IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

SIGAN HLEI PAR, Individually and as Administrator of the Estate of Lian Cung Nung, Deceased,	:	APPEAL NO. C-200032 TRIAL NO. A-1805639
Plaintiff-Appellants,	:	*O P I N I O N.*
vs.	:	
GEICO GENERAL INSURANCE COMPANY,	:	
and	:	
JOHN DOE,	:	
Defendants-Appellees.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: November 10, 2020

Gary F. Franke Co., L.P.A., *Gary F. Franke,* and *Michael D. O'Neill*, for Plaintiff-Appellants,

Garvey Shearer & Nordstrom PSC, John J. Garvey, III, for Defendant-Appellees.

BERGERON, Judge.

{¶1} The widow of a young man, tragically shot and killed while driving, seeks to recover automobile insurance benefits for his injuries. Unfortunately for her, however, the policy at hand limits such recovery to injuries sustained arising out of the use of a vehicle, and the Kentucky Supreme Court has interpreted such language as excluding incidents involving the shooting death of a driver. Because Kentucky law governs this dispute, we must follow the guidance of its Supreme Court, and we accordingly affirm the trial court's grant of summary judgment to the insurer.

I.

{¶2} As Lian Cung Nung drove through the streets of downtown Cincinnati with his wife, plaintiff-appellant Sigan Hlei Par, an unknown assailant in another vehicle shot and killed him. It remains unclear whether the shooting was intentional (perhaps a product of road rage) or whether the gun discharged accidentally, as the police investigation ultimately stalled out. Regardless, this tragedy prompted an insurance claim that lies at the heart of this appeal.

{¶3} Mr. Nung and Ms. Par were residents of Kentucky, and they had a Kentucky Family Automobile Insurance Policy written by defendant-appellee Geico General Insurance Company. Ms. Par filed a claim with Geico to recover for Mr. Nung's injuries, under two provisions of their insurance policy—uninsured motorist coverage and personal injury protection. But Geico denied the claim, under both provisions, on the ground that the injury did not "arise out of" the "use" of a motor vehicle, which prompted Ms. Par to sue. The trial court ultimately agreed with Geico, granting summary judgment in its favor.

{¶4} In her sole assignment of error, Ms. Par argues that the trial court erred in granting summary judgment for Geico and in denying summary judgment on her behalf.

Because we agree that, under Kentucky law, Mr. Nung's injuries did not arise out of the use of a vehicle, we overrule her assignment of error and affirm the trial court's judgment.

II.

{¶5} The parties agree that, under Ohio choice-of-law rules, we should apply Kentucky law to this case. The Ohio Supreme Court has held that suits against an insurance carrier for uninsured motorist benefits sound in contract, not tort law, even when the underlying conduct is tortious. *Ohayon v. Safeco Ins. Co. of Illinois*, 91 Ohio St.3d 474, 747 N.E.2d 206 (2001), paragraph one of the syllabus. Additionally, Ohio courts apply 2 Restatement of the Law 2d, Conflict of Laws, Sections 187 and 188 (1971), when determining which state's law controls in a contract dispute. *Id.* at paragraph two of the syllabus. Absent an express choice-of-law provision, the following factors guide our inquiry: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil * * * of the parties." 2 Restatement, Section 188(2). Finally, the Ohio Supreme Court explains that the predominate factor is "the principal location of the insured risk during the term of the policy." *Ohayon* at 479, quoting 2 Restatement, Section 193. Here, the relevant factors point in one direction. Mr. Nung was a resident of Kentucky, the insurance policy was issued in Kentucky, and the policy explicitly contains Kentucky-mandated provisions. While the couple hopped across the Ohio River at the time of the shooting, this fact does not outweigh the others. We thus have no difficulty in concluding, consistent with the parties' positions, that Kentucky law applies to this case.

{¶6} Our standard of review in interpreting contractual language is de novo. *St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, 875 N.E.2d 561, ¶ 38 ("Contract interpretation is a matter of law, and questions of law are subject to de

novo review on appeal."). Kentucky law requires automobile insurance companies to provide reparation benefits when an "accident" causes "loss from injury arising out of maintenance or use of a motor vehicle." KRS 304.39-030(2). Consistent with that mandate, the two relevant insurance provisions in this case—uninsured motorist coverage and personal injury protection—largely echo that statutory language. The uninsured motorist provision in the relevant policy provides: "[Geico] will pay damages for bodily injury caused by accident which the insured is legally entitled to recover from the owner of an uninsured auto * * * arising out of the ownership, maintenance or use of that auto." And the personal injury protection provision employs similar language: "[Geico] will pay, in accordance with Kentucky law, personal injury protection benefits for * * * bodily injury * * * caused by an accident arising out of the operation, maintenance or use of a motor vehicle as a vehicle." Thus, regardless of which provision applies, the relevant inquiry remains the same: (1) whether Mr. Nung was the victim of an accident; and (2) whether that accident arose out of the use of a vehicle. *See State Farm Mut. Auto. Ins. Co. v. Rains*, 715 S.W.2d 232, 233 (Ky.1986) ("The plain language of the statutes provides for the payment of basic reparation benefits to the victims of *motor vehicle accidents* for injuries *arising out of the use of a motor vehicle*.") (Emphasis sic.)

{¶7} We can easily resolve the first element in Ms. Par's favor—this shooting constitutes an "accident" under Kentucky law. The Kentucky Court of Appeals, in *Stamper v. Hyden*, 334 S.W.3d 120 (Ky.App.2011), joined the majority of jurisdictions in holding that whether an event constitutes an "accident" is determined by the perspective of the insured. *Id.* at 124. In *Stamper*, an ex-boyfriend purposely drove into the side of a woman's car while she was stopped at an intersection. *Id.* at 121. He then jumped into the driver's seat (sitting on her lap) and drove down a highway opposite the flow of traffic. *Id.* In deeming

the woman the victim of an "accident," the court reasoned that "the incident was unexpected by [her] and not her plan, design, or intent." *Id.* at 124. Here, this shooting likewise qualifies as an "accident" because, from Mr. Nung's perspective, it was not his "plan, design, or intent." Underscoring this conclusion, Geico appears to concede the point. Mr. Nung was therefore a victim of an "accident."

{¶8} However, Ms. Par cannot satisfy the second element because, under Kentucky case law, Mr. Nung's injuries did not arise out of the use of a vehicle. The Kentucky Supreme Court decided this issue on nearly identical facts in *State Farm Mut. Auto. Ins. Co. v. Rains*, 715 S.W.2d 232 (Ky.1986). In *Rains*, a victim was killed, while driving, after the victim's brother shot him through the rear window. *Id.* at 233. And the insurance company in *Rains*, as here, denied the insurance claim for bodily injury because the injury did not arise out of the use of a vehicle. *Id.* On appeal, the Kentucky Supreme Court agreed, characterizing any connection between the use of motor vehicles and the injury as merely "incidental." *Id.* The court insisted upon a "causal connection between the injuries and the maintenance or use of the motor vehicle" in order to trigger liability. *Id.* at 234. The fact that the victim was driving the vehicle at the time of the shooting did not supply the requisite "causal connection." We can see no meaningful difference between the facts of this case and *Rains*. Under *Rains*, "[i]t seems equally clear that [Mr. Nung's] injuries did not arise out of the use of a motor vehicle." *Id.* at 234.

{¶9} Despite the holding of *Rains*, Ms. Par maintains that it does not control in light of the ensuing evolution of Kentucky law. In this regard, Ms. Par points first to a 1991 Kentucky Court of Appeals case that expanded upon the causal requirement recognized in *Rains*. *See Kentucky Farm Bur. Mut. Ins. Co. v. Hall*, 807 S.W.2d 954 (Ky.App.1991). In *Hall*, the court held that an injury "arose out of the use of a motor vehicle" after a woman

was struck in the eye (while driving) by a rock kicked up by a lawn mower. *Id.* at 955. In so concluding, the court reasoned that the causation "requirement is satisfied if the injury is reasonably identifiable with the normal use or maintenance of a vehicle and is reasonably foreseeable." *Id.* at 956. Building on this holding, Ms. Par next insists that *Stamper*, *supra*, further broadened the causation requirement by holding that the ex-boyfriend's intentional crashing into the woman's car constituted an "accident." *Stamper*, 334 S.W.3d at 124. In short, Ms. Par seizes upon the gloss applied by the Kentucky Court of Appeals to convince us that perhaps the Supreme Court did not really mean what it said in *Rains*.

{¶10} This argument, however, fails to withstand scrutiny. We first note that *Stamper* is inapplicable to this aspect of the case because it evaluated whether an event constituted an "accident," not whether the accident was caused by the use of a vehicle. *Id.* at 123 ("The disputed issue arose over * * * whether [the woman's] damages were 'caused by an accident.' "). And although, as Ms. Par points out, the court in *Stamper* intimated that the incident arose out of the use of a vehicle, that much is obvious. *See* i*d.* at n.3. The ex-boyfriend used his *vehicle* to intentionally crash into the woman's *vehicle*, and then caused further injury by *driving* her vehicle. *Id.* at 121. That bears no parallel to this case.

{¶11} That then shines a spotlight on *Hall*. While it's debatable whether—and to what extent—the Kentucky Court of Appeals in *Hall* contradicted the Kentucky Supreme Court in *Rains*, we are bound by the higher court's holding. *Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky.1986) ("The [Kentucky] Court of Appeals is compelled to follow precedent established by the decisions of the [Kentucky] Supreme Court."). And under *Rains*, injuries caused by a shooting "d[o] not arise out of the use of a motor vehicle." *Rains*, 715 S.W.2d at 234. Regardless, *Hall* fixated on a common occurrence while driving—a rock or pebble hitting the car (common enough that it keeps windshield repair companies

in business), and utilized that as the basis for satisfying the causal connection requirement. But the court in *Hall* went out of its way to emphasize the regularity of rocks hitting cars as supporting its conclusion; and the same cannot be said for bullets. Taking *Hall* perhaps to its logical conclusion, an auto insurer expects to insure for hazards like propelled rocks, but not stray bullets. Therefore, even if *Hall* and *Rains* could sit comfortably alongside each other, *Hall* would not dictate reversal on this record.

{¶12} We acknowledge, however, the linguistic and policy reasons ably mustered by Ms. Par to convince us to disregard (or at least work around) *Rains*. Indeed, the generic reference to "a vehicle" in the personal injury protection section, without specifying *which* vehicle, lends credence to her argument that causation is satisfied if a vehicle at least contributed to the result. Similar reasoning has persuaded other state supreme courts. *See Continental W. Ins. Co. v. Klug*, 415 N.W.2d 876, 877 (Minn. 1987) (holding that shooting arose out of the use of a vehicle because the assailant used an automobile to keep up with the victim and was driving while making the assault); *Ganiron v. Hawaii Ins. Guar. Ass.*, 744 P.2d 1210, 1212 (Haw. 1987) (holding that shooting by unidentified, passing motorist arose out of the use of a vehicle because the victim "would be entitled to recover for his injuries from the owner or operator of the vehicle from which the shot was fired."); *Wausau Underwriters Ins. Co. v. Howser*, 422 S.E.2d 106, 108 (S.C. 1992) (holding that shooting arose out of the use of a vehicle because the vehicle enabled the assailant to follow closely enough to carry out the assault and the vehicle provided a means of escape afterward). But we are not writing on a blank slate—our job is to interpret Kentucky law in accordance with the decisions of the Kentucky Supreme Court. We cannot turn a blind eye to the definitive decision in this context, and we therefore hold that Ms. Par was not entitled to recover for Mr. Nung's bodily injuries under the terms of Geico's insurance policy.

* * *

{¶13} In light of the foregoing analysis, we overrule Ms. Par's assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

MOCK, P. J., and **CROUSE, J.,** concur.

Please note:

The court has recorded its entry on the date of the release of this opinion