[Cite as *Nationwide Ins. Co. v. Phelps*, 2003-Ohio-497.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

NATIONWIDE INSURANCE, PLAINTIFF-APPELLEE, - VS - ALVIN & ROSEMARY PHELPS, et al., DEFENDANTS-APPELLANTS.	)))))))))	CASE NO. 2002 CO 27 OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from Columbiana County Common Pleas Court, Case No.01 CV 829.

JUDGMENT: Reversed and Remanded.

APPEARANCES:

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JUDGES:
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Hon. Mary DeGenaro

Dated: January 31, 2003

DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court and the parties' briefs. Defendants-Appellants, Alvin and Rosemary Phelps, appeal from the decision of the Columbiana County Court of Common Pleas which granted summary judgment in favor of Plaintiff-Appellee, Nationwide Insurance Company. We are asked to determine whether the insurance policy Nationwide provided to its insured, Jerry Jones, covers the claims the Phelps are making against Jones in federal court. We conclude Nationwide's failure to provide a copy of the Phelps' federal complaint to the trial court prevented it from meeting its burden of proving why it was entitled to summary judgment. Thus, we reverse the trial court's decision and remand this cause for further proceedings.

{¶2} The Phelps and Jones entered in to a contract wherein Jones agreed to construct a home for the Phelps in Ohio. When the parties contracted, the Phelps were living in Pennsylvania and Jones' business was based in West Virginia. However, Jones had a license which allowed him to do business in Ohio. After the home was finished, the Phelps were displeased with it and filed suit first in state court and then in federal court claiming Jones was liable to them in both tort and contract for the deficiencies in the home. It appears the state court case was dismissed before the federal case was filed. It also appears that during the course of the federal proceedings, Jones filed for bankruptcy.

{¶3} During the course of the federal litigation, Jones' insurer, Nationwide, filed the instant action seeking a declaratory judgment that there was no coverage owed to the Phelps for the alleged actions of Jones under the terms of Nationwide's commercial general liability policy with Jones and attached a copy of that policy to the complaint. The Phelps answered that complaint via numerous pro se documents which they filed with the trial court.

{¶4} Subsequently, Nationwide filed a motion for summary judgment, arguing West Virginia law applied to the trial court's determination and, under West Virginia law, the Phelps' claims in federal court do not fall within the coverage Nationwide provided to

Jones in its policy. The Phelps responded to that motion and Nationwide filed a reply memorandum. After reviewing these filings, the trial court granted summary judgment for Nationwide.

{¶5} We conclude the trial court erred when it granted summary judgment to Nationwide because Nationwide failed to meet its burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or material element of the nonmoving party's claim. More specifically, Nationwide never provided the trial court with a copy of the Phelps' complaint in federal court, thereby rendering it impossible to see whether the Phelps' claims fall within the terms of the policy. Accordingly, we reverse the trial court's grant of summary judgment.

{¶6} The Phelps argue the following three assignments of error:

{¶7} "The trial court erred in failing to hold that the insurance policy issues [sic] by Appellee provides coverage for damages to the Appellants' home which occurred after the home became a completed structure."

{¶8} "The trial court erred in failing to hold that the insurance policy provides coverage for damage to work performed by sub-contractors of the insured and to damage to the Appellants' home resulting from work performed by sub-contractors."

{¶9} "The trial court erred in failing to hold that consequential damages claimed by the Appellants and arising from the work and/or completed product of Appellee's insured are covered under the policy."

{¶10} Each of these assignments of error deal with the same issues of law and fact, i.e. whether their claims in federal court were covered by Nationwide's insurance

policy with Jones. Thus, we will address these assignments of error jointly.

{¶11} As stated above, the trial court granted summary judgment to Nationwide. When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court. *Parenti v. Goodyear Tire & Rubber Co*. (1990), 66 Ohio App.3d 826, 829, 586 N.E.2d 1121. This court's review is, therefore, de novo. *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390, 738 N.E.2d 1243. Under Civ.R. 56, summary judgment is only proper when the movant demonstrates that, viewing the evidence most strongly in favor of the non-movant, reasonable minds must conclude no genuine issue as to any material fact remains to be litigated and the moving party is entitled to judgment as a matter of law. Id. "[T]he moving party bears the initial responsibility of informing the trial court of the basis for motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or material element of the nonmoving party's claim." *Drescher v. Burt* (1996), 75 Ohio St.3d 280, 296, 662 N.E.2d 264. The nonmoving party has the reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. at 293.

{¶12} The initial question we must resolve is which state's law governs the interpretation of this contract. Nationwide argues West Virginia law applies while the Phelps argue Ohio law applies. Ohio's rules regarding choice of law "'do not themselves determine the rights and liabilities of the parties, but rather guide decision as to which local law rule will be applied to determine these rights and duties.'" *Ohayon v. Safeco Ins. Co. of Illinois* (2001), 91 Ohio St.3d 474, 476, 747 N.E.2d 206, quoting 1 Restatement of the Law 2d, Conflict of Laws (1971) 3, Section 2, Comment a(3). In making this determination, the Ohio Supreme Court has adopted the Restatement of Law 2d (1971)

561, Conflict of Laws, Section 187. *Schulke Radio Productions, Ltd. v. Midwestern Broadcasting Co.* (1983), 6 Ohio St.3d 436, 438, 6 OBR 480, 453 N.E.2d 683. "Section 187 provides that, subject to very limited exceptions, the law of the state chosen by the parties to a contract will govern their contractual rights and duties." *Ohayon* at 477. In the absence of such a choice by the parties, the Ohio Supreme Court has adopted the Restatement of Law 2d (1971) 561, Conflict of Laws, Section 188. *Gries Sports Enterprises, Inc. v. Modell* (1984), 15 Ohio St.3d 284, 15 OBR 417, 473 N.E.2d 807, at syllabus. Subsequently, the Ohio Supreme Court applied Section 188 to a choice of law issue arising out of an insurance contract. See *Nationwide Mut. Ins. Co. v. Ferrin* (1986), 21 Ohio St.3d 43, 44-45, 21 OBR 328, 487 N.E.2d 568. Thus, "application of the Restatement's contractual choice-of-law provisions to liability insurance cases is no longer a subject of dispute in Ohio." *Ohayon* at 480.

{¶13} In this case, the contract between Nationwide and Jones contains a section listing the West Virginia changes to the policy. However, this is not an affirmative choice that West Virginia's laws will govern the interpretation of the contract. Furthermore, no other section of the contract makes the necessary affirmative choice. Thus, we must apply Section 188 when resolving this choice of law issue.

{¶14} "Section 188 provides that, in the absence of an effective choice of law by the parties, their rights and duties under the contract are determined by the law of the state that, with respect to that issue, has 'the most significant relationship to the transaction and the parties.' Restatement at 575, Section 188(1). To assist in making this determination, Section 188(2)(a) through (d) more specifically provides that courts should consider the place of contracting, the place of negotiation, the place of

performance, the location of the subject matter, and the domicile, residence, nationality, place of incorporation, and place of business of the parties. * * *

{¶15} "Section 188's choice-of-law methodology focuses on the place of contracting, the place of negotiation, the place of performance, the location of the subject matter, and the domicile of the contracting parties. In insurance cases, this focus will often correspond with the Restatement's view that the rights created by an insurance contract should be determined 'by the local law of the state which the parties understood was to be the *principal location of the insured risk during the term of the policy*, unless with respect to the particular issue, some other state has a more significant relationship * * * to the transaction and the parties.' (Emphasis added.) Restatement at 610, Section 193. * * * The principal location of the insured risk described in Section 193 neatly corresponds with one of Section 188's enumerated factors--*the location of the subject matter of the contract*." (Emphasis sic.) *Ohayon* at 477-480.

{¶16} In this case, West Virginia is the place with the most significant relationship to the contract. This is recognized in the contract itself which, as noted above, contains a section dealing with the West Virginia changes to the policy. The place of negotiating the contract and contracting was West Virginia. The principal location of the insured risk during the terms of the policy is in West Virginia, because the majority of Jones' work was in West Virginia. The record does not state where Nationwide is incorporated, but Jones' domicile is in West Virginia. Under Section 188, these factors all demonstrate that West Virginia law should govern the interpretation of James' insurance contract.

{¶17} The Phelps only argument in support of applying Ohio law is that the place of performance of the insurance contract was in Ohio as that was where Jones was

building this home. This argument demonstrates a misunderstanding of the focus of Section188. Under that section, it does not matter where the particular act which invokes the policy's coverage happens. Instead, courts must look to the principal location of the insured risk during the term of the policy to determine the location of the subject matter of the contract. This means we must use the factors in Section 188 to determine the state the parties would expect most of the claims under the policy to arise out of and ignore the state where this particular act occurred. As those factors clearly point to West Virginia, we will construe this contract in accordance with West Virginia law.

{¶18} Under West Virginia law, the construction of written contracts is a question of law. *Riffe v. Home Finders Associates, Inc.* (1999), 205 W.Va. 216, 517 S.E.2d 313, paragraph two of the syllabus. When construing a contract, a court must not alter, pervert, or destroy the clear meaning and intent of the parties which is expressed in the language they chose to use in their agreement. *Coleman v. Sopher* (1997), 201 W.Va. 588, 597, 499 S.E.2d 592. The language in any contract must be considered as an integrated whole, giving effect, if possible, to all parts of the instrument. *Moore v. Johnson Service Co.* (1975), 158 W.Va. 808, 219 S.E.2d 315, paragraph three of the syllabus. The words used in a contract should be given their plain and ordinary meaning. *Supervalu Operations, Inc. v. Center Design, inc.* (1999), 206 W.Va. 311, 315, 524 S.E.2d 666. When the provisions of a contract are clear and unambiguous, they must be applied, not construed. *Orteza v. Monongalia Cty. Gen. Hosp.* (1984), 173 W.Va. 461, 318 S.E.2d 40, paragraph two of the syllabus.

{¶19} A provision of a contract is ambiguous whenever the language of that provision is reasonably susceptible to two different meanings or is of such doubtful

meaning that reasonable minds could disagree as to its meaning. *Pilling v. Nationwide Mut. Fire Ins. Co.* (1997), 210 W.Va. 757, 759, 500 S.E.2d 870. If the provisions of an insurance contract are ambiguous, then the terms of that contract must be strictly construed against the insurer and in favor of the insured. Id. at 759, footnote 2. Thus, when an insurance contract is ambiguous and open to judicial construction, the courts should give effect to "the objectively reasonable expectations" of the applicants and intended beneficiaries regarding the terms of the insurance contract "even though painstaking study of the policy provisions would have negated those expectations." *Riffe* at 221. West Virginia courts will more carefully scrutinize any policy language which has the effect of excluding an insured from coverage. Id. at 222.

{¶20} Nationwide argues each of the Phelps' claims in the federal case are claims of poor workmanship and, under West Virginia law, those claims are not covered by a commercial general liability policy. In response, the Phelps argue their claims arise out of the defective product Jones provided to them, not from the work he performed on the home, and, therefore, their claims are covered by the policy.

{¶21} In its motion for summary judgment, Nationwide asked the trial court to determine that the Phelps' claims in federal court were not covered by James' insurance policy. In its complaint, Nationwide states there is a pending federal case between the Phelps and James, but does not state what claims the Phelps are pursuing in that case. In support of its motion for summary judgment, Nationwide introduced a copy of the insurance policy and made its argument. However, it never provided the trial court with a copy of the federal complaint.

{¶22} When a party moves for summary judgment, that party bears the initial

responsibility of informing the trial court of the basis for the motion and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or material element of the nonmoving party's claim. *Drescher* at 296. As the Ohio Supreme Court succinctly stated in *Drescher*, a court may not grant summary judgment when the movant fails to "provide[ ] evidentiary materials demonstrating that there are no material facts in dispute and the movant is entitled to judgment as a matter of law". Id. "Where, as here, the moving party does not satisfy its initial burden under Civ.R. 56, the motion for summary judgment must be denied." Id. A party could meet its burden by presenting evidence in any of the ways provided by Civ.R. 56(C). Id.

{¶23} Nationwide has failed to meet its initial burden in this case. It is impossible for any court to determine if the Phelps' claims are covered by James' policy if that court is not provided with some evidence of what claims the Phelps are presenting in federal court. Thus, the trial court could not have granted summary judgment to Nationwide.

{¶24} We recognize that the Phelps appended a non-time stamped copy of an amended complaint in the federal case to their merit brief in this court. However, we may not consider that exhibit as reviewing courts are limited to considering the evidence found within the record transmitted to it on appeal. App.R. 9(A); *State v. Callihan* (1992), 80 Ohio App.3d 184, 197, 608 N.E.2d 1136. Thus, we may not now, on appeal, use that exhibit to determine whether the trial court properly granted summary judgment.

{¶25} In conclusion, the trial court erred when it granted summary judgment to Nationwide because Nationwide failed to meet its initial burden on summary judgment of demonstrating the absence of a genuine issue of material fact. Accordingly, we find the Phelps' assignments of error are meritorious. The trial court's decision is reversed and

this case is remanded for further proceedings.

Donofrio and Waite, JJ., concur.