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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000809-MR

JERRY WARD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 11-CI-004527

NATIONWIDE ASSURANCE COMPANY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND NICKELL, JUDGES.

ACREE, CHIEF JUDGE: The issue before us is whether Kentucky law applies to the insurance policy at issue by operation of the public-policy exception to our well-regarded and customary conflicts-of-law test. We find the public-policy exception and, in turn, Kentucky law, so apply. Accordingly, we reverse

the Jefferson Circuit Court's March 14, 2012 order and remand for additional proceedings consistent with this opinion.

I. Facts and Procedure

On August 5, 2009, Appellant Jerry Ward, a Virginia resident, was involved in an automobile accident with Hannah Hardy, a Kentucky resident, in Jefferson County, Kentucky. Hardy, an intoxicated driver, was traveling the wrong direction on Interstate 65, and ultimately collided with the semi tractor-trailer operated by Ward. Ward was injured.

Ward held a policy of insurance issued by Appellee Nationwide Assurance Company.[1] His insurance policy was issued in Virginia, under Virginia law, and included underinsured motorist (UIM) coverage in the amount of $25,000.00 per person.[2]

Hardy's liability insurance carrier, Allstate Property and Casualty Insurance, settled Ward's claim for $25,000.00, Hardy's liability policy limits. Ward communicated this to Nationwide, and Nationwide elected to waive its subrogation rights against Hardy.[3]

Ward then demanded UIM benefits from Nationwide. Nationwide denied Ward's claim because, under Virginia law and Ward's insurance policy, Hardy was

[1] The insurance policy was not for the semi tractor-trailer involved in the accident, but for Ward's personal automobile.

[2] Ward's policy declarations page refers to the coverage as uninsured motorist (UM) benefits, but the policy later explains that UM coverage includes both uninsured and underinsured motorists.

[3] See *Coots v. Allstate Insurance Company*, 853 S.W.2d 895 (Ky. 1993), now codified in KRS 304.39-320.

not an underinsured motorist. Nationwide pointed to the language of Ward's insurance policy, which defines an underinsured motor vehicle as one for which the liability insurance available for payment is less than the total UIM coverage afforded under the policy. Nationwide argued this definition, supported by Virginia statutory authority, entitled it to offset the face amount of Ward's UIM benefits (i.e., $25,000.00) by Hardy's liability policy limits available for payment (i.e., $25,000.00). Based on this, Nationwide deemed Hardy not to be an underinsured motorist and, therefore, declared Ward was not contractually entitled to UIM benefits.

Displeased, Ward sued in Jefferson Circuit Court. Following minimal discovery, the parties filed cross-motions for summary judgment. By order entered March 14, 2012, the circuit court granted Nationwide's summary-judgment motion, and denied Ward's motion. The circuit court, relying on *Poore v. Nationwide Mutual Insurance Company*, 208 S.W.2d 269 (Ky. App. 2006), determined that Virginia law applied pursuant to the "most significant relationship" test utilized by this Commonwealth in resolving contract-based conflicts-of-law issues. And, under Virginia law, the circuit court found Nationwide properly denied Ward's UIM claim because the UIM coverage Nationwide provided was identical to the liability coverage provided by Hardy and, therefore, under the policy's setoff provision and Virginia law, Nationwide was not contractually obligated to pay Ward any UIM benefits.

Ward moved to alter, amend, or vacate the circuit court's order pursuant to Kentucky Rule of Civil Procedure (CR) 59.05, which the circuit court denied. Ward promptly appealed.

II. Standard of Review

"The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). The material facts in this case are not in dispute; only legal questions remain. Our review is *de novo*. *Mitchell v. University of Kentucky*, 366 S.W.3d 895, 898 (Ky. 2012).

III. Analysis

As framed by the parties, the issue before us is whether Virginia or Kentucky law governs this dispute. Ward advocates for the application of Kentucky law, asserting three grounds: (1) the insurance policy itself dictates Kentucky law applies because the accident occurred in Kentucky; (2) under Kentucky's public-policy exception to its traditional conflicts-of-law analysis, Kentucky law applies; and (3) having judicially conceded that Kentucky law applies, Nationwide is estopped from now claiming Virginia law applies.

Nationwide maintains that Virginia law applies. Like the circuit court, Nationwide relies on *Poore*, *supra*. As it did before the circuit court, Nationwide argues that under the express language of Ward's insurance policy Hardy cannot be considered an underinsured motorist. Ward's policy, Nationwide maintains,

follows Virginia law. Nationwide directs our attention to Va. Code Ann. § 38.2-2206(B), which declares a motor vehicle to be underinsured "when . . . the total amount of bodily injury and property damage coverage applicable . . . available for payment for such bodily injury or property damage . . . is less than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of the vehicle." Under this statute, Nationwide argues, if UIM benefits are equal to or less than the liability coverage provided by the tortfeasor, the tortfeasor's vehicle is not considered underinsured and the insured is not entitled to invoke the UIM provision of his or her insurance policy.

Due to the dispositive nature of Ward's choice-of-law argument, we address it first.

Kentucky's conflicts-of-law rules supply the applicable substantive law. When the dispute, such as this one, is contractual in nature, we utilize "the most significant relationship test." *Saleba v. Schrand*, 300 S.W.3d 177, 181 (Ky. 2009) (explaining "Kentucky has consistently applied" the most-significant-relationship test "to resolve choice of law issues that arise in contract disputes"). This test requires us to apply the law of the state with the most significant relationship to the transaction and the parties. *See Schnuerle v. Insight Communications Co., L.P.*, 376 S.W.3d 561, 567 (Ky. 2012). "In applying the most significant relationship test, Kentucky courts have recognized that in most cases the law of the residence of the named insured will determine the scope of coverage." *Poore*, 208 S.W.3d at 271. Ward concedes, applying our traditional choice-of-law rules, Virginia law

controls. (Appellant's Brief at 10). Ward was a Virginia resident driving a vehicle primarily garaged in Virginia which was insured by an insurance policy issued in Virginia under Virginia law.

However, an exception exists to Kentucky's conventional choice-of-law test: "Kentucky courts have traditionally refused to apply the law of another state if that state's law violates a public policy as declared by the Kentucky legislature or courts." *State Farm Mut. Auto. Ins. Co. v. Marley*, 151 S.W.3d 33, 35 (Ky. 2004) (citation omitted). *Marley* re-affirmed the clear public policy of this Commonwealth "to ensure that victims of motor vehicle accidents on Kentucky highways are fully compensated." *Id.* at 36. While, admittedly, *Marley* does not speak of UIM coverage, we regard this to be a distinction without meaning.[4] As succinctly, and properly, explained in *Schardein v. State Auto. Ins. Co.*, CIV.A. 12-288-C, 2012 WL 6675130 (W.D. Ky. Dec. 21, 2012):

> *Marley* provides broadly that Kentucky law applies, even when a traditional conflicts-of-law analysis would dictate otherwise, where the application of the law of another state would violate Kentucky public policy, and the specifics of what the *Marley* court held to be a violation of public policy do not limit its application in other circumstances.

Id. at *2.

The question is whether the application of another state's law violates Kentucky public policy when that law authorizes an insurance carrier to offset the amount of insurance available to the plaintiff through the defendant's insurer

[4] *Marley* refused to apply Indiana law because it held that the household exclusion in the automobile liability policy at issue in that case violated Kentucky public policy.

against the amount of UIM coverage. Our Supreme Court has spoken on this issue. In *Philadelphia Indemnity Insurance Company v. Morris*, 990 S.W.2d 621 (Ky. 1999), the Supreme Court declared void as against public policy any "UIM endorsement requiring setoff[.]" *Id.* at 627. The Court acknowledged the two "prevailing policy views" on this issue. *Id.*

> Under the narrow view, the insured's UIM coverage is always setoff or reduced by the tortfeasor's liability limits. The purpose of the narrow view is to place the insured in the same financial condition that he would be in if the tortfeasor had liability limits equal to the insured's own UIM limits. Under the broad view, UIM coverage is triggered when the insured's damages exceed the tortfeasor's liability limits, at which point the insured is entitled, if damages require it, to receive the full amount of the UIM policy. The public policy underlying the broad view is to provide full recovery to the injured party.

Id. Prior to 1988, Kentucky adhered to the narrow view. Indeed, KRS 304.39-320 contained language affording "a mandatory setoff of a tortfeasor's liability limits against the insured's UIM limits." *Id.* However, in 1988 the Kentucky legislature eliminated the mandatory setoff language, transforming KRS 304.39-120 "into a representation of the broad view." *Id.* This revision "reflects a public policy of broad UIM coverage, the purpose of which is to provide full recovery for the insured[.]" *Id.*

Virginia, unlike Kentucky, continues to embrace the narrow view as it certainly may do. Kentucky's legislature and courts, however, have declared the narrow view to be against this Commonwealth's public policy. *Morris*, 990

S.W.2d at 626-27. For that reason, we find the public-policy exception to our traditional conflicts-of-law analysis applicable under these circumstances. The set-off provision contained in Ward's insurance policy and authorized under Virginia law is contrary to Kentucky public policy. Accordingly, the circuit court erred in holding Virginia law applies to this matter.

In the lone post-*Marley* and -*Morris* case cited by Nationwide[5], and relied upon by the circuit court, *Poore v. Nationwide Mutual Insurance Company*, 208 S.W.3d 269 (Ky. App. 2006), this Court, applying the "most significant relationship" conflicts-of-law test, concluded Indiana law applied and prevented the appellant from stacking UIM coverage. *Id.* at 270. In reaching its decision, this Court noted the injured party was an Indiana resident, the injured party's vehicle was garaged in Indiana, and the insurance policies were entered into in Indiana. Notably absent from *Poore*, however, is any mention or discussion of *Morris* or *Marley*. This is understandable because Kentucky's public-policy exception does not appear to have been at issue in *Poore*.[6] In our view, *Marley* and

[5] Nationwide relies heavily, and almost exclusively, on cases decided prior to *Marley* and *Morris*, including *Lewis v. American Family Ins. Group*, 555 S.W.2d 579 (Ky. 1977), *Kentucky National Ins. Co. v. Lester*, 998 S.W.2d 499 (Ky. App. 1999), *Snodgrass v. State Farm Mut. Ins. Co.*, 992 S.W.2d 855 (Ky. App. 1998), and *Bonnlander v. Leader National Ins. Co.*, 949 S.W.2d 618 (Ky. App. 1996). While neither *Marley* nor *Morris* expressly overruled these prior cases, their continuing validity has assuredly been called into doubt to the extent the holdings in those cases conflict with our Supreme Court's more recent precedent set forth in *Marley* and *Morris*.

[6] Similarly, this Court's recent opinion in *Bandy v. Bevins*, No. 2011-CA-000020-MR, 2013 WL 44027, at *1 (Ky. App. Jan. 4, 2013) appears, at first blush, wholly inconsistent with its ruling in this case. Like this case, at issue in *Bandy* was whether Kentucky or Virginia law applied in resolving whether the appellant's insurance provider, Nationwide Mutual Insurance Company, was contractually obligated to pay Appellant UIM benefits when the UIM coverage available did not exceed the available liability payment. Applying Kentucky's "most significant relationship test" this Court concluded Virginia law applied and affirmed the trial court's conclusion that the appellant's insurance policy and Virginia law permitted Nationwide to offset appellant's UIM

Morris, not *Poore*, dictate the outcome in this matter. Nationwide's reliance on *Poore* is misplaced.

Resolving the conflict-of-law dispute is wholly determinative. We need not address Ward's remaining arguments.

IV. Conclusion

For the foregoing reasons, we reverse the Jefferson Circuit Court's March 14, 2012 order and remand for additional proceedings consistent with this opinion.

ALL CONCUR.

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coverage by the amount available in liability coverage, resulting in the tortfeasor not being deemed an underinsured motorist. *Id.* at 2-3. However, unlike this case, the Appellant in *Bandy* wholly failed to raise Kentucky's public-policy exception to its traditional conflicts-of-law test before this Court or, apparently, the trial court. *See Kentucky Farm Bureau Mut. Ins. Co. v. Shelter Mut. Ins. Co.*, 326 S.W.3d 803, 812 n. 3 (Ky. 2010) (noting that a court may affirm for any reason appearing in the record but must reverse only for preserved issues).