

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

KELLY J. FOSS	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. Sheila G. Farmer, J.
	:	Hon. John F. Boggins, J.
-vs-	:	
	:	Case No. 2005CA00246
CINCINNATI INSURANCE	:	
COMPANIES	:	
	:	
Defendant-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,  
Case No. 2005CV00702

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: March 31, 2006

APPEARANCES:

For Plaintiff-Appellant

REBECCA J. CASTELL  
1360 West Ninth Street  
Suite 200  
Cleveland, OH 44113-1254

For Defendant-Appellee

JAMES F. MATHEWS  
400 South Main Street  
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*Farmer, J.*

{¶1} On November 29, 2003, appellant, Kelly Foss, an Ohio resident, was injured in a single vehicle automobile accident in the state of Indiana, a no-fault state. Appellant was a passenger in a vehicle being operated by her husband, Matthew Foss. At the time of the accident, appellant and her husband maintained insurance with appellee, Cincinnati Insurance Companies. Appellant sought uninsured motorists coverage, but Cincinnati denied coverage.

{¶2} On March 3, 2005, appellant filed a declaratory judgment action against Cincinnati. Both parties filed motions for summary judgment. By judgment entry filed September 8, 2005, the trial court granted Cincinnati's motion for summary judgment, finding Indiana law applied and therefore appellant was not entitled to coverage under the policy.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN UPHOLDING INSURANCE COMPANY'S DECISION TO DENY COVERAGE TO ITS SEVERELY INJURED OHIO POLICYHOLDER. THE BASIS OF THE COURT'S ERROR WAS TO APPLY INDIANA LAW, NOT OHIO LAW, BASED UPON AN ERRONEOUS APPLICATION OF *KURENT V. FARMERS INS. OF COLUMBUS* (1999), 62 OHIO ST. 3D 242."

## II

{¶5} "THE TRIAL COURT COMPOUNDED ITS REVERSIBLE ERROR BY ELECTING NOT TO RESOLVE THE REMAINING COVERAGE ISSUES IN THIS CASE, WHICH SHOULD HAVE OCCURRED HAD THE TRIAL COURT APPLIED THE CORRECT LAW TO THIS CASE."

## I

{¶6} Appellant claims the trial court erred in granting summary judgment to Cincinnati. Specifically, appellant claims the trial court erred in applying Indiana law instead of Ohio law, and in finding her claim was invalid under Indiana law. We disagree.

{¶7} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶8} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶9} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

{¶10} In determining that Indiana law applied, the trial court relied on the case of *Kurent v. Farmers Insurance of Columbus, Inc.* (1991), 62 Ohio St.3d 242, wherein the Supreme Court of Ohio held the law of the situs of the accident is controlling. In looking at the uninsured motorists coverage of the Cincinnati policy, Part C, appellant would be entitled to benefits if she was "legally entitled to recover from the owner or operator of an uninsured motor vehicle." The trial court determined because Indiana's "Guest Statute" law did not permit spousal claims for injuries, appellant was not "legally entitled to recover" and therefore was not entitled to benefits under Cincinnati's uninsured motorists coverage.

{¶11} Appellant argues the syllabus of *Kurent* should be limited to injuries caused by a resident of another state. Therefore, because the accident in this case involved a single vehicle with Ohio residents only, *Kurent* does not apply. The *Kurent* syllabus states as follows:

{¶12} "When an Ohio resident is injured in an automobile accident in a no-fault insurance state, by a resident of that state who is insured under that state's no-fault insurance laws, the Ohio resident's legal right to recover from the tortfeasor-motorist must be determined with reference to the no-fault state's laws. Where the no-fault state does not recognize a claim against the tortfeasor-motorist, the Ohio insured is not entitled to collect uninsured motorist benefits from his own insurer."

{¶13} However, a total reading of *Kurent* explains the syllabus and the reasoning of the court:

{¶14} "Michigan law determines Karczewski's legal liability to the Kurents. He is a Michigan resident and the accident occurred in Michigan. A motorist traveling in Michigan accepts Michigan law as it pertains to accidents occurring in Michigan. That motorist does not have the option, for example, of claiming that Ohio's speed limit or traffic laws govern simply because the motorist resides in Ohio. The notion that Ohio law somehow controls the amount of damages flowing from torts committed on Michigan highways is akin to a contention that a Michigan resident who commits murder in Ohio is exempt from the death penalty because Michigan does not recognize capital punishment.

{¶15} \*\*\*\*

{¶16} "Our decision to apply Michigan tort law to the underlying accident is consistent with the Restatement of the Law of Conflicts approach we adopted in *Morgan v. Biro Mfg. Co.* (1984), 15 Ohio St.3d 339, 341-342, 15 OBR 463, 465- 466, 474 N.E.2d 286, 288-289. Specifically, Section 146 of 1 Restatement of the Law 2d, Conflict of Laws (1971) 430, creates a presumption that the law of the place of the injury controls unless another jurisdiction has a more significant relationship to the lawsuit. Comment *d* to Section 146 emphasizes that the state in which both the conduct and the injury occur has the dominant interest in regulating that conduct, determining whether it is tortious in character, and determining whether the interest is entitled to legal protection. *Id.* at 431." *Kurent* at 246.

{¶17} Appellant argues Ohio has a superior interest. We find *Kurent* addressed the balancing of Ohio law versus situs law as follows:

{¶18} "Section 145 of the Restatement of the Law of Conflicts 2d, supra, at 414, sets forth factors to determine whether one state has a more significant relationship to the lawsuit. These include the place of injury, the place where the conduct causing the injury occurred, the residence or place of incorporation and/or business of the parties, and the place where the relationship between the parties is centered."

{¶19} The issues raised sub judice are identical to *Kurent*, except the accident in this case did not involve a non-Ohio resident. We find this fact alone is insufficient to overcome the presumption of situs law.

{¶20} Based upon the reading of *Kurent* taken as a whole (S.Ct.R.Rep.Op. 1), we find the trial court did not err in determining Indiana's spousal immunity law prevailed over Ohio law.

{¶21} Assignment of Error I is denied.

## II

{¶22} Appellant claims the trial court erred in not addressing her argument that the language of the uninsured motorists coverage is unclear and ambiguous as it relates to covered autos. Cincinnati claims the policy clearly precludes appellant's spouse's vehicle as an uninsured vehicle for purposes of uninsured motorist coverage.

{¶23} As amended, R.C. 3937.18, which governs uninsured/underinsured motorists coverage, permits the inclusion of "terms and conditions that preclude coverage for bodily injury or death suffered by an insured under specified circumstances." See, Subsection (I).

{¶24} The uninsured motorists coverage in the policy sub judice contains the following language:

{¶25} "However, 'uninsured motor vehicle' does not include any vehicle or equipment:

{¶26} "5. For which liability coverage is afforded under this policy."

{¶27} The vehicle involved in the accident was a covered vehicle under the liability policy therefore, uninsured motorists coverage does not apply.

{¶28} Assignment of Error II is denied.

{¶29} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. dissents and

Boggins, J. concurs separately.

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JUDGES

*Gwin, P.J., dissenting*

{¶30} I must dissent from the conclusion reached by the majority. As the majority correctly states, *Kurent* cites with approval the Restatement of the Law of Conflicts regarding an analysis of whether Ohio or Indiana has “a more significant relationship the lawsuit”.

{¶31} I would analyze this case as involving an Ohio plaintiff, an Ohio defendant, traveling in an automobile principally garaged in Ohio and insured in Ohio. The premiums the Ohioans paid were based at least in part upon their state of residence, and the manner in which Ohio insurance laws assign liability in tort actions also has a great deal to do with the cost of the policy.

{¶32} Contrasting the above with Indiana as the situs of the accident, I would find there is no question Ohio has the most significant relationship with the lawsuit. It is true a motorist accepts the traffic laws of whatever jurisdiction he or she enters. I do not believe a motorist necessarily consents to any other laws of the jurisdiction.

{¶33} Ohio courts would not answer this choice of law question in this manner if it were anything other than an insurance case. Indiana has protected its interest in the traffic case, and has no other real connection with this action, certainly not in the contractual relationship between two Ohioans and an Ohio insurance company.

{¶34} I would sustain the assignments of error and apply Ohio law.

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JUDGE W. SCOTT GWIN



*Boggins, J., Concur*

{¶35} As to Assignment of Error I, I concur in the results of Judge Farmer's opinion, but not in the reasoning.

{¶36} Appellant has paid a premium in Ohio for uninsured motorist coverage.

{¶37} The only reason that the issue of the existence of the accident being caused by an uninsured driver (the husband) is because Indiana has a guest statute.

{¶38} If Indiana's laws were identical to Ohio's, the uninsured policy provision would be inapplicable.

{¶39} The conflict of laws question is not applicable.

{¶40} I concur in Assignment of Error II.

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JUDGE JOHN F. BOGGINS

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

KELLY J. FOSS	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
CINCINNATI INSURANCE COMPANIES	:	
	:	
Defendant-Appellee	:	CASE NO. 2005CA00246

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed.

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JUDGES