet purchased Ohio insurance policies on the couple's vehicles from an agent in Ohio.

10. The Allstate Insurance Amended Auto Policy Declarations reflect that the Thaxtons had auto insurance policies with Allstate for the period of June 9, 2011 through December 9, 2011 on three

vehicles: [a] 1990 Ford Van Econoline, a 1997 GMC C1500, and the 2000 Chevrolet Corvette.

11. The policy lists the Thaxtons' address as a post office box in West Liberty, Kentucky, and the Thaxtons received insurance bills from Allstate at that address.

12. The Thaxtons' Allstate Insurance Policy states as follows:

    a. The policy is issued in accordance with the laws of Ohio and covers property or risks principally located in Ohio. Subject to the following paragraph, any and all claims or disputes in any way related to this policy shall be governed by the laws of Ohio.

    b. If a covered loss to the auto, a covered auto accident, or any other occurrence for which coverage applies under the policy happens outside Ohio, claims or disputes regarding the covered loss to the auto, covered auto accident or other covered occurrence may be governed by the laws of the jurisdiction in which that covered loss to the auto, covered auto accident, or other covered occurrence happened, only if the laws of that jurisdiction would apply in the absence of a contractual choice of law provision such as this.

13. The Thaxtons' Allstate Policy further provides that the Thaxtons' uninsured/underinsured coverage limit is $50,000.00 per person or $100,000.00 per accident, and that "[a]ny amount payable to or for an insured person or additional insured person under this coverage will be reduced by all amounts paid by the owner or operator of the underinsured auto or anyone else legally responsible."

14. The Thaxtons have settled with the alleged at-fault driver, Chrispine Panzo Itehua. Mr. Thaxton received $50,000.00 from the liability insurer for Mr. Itehua, and Mrs. Thaxton received $40,000.00 from Mr. Itehua's liability insurer.

15. The Thaxtons initially filed their complaint alleging that they were residents of Ohio, but later amended the complaint to reflect that they are residents of Kentucky.

16. Ms. Thaxton operated a lawn and garden business in West Liberty, Kentucky from 2005 to 2013. Ms. Thaxton has not worked since closing the lawn and garden business. Mr. Thaxton is currently unemployed. After closing his dealership in 2011, Mr. Thaxton worked for Clark Oil Company in West Liberty until 2013.

In response to Thaxton's complaint, and specifically the demand for UIM benefits, Allstate asserted entitlement to a credit and/or setoff of all amounts paid or payable by virtue of the tortfeasor's liability insurance coverage. Allstate contended Ohio law was controlling based on the choice of law provision contained in Thaxton's policy.

Following a period of discovery, Allstate moved for a declaration of rights and summary judgment declaring the rights and obligations created under the policy it issued to Thaxton would be interpreted under Ohio law. In support of its position, Allstate cited the plain language of the policy indicating it was an Ohio policy for property and risks principally located in Ohio and which provided UIM coverage under Ohio law. Allstate restated the pertinent facts regarding Thaxton's

connections with Ohio related to their automobiles. It was Allstate's position Thaxton had purchased an Ohio insurance policy indicating the covered vehicles would be primarily used in that state and was entitled to nothing more than the coverage for which they had contracted.

In response, Thaxton argued the policy's choice of law provision actually required application of Kentucky law rather than Ohio law. Further, Thaxton asserted Restatement (Second) of Conflict of Laws § 193 (1971) creates a rebuttable presumption favoring application of the law of the state where the insured risk is located. Thaxton alleged the facts underlying this dispute supported a finding Kentucky was the location of the insured risk, positing the move to Kentucky in 2001 was known by Allstate or its agent and, despite such knowledge, Allstate had done nothing to modify the policy language or correct the principal location of the insured risk. Alternatively, Thaxton argued under Restatement (Second) of Conflict of Laws § 188 (1971), Kentucky had the most significant relationship to the transaction and the parties and the greatest concern for the subject of the litigation, thereby mandating application of Kentucky law.

The trial court analyzed the dispute under the guidance set forth in *State Farm Mutual Auto Insurance Co. v. Hodgkiss-Warrick*, 413 S.W.3d 875 (Ky. 2013), which utilized Restatement § 188 and § 193 to determine the appropriate state law to apply between an insurance company and its insured involving an

accident occurring in this state where choice of law is in issue. After conducting its analysis, the trial court determined under Restatement § 188 Ohio has the most significant relationship to the transaction at issue and is the principal location of the insured risk, regardless of Thaxton's alleged Kentucky residency, and therefore Ohio law was controlling. Finding no genuine issues of material fact existed, the trial court concluded Mr. Thaxton was entitled to UIM benefits from Allstate not to exceed $50,000.00, less any payments that had been or were to be made related to the collision, including the $50,000.00 from the tortfeasor, and Mrs. Thaxton was likewise entitled to UIM benefits of not more than $50,000.00, less the $40,000.00 payment from the tortfeasor. This appeal followed.

As an initial matter, in contravention of CR[1] 76.12(4)(c)(v), Thaxton does not state whether or how any arguments presented on appeal were preserved in the trial court.

> CR 76.12(4)(c)[(v)] in providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (citations omitted).

[1] Kentucky Rules of Civil Procedure.

Elwell v. Stone, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. App. 1987)). Further, in contravention of CR 76.12(4)(c)(vii), Thaxton's brief does not include a copy of the judgment being appealed. Failing to comply with the civil rules is an unnecessary risk the appellate advocate should not chance. Compliance with CR 76.12 is mandatory. *See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike the brief or dismiss the appeal for Thaxton's failure to comply. *Elwell*, 799 S.W.2d at 47-48. While we have chosen not to impose such a harsh sanction, we caution counsel such latitude may not be extended in the future.

Thaxton first contends the trial court erred in concluding Ohio law governed the UIM coverage dispute and thereafter granted summary judgment in favor of Allstate. An appellate court's role in reviewing a summary judgment is to determine whether the trial court erred in determining no genuine issue of material fact exists and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). A grant of summary judgment is reviewed *de novo* because factual findings are not at issue. *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188, 189 (Ky. App. 2006) (citing *Blevins v. Moran*, 12 S.W.3d 698 (Ky. App. 2000)).

Summary judgment is appropriate "if 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 56.03. The narrow issue presented on appeal concerns interpretation of an insurance contract. Because interpretation of a contract and questions regarding the scope of coverage provided by an insurance policy are purely questions of law, our standard of review is *de novo*. *Dowell v. Safe Auto Ins. Co.*, 208 S.W.3d 872 (Ky. 2006); *Baker v. Coombs*, 219 S.W.3d 204, 207 (Ky. App. 2007). "In the absence of ambiguity a written instrument will be enforced strictly according to its terms." *O'Bryan v. Massey-Ferguson, Inc.*, 413 S.W.2d 891, 893 (Ky. 1966). Courts will interpret the contract terms by assigning language to its ordinary meaning without resort to extrinsic evidence. *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000). Neither party asserts existence of a genuine issue of material fact. Thus, we must review only the trial court's legal conclusions in determining whether summary judgment was appropriately entered.

> For many years, the Supreme Court of Kentucky has
>
> applied § 188 of the *Restatement (Second) of Conflict of Laws* (1971) to resolve choice of law issues that arise in contract disputes. In *Lewis v. American Family Ins. Group*, 555 S.W.2d 579 (Ky. 1977), [the Supreme Court of Kentucky] abandoned the traditional rule according to which a contract's validity was determined by reference

> to the laws of the state in which it was made and adopted the *Restatement's* approach. Under the applicable section,
>
> > [t]he rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.
>
> *Restatement (Second) Conflict of Laws* § 188(1) (1971). Among the factors a court making that determination should consider are the place or places of negotiating and contracting; the place of performance; the location of the contract's subject matter; and the domicile, residence, place of incorporation and place of business of the parties. *Id*. § 188(2). With respect to casualty insurance contracts in particular, a key factor is the expectation of the parties concerning the principal location of the insured risk. *Id.* § 193.

Hodgkiss-Warrick, 413 S.W.3d at 878-79.

Here, Thaxton entered into an insurance contract in Ohio which makes specific reference to Ohio law. The 2000 Corvette covered by the policy was registered and licensed in Ohio, and Thaxton represented to Allstate the vehicle would be garaged and primarily used in Ohio. The expectation of the parties as to the principal location of the insured risk is clearly Ohio. RESTATEMENT § 193. While Thaxton obviously disagrees with this assessment, even a cursory reading of the policy indicates Allstate's belief it was insuring an

Ohio vehicle against risks primarily occurring in Ohio. Unfortunately for Thaxton, the rule of law is clear and well-settled and cuts against their position.

Ohio clearly had a significant relationship with the parties and the insurance transaction at issue here. Thus, Ohio law should control absent some compelling reason to the contrary. *Id.* at 879. No such reason has been presented. Apart from Thaxton providing Allstate with a Kentucky post office box mailing address, all actions related to negotiating, contracting and performing the insurance transaction occurred in and concerned Ohio. As the trial court correctly concluded, "Ohio has the most significant relationship to the transaction herein, and that the principal location of insured risk was Ohio, as the Thaxtons represented to Allstate that it would be; thus Ohio law applies[.]" *See* RESTATEMENT § 188; *Hodgkiss-Warrick*; and *Grange Property and Cas. Co. v. Tennessee Farmers Mutual Ins. Co.*, 445 S.W.3d 51 (Ky. App. 2014). We discern no error in the trial court's choice of law ruling.

There being no genuine issues of material fact and no error in the trial court's legal reasoning, we hold summary judgment was appropriately granted. Therefore, the Fleming Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Christopher W. Goode
Kenneth C. Human
Lexington, Kentucky

BRIEF FOR APPELLEE:

Ernest H. Jones, II
Jamie Wilhite Dittert
Lexington, Kentucky