[Cite as *Peters v. Tipton*, 2015-Ohio-2323.]

STATE OF OHIO, HARRISON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

THOMAS D. PETERS,	)	CASE NO. 13 HA 10
	)	
PLAINTIFF-APPELLANT,	)	
	)	
VS.	)	OPINION
	)	
PAMELA M. TIPTON, ET AL.,	)	
	)	
DEFENDANTS-APPELLEES.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court Case No. CVH-2008-0060

JUDGMENT: Affirmed.

JUDGES:

Hon. Mary DeGenaro
Hon. Cheryl L. Waite
Hon. Carol Ann Robb

Dated: June 12, 2015

APPEARANCES:

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DeGENARO, J.

{¶1} Thomas Peters, Plaintiff-Appellant, appeals the October 1, 2013, decision of the Harrison County Court of Common Pleas granting summary judgment to Defendants-Appellees, Great American Assurance Company and Westchester Fire Insurance Company. Peters' arguments on appeal are meritless.

{¶2} The purpose of an excess policy is to increase the amount, not the scope, of coverage. Neither the Westchester nor Great American policy provides primary coverage; by virtue of the exclusion language, the policies are limited to the scope of coverage provided by the underlying policy. Further, we need not reach the merits of Westchester's first cross-assignment of error regarding choice of law because under either Ohio or North Carolina law the outcome is the same: there is no coverage under either the Westchester or Great American policy. Accordingly, the judgment of the trial court is affirmed.

Facts and Procedure

{¶3} The initial facts and procedure were outlined in *Peters v. Tipton,* 7th Dist. No. 07-HA-3, 2008-Ohio-1524, ¶2-3, 6 (*Peters I)*:

> On January 9, 2002, appellant was working for Pike Electric, Inc. He was repairing lights on a trailer attached to a Pike truck which was parked on the side of the road. His co-workers began raising a live electric line onto a utility pole above the trailer. Out of safety concerns, appellant stopped his repair work and moved to the side of the Pike truck. At that time, a vehicle owned by former defendant Douglas Grim and driven by defendant Pamela Tipton struck appellant pinning him against the Pike truck.
>
> The Pike truck was covered by a business auto policy issued on August 1, 2001 by Liberty Mutual. Appellant was also issued a company vehicle, which was insured under this policy. The policy had three million dollars worth of bodily injury liability coverage with a $500,000 deductible. Pike rejected uninsured/underinsured motorist (hereinafter collectively referred to as UM) coverage.

* * *

> On March 5, 2007, the trial court issued a decision granting full summary judgment to Liberty Mutual. The court noted that a valid offer and rejection need no longer be established on the face of the rejection form. The court concluded that Pike made a knowing and valid rejection of UM coverage and thus UM coverage did not arise by operation of law. The court alternatively stated that even if UM coverage arose by operation of law, appellant did not qualify as an insured under the definition of insured contained in the liability section of the policy. The court also concluded that even if appellant were an insured and even if UM coverage arose by operation of law, any UM coverage would be subject to a $500,000 deductible.

{¶4} This court affirmed the trial court's decision concluding that Liberty Mutual made a meaningful offer from which Pike could knowingly reject uninsured motorist's coverage, and as a result, held that the offer of coverage was sufficient, and thus the rejection was valid, and uninsured motorist's coverage did not arise by operation of law. *Peters I*, ¶1.

{¶5} Peters then re-filed his lawsuit. Pertinent to this appeal, the trial court granted Great American's motion for summary judgment, granted Westchester's motion for summary judgment, and denied Peters' cross-motion for summary judgment and declaratory judgment as to Great American.

Excess Coverage

{¶6} As Peters' two assignments of error are interrelated, they will be discussed together:

{¶7} "The trial court erred to the prejudice of Appellant, Thomas D. Peters, in granting summary judgment in favor of Appellee, Westchester Fire Insurance Company, on Appellant's asserted uninsured motorist claim against Westchester Policy Number CUA-150581-0."

{¶8} "The trial court erred to the prejudice of Appellant, Thomas D. Peters, in granting summary judgment in favor of Appellee, Great American Assurance

Company, on Appellant's asserted uninsured motorist claim against Great American Policy Number EXC5746952."

{¶9} An appellate court reviews a trial court's summary judgment decision de novo, applying the same standard used by the trial court. *Ohio Govt. Risk Mgt. Plan v. Harrison,* 115 Ohio St.3d 241, 2007-Ohio-4948, 874 N.E.2d 1155, ¶ 5. Further, if the terms of an insurance policy are unambiguous, the interpretation of the policy is a matter of law that is reviewed de novo on appeal. *Dorsey v. Federal Ins. Co.,* 154 Ohio App.3d 568, 2003-Ohio-5144, 798 N.E.2d 47, ¶12 (7th Dist.). As with all contracts, we look to the plain language to determine the parties' intent regarding coverage. *Id.* Generally, courts presume that the intent of the parties to a contract resides in the language they choose to employ in the agreement. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d 411 (1987), paragraph one of the syllabus.

Westchester Fire Insurance Company

{¶10} Peters argues that the Westchester policy provides primary and excess coverage. Excess coverage is a type of coverage where "liability attaches only after a predetermined amount of primary coverage has been exhausted." *American Special Risk Ins. Co. v. A–Best Products, Inc.,* 975 F.Supp. 1019, 1022 (N.D.Ohio 1997) (quoting *Continental Marble & Granite v. Canal Ins. Co.,* 785 F.2d 1258 (5th Cir.1986)). Westchester disputes that the policy provides primary coverage, arguing it is excess coverage to the underlying policy provided by Liberty Mutual.

> A true excess policy does not broaden the underlying coverage. While an excess policy increases the amount of coverage available to compensate for a loss, it does not increase the scope of coverage. An excess policy may be written on a "stand alone" basis or as a policy that "follows form." A stand-alone excess policy relies exclusively on its own insuring agreement, conditions, definitions, and exclusions to grant and limit coverage. A following form excess policy incorporates by reference the terms, conditions, and exclusions of the underlying policy.***

Griewahn v. United States Fid. & Guar. Co., 160 Ohio App.3d 311, 319, 2005-Ohio-1660, 827 N.E.2d 341, 347, ¶ 45 (7th Dist.)(internal citations omitted).

{¶11} The language of the Westchester policy is clear and unambiguous. The exclusion in the policy provides that "this policy is limited to the coverage provided by the 'underlying insurance' as listed on Schedule A – Schedule of underlying insurance. If coverage is not provided by 'underlying insurance,' coverage is excluded from this policy." The underlying insurance in this case is the Liberty Mutual policy.

{¶12} As discussed in *Griewahn,* the purpose of an excess policy is to increase the *amount* not the *scope* of coverage. The Westchester policy does not provide primary coverage; by virtue of the exclusion language, the policy is limited to the coverage provided by the underlying policy. This by definition is excess coverage.

{¶13} Whether Peters is entitled to coverage under the Westchester policy is dependent upon coverage under the Liberty Mutual policy. In *Peters I,* this Court held that Peters is not entitled to coverage under the Liberty Mutual policy; thus the issue is res judicata. Consequently, as Peters is not entitled to primary coverage under the Liberty Mutual policy, he is excluded from excess coverage under the Westchester policy.

Great American Insurance Company

{¶14} Turning to the Great American policy, the language is clear and unambiguous: "Except for the terms conditions, definitions and exclusions of this policy, the coverage provided by this policy will follow the first underlying insurance." Westchester is listed as the first underlying insurance.

{¶15} The same analysis relative to coverage under the Westchester policy also applies to the Great American policy. Excess policies are to increase the amount not the scope of coverage. As stated above, there is no coverage under the Westchester policy. Consequently, Peters is not entitled to coverage under the Great American policy. Accordingly, these assignments of error are meritless.

Choice of Law

{¶16} In its first cross-assignment of error Westchester asserts:

{¶17} "Although the trial court properly granted Westchester Fire Insurance Company's motion for summary judgment, the trial court erred in failing to complete its

choice of law analysis. By not conducting the choice of law analysis first, the court erroneously applied the law of Ohio, instead of the law of North Carolina, to this automobile insurance policy dispute between Appellant and Westchester."

{¶18} Westchester goes on to assert that even under North Carolina law the trial court's judgment would be the same. By raising this alternative argument as a basis to affirm the trial court's judgment, Westchester is using it as a shield to defend the judgment in its favor, rather than as a sword to attack it and seek reversal.

{¶19} "A person who intends to defend a judgment or order appealed by an appellant on a ground other than that relied on by the trial court but who does not seek to change the judgment or order is not required to file a notice of cross appeal or to raise a cross-assignment of error." App.R. 3(C)(2). Thus, [a]n appellee who does not file a cross-appeal is still permitted to assert cross-assignments of error in order to defend the trial court's judgment. *Glidden Co. v. Lumbermens Mut. Cas. Co*., 112 Ohio St.3d 470, 2006-Ohio-6553, 861 N.E.2d 109, ¶30-32; R.C. 2505.22. An appellee can "urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon a matter overlooked or ignored by it." *Kaplysh v. Takieddine*, 35 Ohio St.3d 170, 175, 519 N.E.2d 382 (1988), citing *United States v. Am. Ry. Express Co*., 265 U.S. 425, 435 (1924).

{¶20} "Questions involving the nature and extent of the parties' rights and duties under an insurance contract's underinsured motorist provisions shall be determined by the law of the state selected by applying the rules in Sections 187 and 188 of the Restatement of the Law 2d, Conflict of Laws (1971)." *Ohayon v. Safeco Ins. Co. of Illinois*, 91 Ohio St.3d 474, 2001-Ohio-100, 747 N.E.2d 206, at paragraph two of the syllabus. Section 187 provides that the law of the state chosen by the parties governs their contractual rights and duties. *Id.* at 477. When the parties have failed to choose, Section 188 sets out factors to apply, which include 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 contracting parties. *Id*. at 479.

{¶21} *Ohayon* further elaborated on an important factor stating, "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.' '[I]n the case of an automobile liability policy, the parties will usually know beforehand where the automobile will be garaged at least during most of the period in question.' " *Id*. at 479, 747 N.E.2d 206. (Emphasis sic.) (Internal citations omitted).

{¶22} While both sides present arguments and supporting case law to bolster their respective positions—Westchester that North Carolina law applies and Peters that Ohio law applies—we need not reach this question because the outcome is the same under the law of either state.

{¶23} As outlined above, Ohio law dictates that Peters is not entitled to coverage under either the Westchester or Great American policy.

{¶24} Alternatively, under North Carolina law, UM/UIM coverage does not arise by operation of law. Rather, insurers may issue "policy forms that provide excess liability coverage [and] limit or exclude" both UM and UIM coverage. *See* N.C. Gen. Stat. § 58-3-152; *see also* N.C. Gen. Stat. § 20.279.21(g) ("Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a 'motor vehicle liability policy' and such excess or additional coverage shall not be subject to the provisions of this Article." Thus, North Carolina law exempts excess insurers from the requirement to offer UM/UIM coverage, and, in fact, Westchester did not offer such coverage to Pike here.

{¶25} Accordingly, under either Ohio or North Carolina law, summary judgment in favor of Westchester was proper.

Remaining Cross Assignments of Error

{¶26} Westchester raised two additional cross-assignments of error. First, that the trial court mischaracterized the scope and threshold for triggering coverage. Second, that the trial court failed to conclude that Peters did not meet notice and exhaustion requirements. These cross-assignments of error are moot based upon our determination that Peters' assignments of error are meritless, and that the trial court

properly granted Westchester and Great American summary judgment. See App.R. 12(A)(1)(c).

Conclusion

{¶27} In sum, both of Peters' assignments of error are meritless. The purpose of an excess policy is to increase the amount not the scope of coverage. Neither the Westchester nor Great American policy provides primary coverage; by virtue of the exclusion language, the policies are limited to the coverage provided by the underlying policy. In the case of both excess policies, the underlying policy does not provide primary coverage. Further, we need not reach the merits of Westchester's first cross-assignment of error regarding choice of law because under either Ohio or North Carolina law the outcome is the same: there is no coverage under either the Westchester or Great American policy. The remaining cross-assignments of error are moot due to the resolution regarding Westchester and Great American's motions for summary judgment. Accordingly, the judgment of the trial court is affirmed.

Waite, J. concurs.

Robb, J. concurs.