

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE CINCINNATI)
INSURANCE COMPANY,)
)
Appellants,)
)
v.)
)
PEGGY SPAETH, et al.,)
)
Appellees.)

CASE NO. 12-1866

On Appeal from the
Court of Appeals,
Eighth Appellate District
Court of Appeals Case No.: 97715
Cuyahoga County Common Pleas

MEMORANDUM IN SUPPORT OF JURISDICTION

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FILED
NOV 05 2012
CLERK OF COURT
SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST OR INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents an important question as to whether individuals born in the State of Ohio, and thus said to be originally domiciled here, continue to be an Ohio domiciliary simply because they continue to visit the State for business after having relocated to Florida 20 years ago. It is not debatable that this question, and therefore this Court's response, would impact every person born in Ohio. More importantly, this legal issue impacts the many thousands of individuals, who may own a business or even real property in Ohio; but otherwise have a true, fixed permanent home with their spouse elsewhere and subjectively intend to be domiciled in another state. Accordingly, this case is one of a public and great general interest triggering this Court's jurisdiction.

The legal concept of domicile appears not to have been directly addressed by this Court since 1878, more than a century ago. The concepts discussed then, and originally established in *Sturgeon v. Korte*, 34 Ohio St. 525 (1878), provide that where a person resides is a purely factual analysis while the location of that person's domicile is determined by the individual's subjective intent. The principle of domicile identifies an individual's relation to a particular locality. *Id.* at 534 citing *Bell v. Kennedy*, L.R.1 H.L. 320. "Domicile implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance." *Williams v. N. Carolina* (1944), 325 U.S. 226, 229. While the fact of birth initially determines a person's domicile, that default domicile only remains "until another is chosen or where a person is incapable of choosing, until one results by operation of law." *Korte, supra* at 534.

Thus, this Court, from English Law, recognized and adopted that a domicile at birth will change when one who is capable of making a choice removes himself from that place and intends to remain at his new chosen residence. *Id.* "In a strict legal sense, that [chosen residence] is properly the domicile of a person where he has his true, fixed, permanent home and principle establishment, and to which, whenever he is absent, he has the intention of returning." *Korte, supra* at 535 quoting

Story's Conflict of Laws §41. Of particular significance, this Court continued, stating that "it is not, however, necessary that he should intend to remain there for all time. If he lives in a place, with the intention of remaining for an indefinite period of time, as a place of fixed present domicile, and not as a place of temporary establishment, or for mere transient objects, it is to all intents and all purposes, his residence." *Korte, supra* at 535 citing Story's Conflict of Laws §46; *Bruce v. Bruce*, 2 Bos & Pull. N.228; *Sears v. City of Boston*, 1 Met. 250.

Stated differently, domicile is referred to as the physical presence of one in a locale combined with the subjective intent to maintain a permanent residence. *City of Columbus, Division of Income Tax v. Firebaugh*, 8 Ohio App.3d 366, 368 (10th Dist.). Also, it is referred to as "factum" coupled with "animus." "Factum" refers to the fact of a residence while "animus" is defined as the intention to remain. The concept of domicile is both physical and mental. Without the subjective intent to identify the specific location as the person's true, fixed home, and main establishment, that location cannot be found to be the individual's domicile. *Gilbert v. David*, 235 U.S. 561; *City of Cleveland v. Surella*, 61 Ohio App.3d 302 (8th Dist. 1989).

Whether a residence is actually the person's intended permanent home "is known only by the individual concerned and is, therefore, largely a subjective determination." *Hager v. Hager*, 79 Ohio App.3d 239, 244 citing *Coleman v. Coleman*, 32 Ohio St. 155 (1972). Indeed, the simple fact of residence, which lacks the intent to remain permanently, prevents that location and residence from being held to be one's domicile. *Saafeld v. Saafeld*, 86 Ohio App. 225 (1st Dist. 1949). Finally, this Court has held that the very question of domicile is "***and must always remain, one of fact, often attended with much difficulty; but to be determined by the preponderance of evidence favoring one place as against another." *Korte, supra* at 535.

The necessity for a court to follow these concepts, and not misuse or alter them, becomes clear in this case. Appellant, Cincinnati Insurance Company (hereinafter "CIC") issued 83 year old

James Schill an umbrella insurance policy that extended coverage to blood-relatives with whom he shares the same “legal residence of domicile.” In this action, Appellee, Peggy Spaeth sought to extend coverage under this policy to James’s son, 62 year old Robert Schill, against whom she had brought a wrongful death claim on behalf of her late husband’s estate.

The Trial Court concluded that CIC’s umbrella liability insurance policy did not provide additional liability coverage for Robert Schill, a 63 year old Ohio resident, under the CIC policy issued to his 83 year old father, James Schill, because James was domiciled in Florida for the last 20 years and remains so. Therefore, since Robert Schill, an Ohio resident, was not domiciled with his father, James, Robert was not an “insured” under his father’s CIC umbrella liability policy and, thus, had no additional liability insurance coverage for an auto accident that Robert had in Ohio while driving Robert’s own car on which Robert had his own auto liability coverage..

Spaeth appealed and the central question she presented the Eight District Court of Appeals was whether an individual could have multiple domiciles, i.e., one for insurance purposes and one for everything else. The Eighth District, rather than directly addressing Spaeth’s narrowly tailored legal question, impermissibly weighed the factual evidence, rejected James’ undisputed subjective intent and held that James was domiciled in Ohio despite his relocation to Florida 20 years ago. The record was clear that since 1993, James has lived in Florida with his wife. Indeed, every facet of his personal life, from voting to paying taxes, has been done in Florida. James testified that he chose and intended Florida to be his permanent residence and domicile. His testimony, on those issues, was undisputed in the Civil Rule 56 evidentiary record. James went to great lengths to avoid be considered to be domiciled in Ohio. Indeed, he meticulously counted the number of days he was in Ohio on business so as to avoid being presumptively declared, under an Ohio tax statute, to be subject to Ohio income taxes.

Despite James' uncontroverted subjective intent, which was manifested through countless facts over the last 20 years, the Eighth District, in a summary judgment appeal, rejected James' intent and evidence. The Appellate Court impermissibly decided to be the fact finder and held that James' continued operation of his Ohio business and presence in the State for such purpose required a finding that the Ohio born was domiciled in Ohio. In so concluding, the Eighth District ignored its own precedent as well as what this Court stated originally in 1878.

The Eight District abrogated, or at a minimum altered, this Court's domicile analysis and principles in two important ways that will affect thousands of individuals, who have residence in Ohio, as well as the Ohio Department of Taxation and similar entities that rely on domicile rules. First, the Appellate Court improperly concluded that if a person is born in Ohio they are "presumed" to be domiciled in Ohio even where that individual hasn't permanently resided in the state for 20 years. Such a policy or legal presumption is unfair, unjust and not in accord with this Court's original statements on the issue. Rather, a presumption, if any exists, should be given to the place where that subject individual currently resides with their outward expression of their intent to make that residence their permanent home. *City of East Cleveland v. Landingham*, 97 Ohio App.3d 385, 391 (8th Dist. 1994) *citing* 25 American Jurisprudence 2d (1966) 61 Domicil §84, 36 Ohio Jurisprudence 1982, 367 Domicil §19. *In Re Estate of Paich*, 90 Ohio Law Abs. 470, reversed on other grounds, 1 Ohio St.2d 66 (1964).

Likewise, it has been stated that a residence in a specific location is "*prima facie* evidence of domicile there but is rebuttable by proof to the contrary." *Hager v. Hager*, 79 Ohio App.3d 239, 244 (2nd Dist. 1992) *citing* 36 Ohio Jurisprudence 3d (1982), Domicile §19. The Eight District's false presumption ignored this Court's standard for determining domicile and improperly shifted the burden to a non-Ohio resident to prove a negative.

The second change to this Court's domicile test occurred when the Appellate Court rejected James' stated intent to be domiciled in Florida. It is the individual's subjective intent which makes a person's residence their actual domicile. *Sturgeon v. Korte*, 34 Ohio St. 525 (1878); *Gilbert v. David*, 235 U.S. 561; *City of Cleveland v. Surella*, 61 Ohio App.3d 302 (8th Dist. 1989). A person's intended permanent home "is known only by the individual concerned and is, therefore, largely a subjective determination." *Hager v. Hager*, 79 Ohio App.3d 239, 244 citing *Coleman v. Coleman*, 32 Ohio St. 155 (1972).

While the Eighth District did comment that intent was a factor, its opinion establishes that it failed in any way to apply the domiciliary subjective intent requirement. In fact, without the subjective intent determination, the fact of residence is just that. While a person's actions indicate where a person resides, such is only sufficient to determine "residence". The concept of domicile, and its legal definition, embraces the additional requirement that a person subjectively intends to make that residence his domicile. The intent element establishes which residence the individual intends to return to as his permanent home when he is away from that residence for either business, vacation or other reasons. The Eighth District has altered this Court's requirement that intent is a determinative factor in establishing one's domicile. This Court needs to state whether the Appellate Court's alteration of the 1878 domicile standard is proper.

Separate and independent of the Eighth District's creation of a new domicile test, the Appellate Court admittedly improperly weighed evidence and applied the incorrect appellate standard of review. As this Court is aware, an appellate court reviews summary judgment determinations *de novo*, but that appellate court is still obligated to follow the same standard as set forth in Rule 56(C) of the Ohio Rules of Civil Procedure if it wishes to actually enter judgment for a party. Indeed, a summary judgment issued by any court may only be rendered where "reasonable minds can come but to one conclusion, that being that the moving party is entitled to judgment as a

matter of law.” On this very issue, this Court has previously summarily reversed the Eighth District for substituting its judgment on the factual determination of one’s domicile for that of the trial court. *See, In Re Estate of Paich*, 1 Ohio St.2d 66 (1964). This Court succinctly stating:

The domicile of decedent is a question of fact. The records contain sufficient evidence to support the judgment of the probate court. The Court of Appeals was in error in substituting its judgment with that of the probate court on a question of fact and entering final judgment. *In Re Estate of Tyler*, 159 Ohio St. 492.

Ohio law has cautioned all courts that they are not in a position to weigh the evidence. *Turner v. Turner*, 67 Ohio St.3d 337, 341 (1993), *McDaniels v. Daily*, 2008-Ohio-2080 (2nd Dist.) at ¶74-75, *Cox v. Barysplice Products, Inc.*, 2001 Ohio App. LEXIS 2641 (2nd Dist.) 2001-CA-1 (June 15, 2001) (“when reviewing a motion for summary judgment, a court must be careful not to weigh the evidence * * *”). A court is said to have improperly “deviated from its assigned role” where it actually weighs the evidence.) *McDaniels, supra* at ¶75.

Moreover, in derogation of these settled legal rules, the Eight District, in issuing judgment for Spaeth, stated that it was reviewing the evidence in Spaeth’s favor: “Nonetheless, in reviewing the evidence in Spaeth’s favor as required under Civ. R. 56, reasonable minds can come to but one conclusion about the location of James’ domicile.” *Spaeth v. State Auto Mut. Ins.*, 2012-Ohio-3813 (8th Dist.) at ¶39. The actual standard of review requires the opposite – that is—CIC was entitled to have the evidence construed most strongly in its favor before summary judgment could be awarded against CIC.

The Eighth District has changed this Court’s stated test to determine one’s domicile. The Appellate Court has likewise applied the incorrect standard of review, impermissibly weighed evidence and ignored an individual’s stated intent which is directly contrary to this Court’s case law. There are a myriad of factual scenarios that are now in question following the decision at issue. Jurisdiction is respectfully, required.

Finally, left unreviewed, the Eighth District's decision has the same improper expansion to insurance coverage that the original *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660 decision had in the early 1990's. The Appellate Court has expanded coverage to an individual never intended by any of the parties. The Court does so by ignoring the subjective intent of the named insured, James. This is not only in contradiction to the expressed domicile standard this Court long ago pronounced, but is a direct affront to this Court's more recent decision in *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849 which held that the named insured's intent must be the focus of the analysis.

STATEMENT OF THE CASE AND FACTS

Appellant, Cincinnati Insurance Company (hereinafter "CIC") issued James Schill an umbrella insurance policy that extended coverage to blood-relatives with whom he shares the same "legal residence of domicile." In this action, Appellee Peggy Spaeth sought to extend coverage under this policy to James's 63 year old biological son, Robert Schill, who is domiciled in Ohio, and against whom she had brought a wrongful death claim. The Trial Court, however, concluded that this policy did not cover Robert because 83 year old James Schill resided in, and was domiciled in, Florida for the last 20 years. Therefore, the policy's definition of "insured" was not met.

Spaeth appealed. The central question she presented was whether an individual could have multiple domiciles, i.e., one for insurance purposes and one for everything else. In fact, Spaeth never disputed that James Schill was properly domiciled in Florida. Instead, she claimed that Schill could have a separate domicile, solely for insurance purposes, that being Ohio.

This declaratory judgment action stems from Robert's involvement in an automobile collision that resulted in the death of Spaeth's husband. Spaeth filed a wrongful death suit against Robert, and they both sought coverage under an umbrella policy that CIC issued to Robert's father, James. This policy defines "insured" as including any "resident relative" of a named insured, which

in this case is James and his wife, Jean. "Resident relative," in turn, is defined as a blood-relative who is "a resident of 'your' household and whose legal residence of domicile is the same as yours."

There is no question that Robert is domiciled in Ohio. He has not been in the state of Florida for over 20 years. Although James undoubtedly has regular contact with Ohio, it is equally clear that he is, and has been, domiciled in Florida for nearly 20 years. James has lived in Bonita Springs, Florida, with his wife, Jean, since 1993. They promptly applied for and obtained a Homestead Exemption, which entitled them to a reduced assessment on their residence, 4420 Deerwood Court, Bonita Springs, Florida, under Florida tax law based on proof that this was their permanent residence and his intent that this be his permanent home and domicile.

James owns two vehicles that are titled in Florida, in his name, and that are also registered in Florida. One is garaged in Florida, and one is garaged in Ohio for his use and convenience during his visits here. He has been registered to vote in Florida since 1993 and has not voted in Ohio since then. He has had a Florida driver's license since 1993, at which time he also allowed his Ohio driver's license to expire.

As far as his finances are concerned, James receives Social Security benefits that are directly deposited into his Florida bank account where he also maintains his personal checking and savings accounts and, until about three years ago, his safety deposit box. James identifies the Florida domicile for all credit cards, federal tax returns and any other governmental entity or business. James does not file a State of Ohio income tax return.

On a personal level, James and his wife are registered parishioners of a Catholic church in Bonita Springs, Florida. Additionally, James's family doctor is located in Florida, as was his former dentist before he received dentures. All of the Schill family heirlooms, antiques, treasures, and dear personal property are also located in Florida.

At all relevant times, James was the CEO and chairman of Chem Technologies, Ltd., which is located in Middlefield, Ohio. Each month, he travels to Ohio from his home in Florida to work at Chem Technologies for about 10-15 days. It is always James Schill's intent, however, to return to his wife and residence in Bonita Springs, Florida, after concluding his business in Ohio.

Based on this litany of factual evidence, and James' undisputed subjective intent establishing Florida as James' domicile, CIC asserted that Robert is not entitled to coverage under James' umbrella liability policy because he has a separate domicile than James. To avoid this conclusion, Spaeth had to get creative. Spaeth contended that the word "domicile," as used in James's umbrella policy, can be construed to mean "domicile for insurance coverage purposes." Thus, Spaeth argued that James has a "domicile" in Florida for some purposes and another "domicile" in Ohio "for insurance coverage purposes." The parties filed Cross Motions for Summary Judgment. The Trial Court rejected Spaeth's two domicile analysis and entered summary judgment in favor of CIC.

Spaeth appealed. The Eighth District Court of Appeals, rather than directly addressing Spaeth's narrowly tailored question, went "off the board" and improperly determined that every individual whom is born in this State is "presumed" to have Ohio as their domicile and if that individual ever intends to return to Ohio, for whatever purpose, the Eighth District has held that is more determinative than the individual's actions and intent to reside permanently in another State.

LAW AND ARGUMENT

I. Proposition of Law No. I: A Person Has Only One Domicile: Where the Person Resides and has the Intent to Remain Permanently and Return to When Away Temporarily. (*Sturgeon v. Korte*, 34 Ohio St. 525 (1878), affirmed and restated).

The principle of domicile identifies an individual's relation to a particular locality. *Sturgeon v. Korte*, 34 Ohio St. 525 (1878) at 534 citing *Bell v. Kennedy*, L.R.1 H.L. 320. "Domicile implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance." *Williams v. N. Carolina* (1944), 325 U.S. 226, 229. While the fact of birth initially determines a person's domicile, that default domicile only remains "until another is chosen or where a person is incapable of choosing, until one results by operation of law." *Korte, supra* at 534.

"In a strict legal sense, that [chosen residence] is properly the domicile of a person where he has his true, fixed, permanent home and principle establishment, and to which, whenever he is absent, he has the intention of returning." *Korte, supra* at 535 quoting Story's Conflict of Laws §41. If an individual lives in a place, with the intention of remaining for an indefinite period of time, as a place of fixed present domicile, and not as a place of temporary establishment, or for mere transient objects, it is to all intents and all purposes, his residence." *Korte, supra* at 535 citing Story's Conflict of Laws §46; *Bruce v. Bruce*, 2 Bos & Pull. N.228; *Sears v. City of Boston*, 1 Met. 250.

Stated differently, domicile is referred to as the physical presence of one in a locale combined with the subjective intent to maintain a permanent residence. *City of Columbus, Division of Income Tax v. Firebaugh*, 8 Ohio App.3d 366, 368 (10th Dist.). Also, it is referred to as "factum" coupled with "animus." "Factum" refers to the fact of a residence while "animus" is defined as the intention to remain. The concept of domicile is both physical and mental. Without the subjective intent to identify the specific location as the person's true, fixed home and main establishment, that

location cannot be found to be the individual's domicile. *Gilbert v. David*, 235 U.S. 561; *City of Cleveland v. Surella*, 61 Ohio App.3d 302 (8th Dist. 1989).

Whether a residence is actually the person's intended permanent home "is known only by the individual concerned and is, therefore, largely a subjective determination." *Hager v. Hager*, 79 Ohio App.3d 239, 244 *citing* *Coleman v. Coleman*, 32 Ohio St. 155 (1972). The principle factors utilized to determine an individual's intent to identify a location as their domicile include the specific declarations of the individual coupled with where the individual's family is located, where the individual votes and pay taxes. *State ex rel. Caplan v. Kubn*, 8 Ohio N.P. 197 (1901), 201; *Gill v. Blumenberg*, 19 Ohio App. 404, 412 (4th Dist.); *Esker v. McCoy*, 5 Ohio Dec. Rep. 573 (C.P. 1878); *Chase v. Prudential Life Ins. Co.*, 24 Ohio Law. Abs. 439 (2nd Dist. 1937). Finally, this Court has held that the very question of domicile is "* * *and must always remain, one of fact, often attended with much difficulty; but to be determined by the preponderance of evidence favoring one place as against another." *Korte, supra* at 535.

In sum, "If a person has actually removed from one place to another, with an intention of remaining in the latter for an indefinite time and as a place of fixed present domicile, such latter place is to be deemed his place of domicile notwithstanding he may entertain a floating intention to return to his previous domicile at some future period. The intention to retain a former domicile is unavailing if it is doubtful, vague or equivocal." *Redrow v. Redrow*, 94 Ohio App. 38 (12th Dist. 1952) *quoting* 17 American Jurisprudence, 609, §31.

The Eleventh District Court of Appeals decision in *City of Warren v. Rebhan*, 2011-Ohio-6340 (11th Dist.) is illustrative of the proper domicile inquiry this Court originally established. Therein, the Eleventh District noted that whether someone has abandoned property is irrelevant in the determination of one's domicile. Instead, "the relevant inquiry, rather, is whether the [person] intended to abandon his domicile in [one city] in favor of acquiring a domicile in [a new city]." *Id.* at

¶29. In the case *sub judice*, James Schill unequivocally testified that in 1993 when he moved from Ohio to Florida he intended Florida to be his domicile. That intent is supported through circumstantial evidence including the fact that James' wife moved with him to Florida, both he and his wife voted regularly over the next 20 years in Florida, as well as various other factual attributes establishing Florida was his domicile. While it may be true that James Schill returned to Ohio regularly, indeed monthly, during the year for business purposes, that neither equates towards to either re-establishing an Ohio domicile or abandoning his Florida domicile. Once again, James' intent when supported with the fact of residence is what is paramount. The Eighth District Court of Appeals failed to recognize the importance of James' intent and further improperly required him to rebut a presumption that he was domiciled in Ohio today when he had left the state 20 years ago.

II. Proposition of Law No.: II: Where an Appellate Court Reviewing a Summary Judgment Identifies Factual Issues in the Record Supporting Both the Movant and the Non-Movant, the Appellate Court is Required to Remand the Factual Issues to the Trial Court for Further Proceedings and May Not Weigh the Evidence to Issue Judgment.

It is axiomatic that where parties have filed cross-motions for summary judgment, both parties mutually assert that the evidence presented does not create a genuine issue of material fact permitting a trial court to issue judgment as a matter of law. *Heritage Mut. Ins. Co. v. Ricart Ford, Inc.*, 105 Ohio App.3d 261, 264,(10th Dist. 1995)(“The filing of cross-motions for summary judgment does not establish the absence of an issue of fact”); *Johnson v. Kroger Co.*, 1994 Ohio App. LEXIS 4760, *5-6, 4th Dist. No. 94CA-2218 (Oct. 19, 1994)(“The filing of cross-motions for summary judgment does not establish the absence of an issue of fact.”).

Consequently, if a movant claims that there is an absence of a material issue of fact, and that only a legal question remains, such position is limited to his own motion for summary judgment. That party is certainly not inviting a court's determination that there is no material issue of fact regarding the opposing party's cross-motion for summary judgment. *Id.*

Moreover, it is the absence of a dispute over material facts that then permits a court to reach judgment as a matter of law. *American States Ins. Co. v. Honeywell*, 1990 Ohio App. LEXIS 753, 8th Dist. No.: 56552 (March 1, 1990) *citing* and quoting *Norris v. Ohio Std. Oil Co.*, 70 Ohio St.2d 1 at 2 (“a successful motion for summary judgment rests on the two-part foundation that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law”).

While it is true that an appellate court reviews summary judgment determinations *de novo*, the appellate court is still obligated to follow the same standard as set forth in Rule 56(C) of the Ohio Rules of Civil Procedure. *Kuhn v. Youlten*, 118 Ohio App.3d 168, 175 (8th Dist. 1997) (“The reviewing court evaluates the record * * *in a light most favorable to the non-moving party * * * the motion must be overruled if reasonable minds could find for the party opposing the motion.”) *Id. citing Saunders v. McFaul*, 71 Ohio App.3d 46, 58 (8th Dist. 1990); see also, *Norris v. Ohio Std. Oil Co.*, 70 Ohio St.2d 1 at 2.

A “material fact” has been deemed to be one which would affect the disposition of the litigation under the applicable law. *Stachura v. City of Toledo*, 177 Ohio App.3d 481, 2008-Ohio-3581 (6th Dist.) at ¶23 *citing Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304 (6th Dist. 1999), *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826 (8th Dist. 1996), *citing Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

Ohio law likewise cautions all courts that they are not in the position to weigh the evidence. *Turner v. Turner*, 67 Ohio St. 3d 337, 341(1993), *McDaniel v. Daiby*, 2008-Ohio-2080 (2nd Dist.) at ¶74, *Cox v. Barsplice Products, Inc.*, 2001 Ohio App. LEXIS 2641 (2nd Dist.) 2001-CA-1 (June 15, 2001) (when reviewing a motion for summary judgment, a court must be careful not to weigh the evidence * * *) indeed a court improperly is said to have “deviated from its assigned role” where it weighs the evidence. *McDaniel, supra* at ¶75.

In the Eighth District's August 23, 2012 decision, the Court very carefully outlines all of the various facts and evidence which supported CIC's argument that James Schill was domiciled in Florida. *Spaeth v. State Auto Mutual Ins. Co.*, 2012-Ohio-3813 at ¶¶27-32. The Court thereafter sets forth the Spaeth's alleged countervailing evidence and facts from James Schill's deposition. *Id.* at ¶¶33-36. The Court having set forth opposing facts and evidence on the material issue of domicile was required at that point to determine that the trial court's summary judgment was in error and remand for the material issue of fact to be decided by the fact finder. *See, Norris v. Ohio Std. Oil Co.*, 70 Ohio St.2d 1 at 2, *Kuhn v. Youlten*, 118 Ohio App.3d 168, 175 (8th Dist. 1997), *Saunders v. McFaul*, 71 Ohio App.3d 46, 58 (8th Dist. 1990), *American States Insurance Co. v. Honeywell*, 1990 Ohio App. LEXIS 753, 8th Dist. No.: 56552 (March 1, 1990).

Instead, the Court improperly weighed the alleged questions of fact and issued its own factual finding where the Court stated "we glean from James' deposition testimony the following facts and conclusions:" *Spaeth v. State Auto Mutual Ins. Co.*, 2012-Ohio-3813 at ¶38. By so doing this Court impermissibly disregarded all of the undisputed evidence which indicated James Schill's domicile to be in Florida. *Id.* at ¶38. Respectfully, the Appellate Court's failed to adhere to the requisite standard of review when this Court weighed the respective positions on the issue of domicile: "It is not the duty of a court to determine what the facts are, but whether a genuine issue of material fact exists." *Stemen v. Shibley*, 11 Ohio App.3d 263, 269 (6th Dist. 1982) *citing Saunders v. Winters Natl. Bank*, 120 Ohio App. 125 (2nd Dist. 1963), *Bowlds v. Smith*, 114 Ohio App. 21, 29 (6th Dist. 1961).

CONCLUSION

Jurisdiction over this matter is warranted. The legal definition of domicile in Ohio set forth in 1878 and left untouched before the intrusion in this matter makes paramount the individual's intended permanent residence. An individual's subjectively stated intent should thereafter be presumed his actual domicile unless evidence exists which would lead to reasonable minds coming to but one conclusion as to a different domicile.

The Eighth District's decision here calls into question whether the subjective intent prong of the domicile test is necessary and further questions whether an appellate court, confronted with what it believes evidence on both sides of an issue, nonetheless permits the appellate court to weigh that evidence "gleaning" what it will from the evidence in issuing judgment beyond what its assigned standard of review permits. Accordingly, this Court should accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing instrument was made by mailing true and correct copies thereof, in sealed envelopes, postage fully prepaid and by depositing same in the U.S. mail on this 2nd day of November, 2012, to the following:

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[Cite as *Spaeth v. State Auto Mut. Ins. Co.*, 2012-Ohio-3813.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 97715

PEGGY SPAETH

PLAINTIFF-APPELLANT

vs.

STATE AUTO. MUTUAL INS. CO., ET AL.

DEFENDANTS-APPELLEES

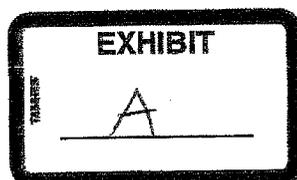
**JUDGMENT:
REVERSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CV-753013 and CV-710632

BEFORE: Rocco, J., Cooney, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: August 23, 2012

-i-



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KENNETH A. ROCCO, J.:

{¶1} Plaintiff-appellant Peggy Spaeth appeals from the trial court's order granting summary judgment in favor of defendant-appellee The Cincinnati Insurance Company ("CIC") on her claim for an extension of coverage under an umbrella insurance policy issued by CIC (the "Policy") to James Schill and his wife, Jean Schill. Spaeth sought to extend coverage under the Policy to the Schills' biological son, Robert Schill, against whom she brought a wrongful death action.

{¶2} In granting CIC's motion, the trial court concluded there is no extension of coverage under an umbrella policy when a relative does not reside both in the named insured's household and have the same legal residence of domicile as the named insured, where the policy's definition of "insured" requires a "resident relative" to meet both conditions. The trial court found that James is domiciled in Florida whereas Robert is domiciled in Ohio. The Policy did not, therefore, provide coverage to Robert because Robert and James do not share the same domicile.

{¶3} Spaeth asserts three assignments of error in which she raises the following three issues: whether (1) James is domiciled in Ohio, at least for purposes of coverage under the Policy, (2) a genuine issue of material fact remains for litigation regarding the location of James's domicile, or (3) Robert is an insured under the Policy regardless of the location of James's domicile.

{¶4} Upon a review of the record, this court answers Spaeth's first question in the affirmative. We, therefore, reverse the trial court's grant of summary judgment in favor of CIC, and its denial of Spaeth's motion for summary judgment.

{¶5} On August 16, 2008, Spaeth's husband, Dr. Miles M. Coburn, was riding his bicycle northbound on State Route 44 in Newbury Township. Robert was at the same time driving his motor vehicle southbound on Route 44. At the intersection near State Route 44 and Music Street, Robert crested a hill and struck Coburn, who may have been attempting a left turn onto Music Street. Coburn died as a result of the collision.

{¶6} Robert was driving his personally owned vehicle on August 16, 2008. The vehicle was covered by an automobile liability insurance policy issued by State Automobile Insurance Company and State Automobile Mutual Insurance Company (collectively, "State Auto"). The policy had a coverage limit of \$500,000.

{¶7} On November 19, 2009, Spaeth filed a wrongful death action against Robert and State Auto, Cuyahoga C.P. No. CV-710632. After settlement, Spaeth dismissed her claims against State Auto on July 23, 2010.

{¶8} On April 11, 2011, Robert filed a declaratory judgment action after CIC denied him coverage under the Policy, Cuyahoga C.P. No. CV-753013. Robert sought a declaration that he is an "insured" under the Policy by arguing (1) he is James's blood relative, (2) he is a resident of James's household, and (3) he has the same legal residence of domicile as James. CIC countered that James can have only one "legal residence of

domicile” and it is in Florida. Because Robert is domiciled in Ohio, Robert is not entitled to coverage under the Policy.

{¶9} After the trial court consolidated the wrongful death and declaratory judgment actions, all parties filed motions for summary judgment on the issue of James’s domicile.

The trial court agreed with CIC and granted its motion for summary judgment, and denied Spaeth’s and Robert’s motions for summary judgment.

{¶10} The parties entered into a global confidential settlement agreement in which the sole remaining issue is liability coverage for Robert under the Policy. Although Robert had separate counsel below, he assigned his claim for coverage under the Policy to Spaeth as administrator of Coburn’s estate.

{¶11} Spaeth now appeals and presents the following assignments of error:

1. The trial court erred in granting summary judgment in favor of Defendant-Appellee The Cincinnati Insurance Company (See Journal Entries of 11/17/11, 11/18/11, and Nunc Pro Tunc Journal Entry of 2/28/12).
2. The trial court erred in denying summary judgment motions of Appellant-Assignee Peggy Spaeth and her Assignor, Robert J. Schill (See Journal Entries of 11/17/11, 11/18/11, and Nunc Pro Tunc Journal Entry of 2/28/12).
3. Alternatively, and at a minimum, if there are genuine issues of disputed facts on where an insured is domiciled for purposes of providing liability coverage under this umbrella policy, the issue must be resolved by a jury, instead of on summary judgment (See Journal Entries of 11/17/11, 11/18/11, and Nunc Pro Tunc Journal Entry of 2/28/12).

{¶12} A declaratory judgment action allows a court of record to declare the rights, status, and other legal relations of the parties. Civ.R. 57 and R.C. Chapter 2721. Such

an action is an appropriate mechanism for establishing the obligations of an insurer in a controversy between it and its insured as to the fact or extent of liability under a policy. *Lessak v. Metro. Cas. Ins. Co. of N.Y.*, 168 Ohio St. 153, 155, 151 N.E.2d 730 (1958). When a declaratory judgment action is resolved by summary judgment, our review of the trial court's resolution of legal issues is de novo. *King v. W. Res. Group*, 125 Ohio App.3d 1, 5, 707 N.E.2d 947 (7th Dist.1997). The court applies the following test:

Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor.

Zivich v. Mentor Soccer Club, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201.

{¶13} The party moving for summary judgment bears the initial burden of showing there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264. If the moving party satisfies that burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's responses, by affidavit or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). Identical standards of interpretation are applied to insurance contracts as are applied to other written contracts. *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.*, 64 Ohio St.3d 657, 665, 597 N.E.2d 1096 (1992). We examine the insurance contract as a whole and presume that the intent of the parties is

reflected in the policy's language. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d 411 (1987), paragraph one of the syllabus. Interpretation of a clear and unambiguous insurance contract is a matter of law, subject to de novo review. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (1995).

{¶14} With the foregoing principles in mind, we turn to the language of the Policy issued to the Schills. We must initially determine whether James and Robert share the same domicile, or whether there remains a genuine issue of material fact relating to this determination.

{¶15} The Policy contains the following definitions:

Throughout this policy the words "you" and "your" refer to the person named in the Declarations as the Named Insured and his or her legally recognized spouse, provided his or her spouse's legal residence of domicile is the same as theirs.

* * *

6. "Coverage territory" means anywhere.

* * *

11. "Insured":

a. Means:

* * *

(2) For "occurrences" caused by the use of "automobiles":

* * *

(c) "Your resident relatives" for any "occurrence", involving an "automobile" they own, lease, rent or use.

* * *

16. "Resident relative" means:

a. A person related to "you" by blood, marriage or adoption that is a resident of "your household" and whose legal residence of domicile is the same as yours.

* * *

21. "Underlying insurance" means the policies of insurance listed in Schedule A – Schedule of Underlying Insurance and the insurance available to the "insured" under all other insurance policies applicable to the "occurrence." "Underlying insurance" also includes any type of self-insurance or alternative method by which the "insured" arranges for funding of legal liabilities which would also be insured under this policy.

{¶16} The Policy does not define "resident" or "household." Nor does it define "domicile" or "legal residence of domicile."

{¶17} The Declarations Page of the Policy (Policy No. U02 0260766, effective August 24, 2007 to August 24, 2008) identified James and Jean Schill as the Named Insureds. The address listed on the Policy was "16800 Orange Lane, Burton, OH 44021-9212" (the "Ohio House"). The policy limits were \$5 million. Although the Schedule of Underlying Insurance specified minimum limits of insurance for bodily injury and property damage to be maintained by "you and your relatives" during the term of the Policy, specific insurance policies were not listed in the schedule.

{¶18} The Schills also maintained an Executive Homeowner policy with CIC, Policy No. H04 0260766, effective from August 24, 2007 to August 24, 2008. The Schills were the Named Insureds on this policy, and the address listed was the Burton, Ohio address listed in the Policy. The policy limits were \$500,000.

{¶19} Finally, the Schills maintained an Executive Homeowner policy with CIC, Policy No. H02 0260766, effective from October 29, 2007 to October 29, 2008. The Schills were the Named Insureds on this policy, but the address listed was “4420 Deerwood Ct., Bonita Springs, FL 34134-8763” (the “Florida House”). The policy limits were \$300,000.

{¶20} The Policy’s insuring agreement provides, in relevant part, CIC will pay on behalf of an insured the ultimate net loss that the insured is legally obligated to pay as damages arising out of an occurrence that is in excess of the underlying insurance. Insured, for purposes of occurrences caused by the use of an automobile, means your “resident relatives” for any occurrence involving an automobile they own, lease, rent, or use. “Resident relative” means a person related to you by blood, marriage, or adoption that is a resident of your household *and* whose legal residence of domicile is the same as yours.

{¶21} There is no dispute Robert is related to James by blood. In order to qualify as a “resident relative” under the Policy, Robert also needs to reside in James’s household *and* his legal residence of domicile. If Robert qualifies as a “resident relative,” meaning he resides both in James’s household *and* his legal residence of domicile, he is an

“insured” as defined under provision 11(a)(2)(c) of the Policy. Under these circumstances, CIC must pay the ultimate net loss that Robert is legally obligated to pay as damages arising out of the August 16, 2008 accident that is in excess of the underlying insurance. If he is not an insured under provision 11(a)(2)(c) of the Policy, CIC has no obligation to provide coverage for any damages as a result of the August 16, 2008 accident.

{¶22} While it is true the Policy does not define “resident” or “reside,” this case is distinguishable from the line of cases holding where “resident” or “reside” is not defined, the terms are ambiguous and thus strictly construed against the insurer and liberally in favor of the insured. *E.g., Prudential Prop. & Cas. Ins. Co. v. Koby*, 124 Ohio App.3d 174, 705 N.E.2d 748 (11th Dist.1997). Here, the Policy also requires a resident relative to reside in the Named Insured’s “legal residence of domicile.”

{¶23} It is a fundamental principle of law that a person must have a domicile. *Senn v. Cleveland*, 8th Dist. No. 84598, 2005-Ohio-765, ¶38. That domicile, in the words of Justice Holmes, is a person’s “pre-eminent headquarters.” *Williamson v. Osenton*, 232 U.S. 619, 625, 34 S.Ct. 442, 58 L.Ed. 758 (1914). It therefore follows that, while a person may have multiple residences, he may have only one domicile at any one time. *See, e.g., State ex rel. Klink v. Eyrich*, 157 Ohio St. 338, 343, 105 N.E.2d 399 (1952).

{¶24} “The burden of proof of domicile rests upon the party whose right to affirmative relief depends upon establishing his domicile or the domicile of another in a

given place.” *E. Cleveland v. Landingham*, 97 Ohio App.3d 385, 391, 646 N.E.2d 897 (8th Dist.1994), citing *Indian Hill v. Atkins*, 57 Ohio L. Abs. 210, 90 N.E.2d 161 (1st Dist.1949). In this case, the burden is initially on Spaeth. Evidence was presented to demonstrate that James was born, raised, married, and worked in Ohio at least up until 1993 when his wife purchased a home in Florida. This evidence was sufficient for Spaeth to meet her initial burden of proof. *Landingham*.

{¶25} Once Spaeth established James’s domicile in Ohio, the burden then shifted to CIC. “The law in this area is well-established: ‘a person is presumed to continue his old domicile until it is clearly shown that he has acquired a new one.’” *Springfield v. Betts*, 114 Ohio App.3d 70, 73, 682 N.E.2d 1025 (2d Dist.1996), quoting 36 Ohio Jurisprudence 3d (1982), Domicile, Section 19. The acquisition of a new domicile requires two elements: the factum, or residence, and the animus, or an intention to remain. *Landingham*, citing *Anderson v. May*, 91 Ohio App. 557, 107 N.E.2d 358 (7th Dist.1951), *rev’d on other grounds*, 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953). *See also Holtz v. Holtz*, 2d Dist. No. 2005-CA-43, 2006-Ohio-1812. The Supreme Court of Ohio, quoting a judgment entry from the Clermont County Probate Court, has consequently emphasized:

When a person’s legal residence is once fixed * * * it requires both fact and intention to change it. In other words, to effect a change in domicile from one locality, country, or state to another, there must be an *actual abandonment of the first domicile, coupled with an intention not to return to it*, and there must be a new domicile acquired by actual residence in another place, with the intention of making the last acquired residence a permanent home. The acts of the person must correspond with such purpose. The change of residence must be voluntary; the residence at the place chosen for

the domicile must be actual and to the fact of residence there must be added the animus manendi, which means the mind to remain.

(Emphasis added.) *In re Estate of Hutson*, 165 Ohio St. 115, 119, 133 N.E.2d 347 (1956).

{¶26} Pursuant to *Hutson*, the abandonment of a former domicile and the acquisition of a new one happens only by the concurrence of both the fact of a new residence and the *intent to remain* in that residence. The intention of making the last acquired residence a permanent home must correspond with the acts of the person. *Id.*

{¶27} In support of its position that James changed his domicile from Ohio to Florida, CIC relied on the Schills' move to Florida in 1993. Jean Schill owns the Florida House for which she promptly applied for and obtained a Homestead Exemption. The exemption led to a reduced assessment on the Florida House under Florida tax law based on proof the house was a permanent residence. While he admitted receiving some bills at the Ohio House and keeping a car there, James testified during deposition he does not "reside here." James also testified he considers the Florida House his residence, a "permanent location for all purposes," including tax purposes.

{¶28} James is the CEO and Chairman of ChemTechnologies, Ltd. located in Middlefield, Ohio. He travels to Ohio to work at the business approximately 10 to 15 days per month, and stays at the Ohio House for both cost and convenience. James testified he always intends to return to Florida following completion of business in Ohio.

{¶29} James owns two vehicles. They are both titled in his name and registered in Florida even though he garages one car in Ohio for his use and convenience while in

Ohio. James registered in 1993 to vote in Florida; he has not voted in Ohio since 1993. James also allowed his Ohio driver's license to expire when he obtained a Florida driver's license in 1993.

{¶30} James maintains a Florida bank account in which he receives his Social Security benefits by direct deposit. His personal checking and savings accounts are in Florida. James also receives his personal credit card bills at the Florida House.

{¶31} James's family doctor is located in Florida. All of the Schills' family heirlooms, antiques, treasures, and personal property dear to them are also located in Florida.

{¶32} Finally, James generally spends less than 160 days in Ohio per year. James, a CPA who is no longer in practice, is aware of the Ohio statute that specifies the number of days a person may spend in Ohio without potentially rebutting a presumption that you are not domiciled in Ohio. According to James, he purposely stays in Ohio under the statutory limit to avoid questions about his domicile.

{¶33} Spaeth counters that certain other facts establish James's intent to be domiciled in Ohio, not Florida, at least for insurance purposes. In addition to other evidence, we turn to James's deposition testimony in considering Spaeth's position.

{¶34} James testified with regard to his understanding of the Policy and the Ohio House homeowner policy:

Q. Did [the insurance agent] ever indicate to you that Robert would be covered under the homeowners insurance for the Orange Lane property?

A. We just never discussed that one way or other.

* * *

A. I assumed that any title holder to the property would be. I took it for granted that [the insurance agent] would make sure that any title holder was protected.

Q. Under that policy with Cincinnati?

A. Under that policy, m-hm.

Q. All right. And that would include Robert as a title holder?

A. Sure. Yes.

* * *

Q. Did the umbrella policy provide coverage to you for both Florida and Ohio to your knowledge?

A. It was around the clock coverage wherever. For wherever and whatever.

Q. For both households, both households, correct?

A. Yeah.

{¶35} With regard to his future intentions about returning to Ohio for a couple of weeks per month, James testified:

Q. What was your purpose for moving to Florida in 1993?

A. Well, we had sold a business in Chardon, Ohio. We had a very small condominium down there where my wife liked very much. We thought I was going to retire, so we moved to Florida. *But I flunked retirement.*

* * *

Q. As you sit here today, do you intend to stop coming back to Ohio for the middle two weeks at any point in time?

A. As long as I'm physically able, I'm trying to beat JCPenney's record of 99 years.

Q. *So as long as you can come to Ohio for a couple of weeks every month, you will?*

A. Yes.

* * *

Q. And are you an active CEO as it relates to ChemTechnologies, aware of its day-to-day operation?

A. You better believe it.

* * *

Q. And whenever you come in from Florida for business purposes, it's always your intent to return to the Orange Lane address to stay at nighttime?

A. Yes.

(Emphasis added.)

{¶36} With regard to James's intentions about limiting his time in Ohio, he testified:

Q. Have you ever filed a formal declaration with the State of Ohio indicating that you are not domiciled in Ohio?

A. No.

* * *

Q. Would it be fair – so you're aware that Ohio has a statute that specifies that if you are in Ohio less than a certain amount of days, you are rebuttably presumed not to be domiciled in Ohio, correct?

A. I am aware of that.

* * *

A. It used to be, it used to be less than 150, no question. From 150 to 180 you could state your case. *Over 180, you're dead.*

* * *

Q. If you were in Ohio less than 150 days, there was no question that you were not domiciled in Ohio, correct?

* * *

A. Correct.

Q. And between 150 and 180 days back then, if you were here * * * you could state your case and make the case that you weren't really a resident of Ohio, correct.

A. Correct.

* * *

Q. And at all times you were aware of those parameters and you attempted to abide by them, so that there's no question that you were not a resident of Ohio, correct?

* * *

A. Correct.

Q. *Have you ever filed what they call an Affidavit of Non-Ohio Domicile or a notice of no Ohio income tax liability with the Ohio Department of Taxation?*

A. *No.*

(Emphasis added.)

{¶37} As it relates to this line of inquiry, R.C. 5747.24(B)(1) currently provides:

(B)(1) Except as provided in division (B)(2) of this section, an individual who during a taxable year has no more than one hundred eighty-two contact periods in this state, which need not be consecutive, and who during the entire taxable year has at least one abode outside this state, is presumed to

be not domiciled in this state during the taxable year if, on or before the fifteenth day of the fourth month following the close of the taxable year, the individual files with the tax commissioner, on the form prescribed by the commissioner, a statement from the individual verifying that the individual was not domiciled in this state under the division during the taxable year.

* * *

The presumption that the individual was not domiciled in this state is irrebuttable unless the individual fails to timely file the statement as required or makes a false statement. *If the individual fails to file the statement as required or makes a false statement, the individual is presumed under division (C) of this section to have been domiciled in this state the entire taxable year.*

(Emphasis added.)

{¶38} We glean from James's deposition testimony, the following facts and conclusions:

- 1) James was born, raised, and married in Ohio, and worked here his entire career. He has no current intention to stop working and stop returning to the Ohio House. James intended to "retire" to Florida, but he "flunked retirement."
- 2) James does not own either the Ohio House or Florida House. His wife owns the Florida House and two-thirds of the Ohio House. Robert owns the remaining one-third of the Ohio House. Moreover, a purchase of a second home alone is a neutral fact that does not meet CIC's burden of proving that James changed his domicile from Ohio to Florida. In other words, the establishment of a Florida residence does not lead to the inescapable conclusion that James abandoned his domicile in Ohio. Finally, because James is not the legal or titled owner of the

Florida House, the fact that Jean Schill obtained a Homestead Exemption under Florida law is irrelevant. *See* Florida Statute 196.031(1)(a).

- 3) Likewise, it is clear James intended to avoid Ohio state income tax by “moving” to Florida. He understands how crucial it is to remain under the statutory limit in effect otherwise “you’re dead.” The mere fact he considers Florida his domicile for tax purposes and tracks his time spent in Ohio for these purposes, however, does not automatically lead to the conclusion James abandoned his domicile in Ohio.
- 4) James never filed any documents with the Ohio tax authorities relating to his “Florida domicile.” Just because the Ohio tax authorities have not pursued James for back taxes based on an Ohio domicile does not automatically make Florida James’s domicile.
- 5) James pays for the mortgage, taxes, insurance, utilities, and most, if not all, operating expenses for the Ohio House. James also often discusses with Robert aesthetic and maintenance items to be completed around the Ohio House.
- 6) Three of James’s four children reside in Ohio.
- 7) While James provides financial support to his other children, he does not pay directly the mortgage, taxes, insurance, utilities, and most, if not all, operating expenses for their homes.
- 8) James purchased from an Ohio agent the homeowners’ and umbrella insurance policies for the Ohio House, and he is identified as the Named Insured on both

policies. Both policies list the Ohio House's address for the Named Insured. The Policy contains Ohio-specific terms and endorsements. As required by law, CIC offered excess uninsured and underinsured coverages to the Schills. Finally, the Policy does not specifically exclude Robert.

- 9) James, the CEO and Chairman of an Ohio company partially owned by him, travels to Ohio for up to 15 days per month to work at the business and oversee its day-to-day operations. While in Ohio, he generally awakens at 4:00 a.m. and goes to bed at 7:00 p.m., "working in between," for seven days a week. However, we no longer live in a party-line, land-line world. James has available to him a variety of electronic communication devices that he can use daily, if not hourly, to communicate with his Ohio business subordinates from the Florida House, providing them with directions and making business decisions.
- 10) James lives in the Ohio House when he travels to Ohio. James has a car at the house for his use, along with toiletries, food, and clothing. He sleeps in a first-floor bedroom that is not, to the best of his knowledge, used by anyone else at any time. Robert has a bedroom on the second floor.
- 11) Jean Schill travels to Ohio a couple of times per year and stays mostly at the Ohio House for up to five weeks at a time. Jean's and James's trips to Ohio sometimes overlap.
- 12) James has been a general partner of the Schill Family Trust Limited Partnership since 1997. It is an Ohio partnership that includes his four children, including

Robert, as partners. The partnership uses the Ohio House as its mailing address, including on its tax filings. Finally, the partnership owns an interest in ChemTechnologies, Ltd.

- 13) James's accountant, who reviews his personal taxes and those for his Ohio business and Ohio family partnership, is located in Ohio. James's investment firm and account manager are located in Ohio. James's attorneys who created the Ohio family partnership, and handle his estate plan and legal issues involving his business, are located in Ohio.
- 14) The fact that James votes in Florida is not dispositive evidence that he changed his domicile to Florida.

{¶39} James is not a typical "snowbird" who travels to Florida for the winter. Because of James's considerable finances, he created two locations in which he carries on important parts of his life. Nonetheless, in reviewing the evidence in Spaeth's favor as required under Civ.R. 56, reasonable minds can come to but one conclusion about the location of James's domicile. *Zivich*, 82 Ohio St.3d 367, 696 N.E.2d 201. Based on the foregoing facts and conclusions, we conclude James never abandoned his domicile in Ohio by virtue of his wife's purchase of a second home in Florida because he travels here and stays at the Ohio House for up to a minimum of two weeks every month to operate an Ohio business as its CEO and Chairman. Through his own admission, James may have intended to make Florida his domicile, but he "flunked retirement" and his actions after

1993 contradict an intention to make Florida a permanent home. *Hutson*, 165 Ohio St. 115, 133 N.E.2d 347.

{¶40} Accordingly, Robert qualifies as a “resident relative” under the Policy because he resides in both James’s household *and* his legal residence of domicile. Robert is an “insured” as defined under provision 11(a)(2)(c) of the Policy, and CIC has the obligation to provide coverage under the Policy in excess of underlying insurance as a result of the August 16, 2008 accident.

{¶41} “Underlying insurance” includes insurance available to the “insured” under all other insurance policies applicable to the “occurrence.” “Schedule A – Schedule of Underlying Insurance” of the Policy provides, “[i]t is agreed by you and your relatives that the following minimum limits of underlying insurance are in force as of the inception date of this policy and will be maintained during the term of this policy”: auto liability with bodily injury limits of \$100,000 each person/\$300,000 each occurrence, and property damage limits of \$100,000 each occurrence.

{¶42} There is no dispute Robert is a relative of the Schills, and he has an automobile insurance policy through State Auto with the required limits of coverage. Robert’s State Auto policy is, therefore, “underlying insurance” to the Policy. This is an interpretation of a clear and unambiguous insurance contract. *Kelly*, 31 Ohio St.3d 130, 509 N.E.2d 411; *Nationwide Mut. Fire Ins. Co.*, 73 Ohio St.3d 107, 652 N.E.2d 684.

{¶43} If CIC intended to limit Schedule A to specific insurance policies, including the Schills’ homeowner and motor vehicle policies, it should have listed those policies in

Schedule A. If CIC wanted to place certain parameters around the definition of “legal residence of domicile,” it should have included a definition with those parameters in the Policy. Finally, CIC did not exclude any resident of the domicile, including Robert, from coverage.

{¶44} We, therefore, reverse the trial court’s grant of summary judgment in favor of CIC, and its denial of summary judgment against Spaeth. Pursuant to App.R. 16(B), we order final judgment be entered in favor of Spaeth.

It is ordered that appellant recover from appellee the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, JUDGE

COLLEEN CONWAY COONEY, P.J., and
SEAN C. GALLAGHER, J., CONCUR

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

PEGGY SPAETH

Appellant

COA NO.
97715

LOWER COURT NO.
CP CV-710632
CP CV-753013

COMMON PLEAS COURT

-VS-

STATE AUTO. MUTUAL INS. CO.

Appellee

MOTION NO. 458241

Date 09/21/12

Journal Entry

Motion by Appellee for reconsideration is denied.

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ALL PARTIES.-COSTS TAXED

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SEP 21 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DER.



Presiding Judge COLLEEN CONWAY COONEY,
Concurs

Judge SEAN C. GALLAGHER, Concurs

[Signature]
Judge KENNETH A. ROCCO

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