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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-002029-MR
AND
NO. 2015-CA-000015-MR

JAMOS CAPITAL LLC; JAMOS FUND, I, LP;
AND JAMOS FINANCIAL
SOLUTIONS, LLC — APPELLANTS/CROSS-APPELLEES

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 12-CI-003380

ENDURANCE AMERICAN SPECIALTY
INSURANCE COMPANY — APPELLEE/CROSS-APPELLANT

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KRAMER, D. LAMBERT AND STUMBO, JUDGES.

STUMBO, JUDGE: Jamos Capital, LLC, Jamos Fund I, LP, and Jamos Financial Solutions, LLC (hereinafter collectively referred to as Appellants) appeal from an order of the Jefferson Circuit Court which held that Endurance American Specialty

Insurance Company (hereinafter referred to as Appellee) was not obligated to defend or indemnify Appellants under the terms of a professional liability insurance policy on claims presented against them in a pending professional liability lawsuit. Appellants argue that the policy exclusions relied upon by the trial court in finding no duty to defend or indemnify were inapplicable. Appellee cross-appeals an order of the trial court which found that Kentucky law applies to the contract at issue instead of Ohio law. We believe that the trial court erroneously found that Kentucky law applies to the insurance contract. For this reason, we cannot reach the merits of Appellants' appeal at this time. We therefore reverse and remand for the trial court to analyze the insurance policy at issue and utilize Ohio law.

This case has previously been before this Court; therefore, we will utilize that recitation of the relevant facts.

> Jamos Capital is the sole owner of Jamos Fund and Jamos Financial. Jamos Fund is in the business of collecting delinquent property taxes. Jamos Fund purchased certificates of delinquency against various Jefferson County, Kentucky, properties. A number of Plaintiffs filed a class action lawsuit against all three Jamos Appellants alleging improper practices in the collection of property taxes.
>
> Jamos Capital had a professional liability insurance policy through Endurance. The policy requires Endurance to defend and indemnify Jamos Capital. Jamos Capital informed Endurance of the pending lawsuit and Endurance retained a lawyer to defend all the Jamos Appellants. After about a year, Endurance denied it had a contractual obligation to defend the Jamos Appellants and refused to continue to pay the cost of the

> defense. Jamos then filed the underlying motion for declaratory judgment against Endurance. The trial court found that Endurance was not required to defend or indemnify the Jamos Appellants due to some exclusions outlined in the policy. The motion for declaratory judgment was denied and this appeal followed.

Jamos Capital, LLC v. Endurance Am. Specialty Ins. Co., No. 2012-CA-002168-MR, 2014 WL 897018, at *1 (Ky. Ct. App. Mar. 7, 2014).

The previous panel of this Court reversed and remanded the case to the trial court because that court had not reached a decision as to whether Ohio or Kentucky law applied to the insurance policy at issue. The insurance policy at issue was entered into in Ohio, but the lawsuit against Appellants is being brought in Kentucky. On remand, the trial court ultimately found that Kentucky law applied to the insurance policy. This appeal and cross-appeal followed.

We believe the choice of law issue requires reversal and remand to the trial court; therefore, we will only discuss that issue. The choice of law issue is purely a question of law, thus our review is *de novo*. *State Farm Mut. Auto. Ins. Co. v. Hodgkiss-Warrick*, 413 S.W.3d 875, 878 (Ky. 2013).

> We may begin our analysis by noting that for many years now we have 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), this Court 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).

Id. at 878-79. "It is, of course, a well-settled principle of general contract law that courts are not to enforce contracts in contravention of public policy." *Id.* at 879-80.

> Courts will not disregard the plain terms of a contract between private parties on public policy grounds absent a clear and certain statement of strong public policy in controlling laws or judicial precedent. The United States Supreme Court has stated that under federal law public policy will render a contract term unenforceable only if the policy is explicit, well defined, and dominant, [and may] be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. *Eastern Associated Coal Corp. v. United Mine Workers of America, District 17,* 531 U.S. 57, 62, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000) (*quoting W.R. Grace & Co. v. Intern. Union of Rubber Workers,* 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983), *in turn quoting Muschany v. United States,* 324 U.S. 49, 65 S.Ct. 442, 89 L.Ed. 744 (1945)). Similarly, § 178 of the *Restatement (Second) of Contracts* (1979) - "When a Term Is Unenforceable on Grounds of Public Policy" - provides that in the absence of legislation expressly forbidding enforcement, a contract term is unenforceable on public policy grounds only if the policy asserted against it is clearly manifested by legislation or judicial decision and is sufficiently strong to override the

> very substantial policies in favor of the freedom of contract and the enforcement of private agreements.
>
> Our law is in complete accord. In *Zeitz v. Foley,* 264 S.W.2d 267, 268 (Ky.1954), our predecessor Court, emphasizing that contracts voluntarily made between competent persons are not to be set aside lightly, and that the right of private contract is no small part of the liberty of the citizen, observed that public policy would not bar enforcement of a contract unless it clearly appears that [the] contract has as its direct object and purpose a violation of the Federal or state constitution, Federal or state statutes, some ordinance of a city or town, or some rule of the common law. More recently, in *Kentucky Farm Bureau Mut. Ins. Co. v. Thompson,* 1 S.W.3d 475, 476 - 77 (Ky.1999), we reiterated that public policy, invoked to bar the enforcement of a contract, is not simply something courts establish from general considerations of supposed public interest, but rather something that must be found clearly expressed in the applicable law.

Id. at 880-81 (internal quotation marks omitted).

> If the mere fact that Kentucky law differed from a sister state's law were enough to require the application of Kentucky law, after all, then there would be no choice of law question, for Kentucky law would always apply in Kentucky courts. To bar enforcement in the case where the contract was valid where made, the Kentucky public policy against enforcement must be a substantial one, a well-founded rule of domestic policy established to protect the morals, safety or welfare of *our people.*

Id. at 882 (emphasis in original, citation omitted, and internal quotation marks omitted).

In the case at hand, the trial court initially found that Ohio had the most significant relationship to the insurance policy because Appellants do business not only in Kentucky, but also in Ohio. Additionally, the court found that the contract

was produced in Ohio and purchased through an Ohio broker. Also relevant is the fact that Jamos Capital, the named insured and purchaser of the insurance policy, has its principal place of business in Ohio. Ultimately, however, the trial court found that the public policy exception applied because Ohio law does not allow an insurance policy to cover punitive damages,[1] but Kentucky law does allow for such coverage.[2] The court found that Kentucky Revised Statute (KRS) 411.186 codifies the intent of Kentucky's General Assembly in regard to the coverage of punitive damages in insurance contracts.

We disagree with the trial court. We believe that Ohio law should apply to the insurance policy in question. As discussed by the trial court, Ohio has the most significant relationship to the contract. We also believe that the public policy exception does not apply in this case.

KRS 411.186, the statute relied upon by the trial court in order to justify the public policy exception, states:

> (1) In any civil action where claims for punitive damages are included, the jury or judge if jury trial has been waived, shall determine concurrently with all other issues presented, whether punitive damages may be assessed.
> (2) If the trier of fact determines that punitive damages should be awarded, the trier of fact shall then assess the sum of punitive damages. In determining the amount of punitive damages to be assessed, the trier of fact should consider the following factors:
> (a) The likelihood at the relevant time that serious harm would arise from the defendant's misconduct;

[1] *Casey v. Calhoun*, 531 N.E.2d 1348 (Ohio App. 1987).
[2] Punitive damages are an issue in the underlying professional liability lawsuit against Appellants.

(b) The degree of the defendant's awareness of that likelihood;
(c) The profitability of the misconduct to the defendant;
(d) The duration of the misconduct and any concealment of it by the defendant; and
(e) Any actions by the defendant to remedy the misconduct once it became known to the defendant.
(3) KRS 411.184[3] and this section are applicable to all cases in which punitive damages are sought.

This statute relied upon by the trial court only generally describes punitive damages. It does not require that punitive damages be covered by insurance policies or prohibit their exclusion; therefore, we do not believe there is legislation expressly forbidding or requiring the coverage of punitive damages.

We must now determine if Kentucky's public policy regarding the coverage of punitive damages is "clearly manifested by legislation or judicial decision and is sufficiently strong to override the very substantial policies in favor of the freedom of contract and the enforcement of private agreements." *Hodgkiss* at 880. As previously mentioned, we do not believe the statute relied upon by the trial court is explicit and well defined so as to require the usage of Kentucky law. The only case law this Court has discovered regarding punitive damages being covered in an insurance contract is *Cont'l Ins. Companies v. Hancock*, 507 S.W.2d 146 (Ky. 1973). In that case, the Court stated that it is not against public policy to allow a person to insure against punitive damages. *Id.* at 151. The Court did not say that punitive damages must be covered in insurance policies. Allowing a person to insure against punitive damages is a far cry from a public policy that is

[3] KRS 411.184 is irrelevant to this case.

"established to protect the morals, safety or welfare of *our people*." *Hodgkiss* at 882 (emphasis in original).

What we have in this case is simply a difference in the law between Kentucky and Ohio. One state allows an insurance policy to cover punitive damages and one state does not. We do not believe that Kentucky has such a strong public policy regarding the coverage of punitive damages in insurance contracts to override Ohio's insurance laws regarding punitive damages; therefore, we must reverse and remand the judgment of the trial court. Upon remand, the trial court should analyze the insurance policy in question utilizing Ohio law.

ALL CONCUR.

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