



**In the
Missouri Court of Appeals
Western District**

**ALLSTATE FIRE AND CASUALTY
INSURANCE COMPANY,**

Respondent,

v.

PHILIP STRATMAN,

Appellant.

WD83564

OPINION FILED:

DECEMBER 8, 2020

**Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Marco Roldan, Judge**

**Before Division Four: Cynthia L. Martin, Chief Judge, Presiding, Gary D. Witt, Judge,
Anthony Rex Gabbert, Judge**

Philip Stratman appeals the judgment of the Jackson County Circuit Court finding that Kansas law applied to the substantive issues in his cross claim against Allstate Fire & Casualty Insurance Company (“Allstate”) and in granting judgment on the pleadings and summary judgment in favor of Allstate. Stratman complains in six points on appeal that Missouri law applies to the dispute and, regardless of which state’s law applies, the trial court erred in its judgment. The judgment is reversed and the cause is remanded.

Facts

On February 13, 2014, Philip Stratman was involved in a car accident in Jackson County, Missouri that resulted in paralysis to Steven Holdeman. At the time of the accident, Stratman was insured by a policy issued by Allstate with coverage limits of \$100,000 for each person and \$300,000 for each occurrence. Stratman alleges that Steven Holdeman and his wife Sarah Holdeman (“the Holdemans”) offered to settle their claims against Stratman for the applicable coverage limits of his Allstate policy, but Allstate rejected their offer. Allstate admits that the Holdemans offered to settle their claims within the amount of Stratman’s insurance coverage, but it denies that it rejected that offer.

On October 21, 2014, the Holdemans filed a lawsuit against Stratman¹ in the Jackson County Circuit Court. On December 13, 2016, a judgment was entered against Stratman in the amount of \$34,311,833.22,² plus post-judgment interest.³ On March 27, 2017, the Holdemans sought to collect the proceeds of Stratman’s Allstate policy by filing an action in the Jackson County Circuit Court pursuant to Missouri’s equitable garnishment statute, section 379.200, RSMo, naming both Stratman and Allstate as defendants.

On June 22, 2018, Stratman filed a cross claim against Allstate alleging that it committed the tort of bad faith refusal to settle and breached numerous fiduciary duties it owed him in its response to the Holdemans’ insurance claim and lawsuit against him. Stratman alleges that Allstate caused him to suffer a judgment far in excess of his insurance coverage. He further claims that

¹ The suit was brought against Stratman as well as others involved in the accident.

² The judgment was against Stratman and in favor of Steve Holdeman for \$28,196,248.41 and in favor of Sarah Holdeman for \$6,115,584.81 for their injuries and pre-judgment interest.

³ That judgment was affirmed by this court in *Holdeman v. Stratman*, 556 S.W.3d 46 (Mo. App. W.D. 2018).

Allstate's conduct caused him to suffer damage to his credit, stress, emotional distress, attorney fees, and a fear of bankruptcy.

During the course of the litigation, Allstate settled with the Holdemans and satisfied the tort judgment against Stratman. On July 18, 2018, the Holdemans dismissed all their claims with prejudice. This left Stratman's cross claim as the only remaining cause of action. On October 1, 2018, the Holdemans filed a satisfaction of the December 13, 2016 judgments and forever discharged Stratman from any and all liability.

On May 1, 2019, Allstate filed a motion to apply Kansas law to Stratman's cross claim. It cited this provision in the insurance policy:

What Law Will Apply

This policy is issued in accordance with the laws of Kansas and covers property or risks principally located in Kansas. 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 Kansas.

If a covered loss to the **auto**, a covered **auto** accident, or any other occurrence for which coverage applies under this policy happens outside Kansas, claims or disputes regarding that 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.

(Emphasis in original policy). Stratman opposed the motion, arguing that the "What Law Will Apply" provision does not apply to his tort claims and would be unenforceable and against Missouri's public policy if it were to apply. He further argued that Missouri's choice of law principles dictate that Missouri law govern his claims.

On July 10, 2019, the trial court entered an order holding that Kansas law would apply to all substantive issues in the case. On July 22, 2019, Allstate filed a motion for judgment on the

pleadings and a motion for summary judgment. It argued that Kansas does not recognize tortious causes of action for insurance claims. It concluded that Stratman could only collect the amount of the judgment against him as breach of contract damages. Since that judgment had been satisfied, Allstate argued that Stratman no longer had a cause of action against Allstate under Kansas law.

On August 1, 2019, Stratman filed a motion asking the trial court to reconsider its order to apply Kansas law. He also filed a response to Allstate's motion for judgment on the pleadings. On August 21, 2019, Stratman filed suggestions in opposition to Allstate's motion for summary judgment, arguing that facts material to whether Kansas or Missouri law applies remain in dispute and that Allstate is not entitled to judgment as a matter of law under either Missouri or Kansas law.

On February 4, 2020, the trial court entered a Judgment denying Stratman's motion to reconsider the order to apply Kansas law, granting Allstate's motion for judgment on the pleadings, and granting Allstate's motion for summary judgment. This appeal follows.

Standard of Review

The trial court in this case determined that Kansas law governed the substantive issues. This choice-of-law determination does not affect our standard of review. *Kissinger v. Am. Fam. Mut. Ins. Co.*, 563 S.W.3d 765, 775 (Mo. App. W.D. 2018). "Regardless of which state's law governs the substantive issues involved in this case, ... procedural questions are determined by the state law where the action is brought." *Id.* (internal quotation marks omitted). "The standard of review is a procedural matter for which this court will apply Missouri law." *Id.* (internal quotation marks omitted).

"We review a trial court's ruling determining which state's law applies to an insurance policy *de novo*." *Doe Run Resources Corp. v. Certain Underwriters at Lloyd's London*, 400 S.W.3d 463, 472 (Mo. App. E.D. 2013). "Whether to grant summary judgment is an issue of law

that this Court determines *de novo*.” *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007). “A court’s grant of judgment on the pleadings is reviewed *de novo*.” *Bell v. Phillips*, 465 S.W.3d 544, 547 (Mo. App. W.D. 2015) (internal quotation marks omitted).

Analysis

Stratman asserts six points on appeal, each of which depends on our resolution of Stratman’s first point on appeal. In his first point on appeal, Stratman argues that the trial court erred in granting Allstate’s motion to apply Kansas law to his cross claim. He states that Missouri’s choice of law principles dictate Missouri law applies to the bad faith cause of action pursuant to the second paragraph of the insurance policy’s choice of law provision. Alternatively, Stratman maintains that the insurance policy’s choice of law provision is unenforceable because public policy requires the application of Missouri law to his bad faith claim because the economic harm and place where he was injured, the place where the conduct causing his injury occurred, his residence, and the place where his relationship with Allstate is centered are all in Missouri.

“In construing the terms of an insurance policy, this Court applies the meaning which would be attached by an ordinary person of average understanding if purchasing insurance and resolves ambiguities in favor of the insured.” *Seeck*, 212 S.W.3d at 132 (internal quotation marks omitted). “An ambiguity exists when there is duplicity, indistinctness, or uncertainty in the meaning of the language in the policy.” *Id.* (internal quotation marks omitted). “Language is ambiguous if it is reasonably open to different constructions.” *Id.* (internal quotation marks omitted). “Absent an ambiguity, an insurance policy must be enforced according to its terms.” *Id.* “If, however, policy language is ambiguous, it must be construed against the insurer.” *Id.* (internal quotation marks omitted). “Generally speaking, whether a forum selection clause that by its terms applies to contract actions also reaches non-contract claims depends on whether resolution of the

claims relates to interpretation of the contract.” *Major v. McCallister*, 302 S.W.3d 227, 231–32 (Mo. App. S.D. 2009).

Resolution of Stratman’s first point on appeal first requires us to construe his insurance policy with Allstate. That policy includes a choice of law provision which provides in relevant part:

What Law Will Apply

This policy is issued in accordance with the laws of Kansas and covers property or risks principally located in Kansas. 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 Kansas.

If a covered loss to the **auto**, a covered **auto** accident, or any other occurrence for which coverage applies under this policy happens outside Kansas, claims or disputes regarding that 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.

(Emphasis in original policy). Allstate argues that the first paragraph applies to Stratman’s suit and, thus, Kansas law applies. Stratman argues the second paragraph applies and, because Missouri law would apply in the absence of a choice of law provision, Missouri law applies.

It is undisputed that the accident in this case was a covered loss that occurred outside of Kansas, requiring application of the second paragraph of the insurance policy’s choice of law provision. The parties dispute, however, whether Stratman’s bad faith refusal to settle claim falls within the scope of the second paragraph of the choice of law provision. Allstate argues a bad faith refusal to settle claim is not “an occurrence for which coverage applies.” Stratman argues that his bad faith refusal to settle is a “claim or dispute regarding” a covered loss or occurrence.

We agree with Stratman’s construction of the second paragraph of the insurance policy’s choice of law provision. The choice of law provision quoted above states that “claims or disputes regarding that covered loss ... or other covered occurrence” are to be governed by the law of the jurisdiction where the covered loss occurred if that state’s law would apply in the absence of contractual choice of law provision. Stratman alleges bad faith refusal to settle.

[A] bad faith refusal to settle action will lie when a liability insurer: (1) reserves the exclusive right to contest or settle any claim; (2) prohibits the insured from voluntarily assuming any liability or settling any claims without consent; and (3) is guilty of fraud or bad faith in refusing to settle a claim within the limits of the policy.

Scottsdale Ins. Co. v. Addison Ins. Co., 448 S.W.3d 818, 827 (Mo. banc 2014). By its very nature, this claim regards a covered loss or occurrence. The cause of action presupposes a claim against the policy that should have been settled and could have been settled but for the bad faith of the insurance carrier. To read the second paragraph of the policy’s choice of law provision to exclude bad faith refusal to settle because such claims are not themselves a covered loss or occurrence would be to disregard the plain language of the policy and an insured’s reasonable expectation in light of the plain language of the policy. See *Exotic Motors v. Zurich Am. Ins. Co.*, 597 S.W.3d 767, 770 (Mo. App. E.D. 2020) (“Where no ambiguity is found, we will enforce an insurance policy according to its terms, applying the plain and ordinary meaning as understood by lay persons buying insurance, consistent with the reasonable expectations, objectives, and intent of the parties.”) (internal quotation marks omitted). We find that the second paragraph of the insurance policy’s choice of law provision is applicable to the current case.

Pursuant to the second paragraph of the choice of law provision, claims regarding the Missouri accident may be governed by Missouri law only if Missouri law would apply in the absence of the first paragraph of the policy’s choice of law provision. In deciding the substantive

law which will apply, Missouri courts use Missouri's choice of law rules. *Interstate Cleaning Corp. v. Commercial Underwriters Ins. Co.*, 325 F.3d 1024, 1028 (8th Cir. 2003). Stratman argues that this court should use Section 145 of the Restatement (Second) of Conflict of Laws which applies to tort claims. Allstate argues this court should use Section 188, applying to contracts, and Section 193, applying to insurance contracts. Section 188 provides that the law of the state with the most significant relationship to the transaction and parties governs. Section 193 provides further guidance that, unless another state can be said to have a more significant relationship, the state which was the principal location of the insured risk is considered to be the state with the most significant relationship.

While arguing that this court should use Sections 188 and 193, applicable to contracts, Allstate nonetheless acknowledges that bad faith refusal to settle is an extra contractual claim.⁴ Stratman's cause of action for bad faith refusal to settle is a tort. *See, Bonner v. Automobile Club Inter-Ins. Exch.*, 899 S.W.2d 925, 928 (Mo. App. E.D. 1995) ("It is also clear that a bad faith action for refusal to settle sounds in tort, not in contract...") (internal quotation marks omitted);

⁴ Missouri cases discussing Sections 188 and 193 do so in the context of contract claims. *See, e.g., Kissinger v. Am. Fam. Mut. Ins. Co.*, 563 S.W.3d 765, 773 (Mo. App. W.D. 2018) (discussing uninsured motorist coverage and medical expense coverage under the insurance policy); *Kerns v. All. Indem. Co.*, 515 S.W.3d 254, 266 (Mo. App. W.D. 2017) (discussing stacking uninsured motorist benefits); *Doe Run Resources Corp. v. Certain Underwriters at Lloyd's London*, 400 S.W.3d 463, 471 (Mo. App. E.D. 2013) (discussing a refusal to pay out under an insurance policy); *Sauvain v. Acceptance Indem. Ins. Co.*, 339 S.W.3d 555, 559 (Mo. App. W.D. 2011) (discussing whether a policy covered a loss resulting from an accident); *Dodson Intern. Parts, Inc. v. Natl. Union Fire Ins. Co. of Pittsburg Pennsylvania*, 332 S.W.3d 139, 145 (Mo. App. W.D. 2010) (discussing whether exclusions applied so as to deny coverage); *Accurso v. Amco Ins. Co.*, 295 S.W.3d 548, 551 (Mo. App. W.D. 2009) (discussing whether underinsured limits under respective policies could be stacked); *Bauer v. Farmers Ins. Co.*, 270 S.W.3d 491, 493 (Mo. App. W.D. 2008) (discussing stacking of uninsured motor vehicle coverage); *Byers v. Auto-Owners Ins. Co.*, 119 S.W.3d 659, 663 (Mo. App. S.D. 2003) (discussing whether the driver of van involved in an accident was a covered driver under a commercial automobile liability policy); *Egnatic v. Nguyen*, 113 S.W.3d 659, 664 (Mo. App. W.D. 2003) (discussing whether an insurance company complied with its own cancellation and reinstatement procedures and whether it forfeited the premium payment requirement); *Atlas Intermodal Trucking Serv., Inc. v. United Fire & Cas. Co.*, 973 S.W.2d 174, 177 (Mo. App. E.D. 1998) (discussing an insurance company's duty to defend and indemnify under the terms of a policy); *Hartzler v. Am. Fam. Mut. Ins. Co.*, 881 S.W.2d 653, 654 (Mo. App. W.D. 1994) (discussing stacking of underinsured motorist coverage).

Scottsdale Ins. Co., 448 S.W.3d at 830 (underscoring that bad faith refusal to settle is a routine tort that can be assigned just like any other tort claim of a non-personal nature.). Thus, Section 145 is the applicable provision for the tort of bad faith refusal to settle. See *W. Am. Ins. Co. v. RLI Ins. Co.*, 698 F.3d 1069, 1073 (8th Cir. 2012) (“[B]ecause Missouri law characterizes an insurer’s bad faith failure to settle as a tort claim, Missouri courts would apply the ‘most significant relationship’ test set forth in § 145 of the Restatement (Second) of Conflict of Laws in resolving this choice-of-law issue.”).

“For conflicts of law related to tort claims, Missouri employs the most significant relationship test set forth in Restatement (Second) of Conflict of Laws § 145 (1971).” *Zafer Chiropractic & Sports Injuries, P.A. v. Hermann*, 501 S.W.3d 545, 550 (Mo. App. E.D. 2016).

Section 145 states:

- (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
- (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
 - (a) the place where the injury occurred,
 - (b) the place where the conduct causing the injury occurred,
 - (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
 - (d) the place where the relationship, if any, between the parties is centered.

Section 6 of the Restatement provides:

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

Stratman and Allstate disagree in their briefs over which state would prevail under a Section 145 analysis. In his fourth point on appeal, Stratman argues that summary judgment was error because the parties disagree on the Section 145 material facts including where the injury occurred, when the injury occurred, and where Stratman resided at the time of the injury. Allstate concedes that if a Section 145 analysis is required in this case, genuine issues of material fact are in dispute prevent the issuance of summary judgment. We agree. Stratman's first and fourth points are granted.

In his second and fifth points on appeal, Stratman argues the trial court erred in granting Allstate's motion for judgment on the pleadings and summary judgment because it applied Kansas law and such judgment was not appropriate under Missouri law. In his third and sixth points on appeal, Stratman argues his cross claim states a valid cause of action under Kansas law. Given our disposition of Stratman's first and fourth point, we need not address these other points on appeal.

The trial court's judgments determining that Kansas law applies to the substantive issues in this case and granting judgment on the pleadings and summary judgment in reliance on that

determination is vacated. The first paragraph of the insurance policy's choice of law provision is not applicable to this case. The second paragraph of the insurance policy's choice of law provision applies to Stratman's bad faith refusal to settle claim. Determining whether Missouri or Kansas law will apply to resolution of the claim will require the trial court to conduct a Section 145 analysis, which remains subject to the resolution of genuine issues of material fact in dispute.

Conclusion

The judgment is reversed and the matter is remanded for further proceedings consistent with this opinion.

A handwritten signature in black ink, appearing to read "Anthony Rex Gabbert", is written over a horizontal line.

Anthony Rex Gabbert, Judge

All concur.