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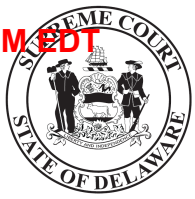

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HENRY BRADLEY MARSHALL, Individually and as Executor of the Estate of NINA MARSHALL, deceased,	:	
Plaintiff Below-Appellant,	:	
v.	:	No. 349, 2013
STATE FARM FIRE & CASUALTY COMPANY,	:	
Defendant-Below-Appellee.	:	

DEFENDANT BELOW-APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

On May 13, 2005, Appellant/Plaintiff Below, Henry Bradley Marshall (hereafter "Plaintiff") filed a Complaint for personal injuries resulting from a fire occurring at the premises of 2615 N. Heald Street, Wilmington, Delaware, on May 13, 2003.[1] Said Complaint asserted claims of negligence against Ronald Turner and Shirley Gladney, as well as a claim of negligent entrustment against Ms. Gladney. On February 26, 2007, the Superior Court granted summary judgment as to all claims against Ms. Gladney. The remaining claims against Mr. Turner went to a non-jury trial and his negligence was found to be the proximate cause of the Plaintiff's injuries. The trial court awarded $250,000 in damages.

On January 11, 2011, Plaintiff filed a Complaint against Appellee/Defendant Below, State Farm Fire and Casualty Company (hereafter "State Farm"), seeking to recover damages awarded against Mr. Turner in the underlying personal injury matter. State Farm filed a Motion for Summary Judgment on December 5, 2012, and Plaintiff thereafter filed a response. Oral argument was held by the Superior Court on April 12, 2013, and supplemental briefing was submitted shortly thereafter. On June 13, 2013, the Superior Court issued its Memorandum Opinion granting summary judgment in favor of State Farm. On June 14, 2013, Plaintiff

[1] At the time the underlying Complaint was filed, both Nina Marshall and Henry Bradley Marshall were living. Nina Marshall has since passed away.

filed a Motion for Reargument and on June 18, 2013, State Farm filed its response thereto.

On July 2, 2013, Plaintiff filed the instant appeal from the decision by the Superior Court below. On September 25, 2013, Plaintiff filed his Opening Brief. This is State Farm's Answering Brief on appeal.

SUMMARY OF THE ARGUMENT

Denied. Superior Court correctly ruled that as a matter of law an estate cannot have relatives for the purposes of insurance coverage and thus the tortfeasor in the underlying personal injury action was not an insured under State Farm's Homeowner's Policy. The Court correctly found that the policy provisions are unambiguous.

STATEMENT OF FACTS[2]

On May 13, 2003, fire occurred in the residence located at 2615 N. Heald Street, Wilmington, Delaware. [A-10]. It is undisputed that Jean E. Richardson owned the residence until her death on October 3, 2002. [A-9; B-1]. Shirley Gladney was named as Executrix of Ms. Richardson's estate in her Last Will and Testament dated July 30, 1985, but in a First Codicil executed on January 16, 2002, Ms. Richardson substituted John Henry Washington as Executor of her estate. [A-87-92]. On February 28, 2003, the Register of Wills issued Letters of Successor Administration to and appointed Ms. Gladney as Personal Representative of Ms. Richardson's estate, after Mr. Washington expressed the desire to no longer serve as Executor. [A-95; B-8-11,15]. Ms. Gladney assumed ownership of the residence sometime in 2003. [A-94].[3] It is not disputed that Ms. Gladney owned the residence on May 13, 2003. Id.

Prior to May 13, 2003, but after Ms. Richardson's death on October 3, 2002, Ms. Gladney permitted her son, Ronald Turner, to reside in the residence at 2615

[2] References to Plaintiff's Appendix will be designated as [A-], and references to State Farm's Appendix will be designated as [B-].

[3] Plaintiff has submitted at A-97-99 of his Appendix a land parcel document of the subject residence. This document was not made part of the record before the trial court below and constitutes inadmissible hearsay. It is well-settled that this Court will not as a matter of general practice consider evidence which was not part of the record below. *Getty Oil Company v. Heim*, 372 A.2d 529, 534 (Del. 1997) ("In general our function is to review the record, not to provide a forum for making it"). State Farm would request that the Court ignore this "evidence" as support for any factual assertion made in this appeal.

N. Heald Street, Wilmington, Delaware. [A-96; B-16]. Mr. Turner was occupying the presence when the fire occurred on May 13, 2003.

On May 13, 2005, Plaintiff filed a Complaint for personal injuries resulting from the fire of May 13, 2003. [A-1-3]. The Complaint asserted claims of negligence against Mr. Turner and Ms. Gladney, as well as a claim for negligent entrustment against Ms. Gladney. Id. On February 26, 2007, the trial court granted summary judgment as to all claims against Ms. Gladney. [B-20]. The remaining claims against Mr. Turner proceeded to a non-jury trial. The trial court found that Mr. Turner was negligent and that his negligence was the proximate cause of Plaintiff's injuries. [A-4-8]. The court awarded $250,000 in compensatory damages. Id.

At all times relevant hereto, the residence was insured through a Homeowner's Insurance Policy ("the Homeowner's Policy") issued by State Farm. [A-51-86]. The original policy names Jean E. Richardson as the named insured. [A-51]. Sometime after Ms. Richardson's death, the named insured under the policy was changed to "the estate of Jean E. Richardson". [A-102].

ARGUMENT

I. QUESTION PRESENTED

Whether the Superior Court erred in concluding that Ronald Turner was not an insured under State Farm's Homeowner's Policy?

II. SCOPE OF REVIEW

The interpretation of an insurance policy is subject to *de novo* review. *Conagra Foods, Inc. v. Lexington Insurance Company,* 21 A.3d 62, 68 (Del. 2011). Clear and unambiguous language in an insurance contract will be given its ordinary meaning. Id., at 69. Where the language of a policy is clear and unequivocal, the parties are bound by its plain meaning. Id. An insurance contract is not ambiguous simply because the parties disagree as to its proper interpretation. Id.

III. MERITS OF ARGUMENT

A. RONALD TURNER WAS NOT A "RELATIVE" OF THE ESTATE OF JEAN E. RICHARDSON AND IS THEREFORE NOT AN INSURED UNDER THE HOMEOWNER'S POLICY

In the original Complaint, Plaintiff claimed that Ronald Turner was an insured by virtue of subsection 9b of the Liability Conditions section of the Homeowner's Policy. [A-9-10]. That subsection provides as follows in relevant part:

"9. **Death.** If any person shown in the **Declarations**...dies:

a. We insure the legal representative of the deceased. This condition applies only with respect to the premises and property of the deceased covered under this policy at the time of death;

b. **insured** includes:

(1) Any member of your household who is an **insured** at the time of your death, but only while a resident of the **resident premises**;..."

[A-74]. Plaintiff thereafter pursued this argument in his Response to State Farm's Motion for Summary Judgment. [A-17-18]. However, under questioning by the trial court at oral argument on the motion, Plaintiff had to concede that Mr. Turner was not "a member of [the] household at the time of [Ms. Richardson's] death", and abandoned this argument. [A-16-18].

Plaintiff has elected instead to stake out the position that Mr. Turner was an insured under the Definitions language found at page 1 of the Homeowner's Policy:

"DEFINITIONS

"You" and "your" mean the "named insured" shown in the **Declarations.** Your spouse is included if a resident of your household. "We" "us" and "our" mean the Company shown in the **Declarations**.

* * *

4. "**insured**" means you and, if residents of your household:

a. Your relatives;...."

[A-55]. Specifically, Plaintiff argued that Mr. Turner was an insured as a "relative" of the "named insured". As already noted, the original "named insured" under the Homeowner's Policy was Jean E. Richardson. [A-51]. Sometime following her death, the "named insured" was changed to "Estate of Jean E. Richardson". [A-102]. During oral argument on the summary judgment motion (as well as in his Response to the Motion), Plaintiff's counsel argued that "[f]or all intents and purposes, Gladney was the estate". [A-17,38-41].[4] Counsel's argument continued that "...if Ms. Gladney is the one – she's the person that's handling the estate...she is insured under it and, therefore, her relatives...would also be an insured". [A-40-41].

This argument was rejected by the trial court, as it should be here on appeal, because there is a clear fundamental difference between naming the Estate of Ms. Richardson on the one hand and Ms. Gladney as an individual on the other as the named insured. The trial court noted this distinction during oral argument:

> "THE COURT: Mr. Turner is not a relative of the estate. He is a relative of the executrix, which is a difference. These are two different entities. He is a relative of a person. He is not a relative of the estate."

[4] It is worth noting here that while Ms. Gladney was named as Executrix in Ms. Richardson's last Will and Testament, Ms. Richardson executed a First Codicil that deleted this appointment and substituted instead John Henry Washington as Executor of the Estate. [A-90-92]. Ms. Gladney testified that sometime in 2003 Mr. Washington no longer wished to serve as Executor and on February 28, 2003, the Register of Wills issued Letters of Successor of Administration to Ms. Gladney. [A-95; B-8,15]. State Farm does not dispute that at the time of the fire loss on May 13, 2003 was serving as Executrix of Ms. Richardson's Estate.

[A-39-40]. The trial court adopted this elementary observation in its Memorandum Opinion when it held that a legal estate cannot, by definition, have a "relative" and that the language of policy in this regard is unambiguous:

> "Common sense dictates that people have relatives. Artificial entities, such as corporations and partnerships, do not have relatives.... The Court is unaware of any jurisdiction that has held that an estate, executor/executrix, or other legal representative can have relatives. To find otherwise would extend the exposure under the insurance contract beyond what reasonably could have been foreseen or contemplated by the parties negotiating this policy."

Memorandum Opinion, at 6-7.

Indeed, this fundamental distinction is reflected by the unambiguous language of section 9a. which provides as follows:

> 9a. **Death.** If any person shown in the Declarations (Jean E. Richardson)...dies:
>
> > a. We insure the legal representative of the deceased. This conditions applies only with respect to the premises and property of the deceased covered under this policy at the time of death...."

The policy makes clear that Ms. Gladney was being insured only in her capacity as "legal representative" of the estate, not as an insured in her own individual capacity.

This interpretation is likewise supported by the nature of an estate and legal representative's relationship to it. In *Chambers v. Gallo,* 108 A.2d 254 (Del. 1954), the Court recognized that an estate is a unique legal entity that, by statutory

directive, takes temporary title and possession of the deceased's property for the purpose of administering the estate. The legal representative of an estate takes title or possession to real estate **in his or her administrative capacity** on the **temporary** basis for the benefit of the estate's creditors, if there are any, and the heirs of the deceased. Id., at 255 (emphasis added); see also 12 Del. C. §1902(b) (1974). Throughout his brief Plaintiff conflates Ms. Gladney as an individual with Ms. Gladney in her capacity as a legal representative. The latter is insured on a temporary basis and only for the limited purposes expressed by the policy, whereas Ms. Gladney the individual is not an insured.

As noted by the trial court, there is no case law that has found an individual to be a "relative" of an estate or to extend coverage under an insurance policy to a "relative" of an executor/executrix or other legal representative of an estate. Memorandum Opinion at 7. However, there is case law to the contrary. In its post-argument briefing, State Farm pointed to the case of *Winters v. Hart*, 832 N.E.2d 753 (Ohio App. 2005) in support of the position that there cannot be a "relative" of an estate. In *Winters,* the late Sidney Kelsey created through his Will a testamentary trust for the benefit of his daughter Andrea Hart. The trustees were directed to purchase and hold title to a manufactured home for use by Andrea Hart and her family. During the coverage period the policy on the manufactured home, Andrea's daughter, Dianna, pushed her father, Robert, who fell and subsequently

died from his injuries. His estate brought a wrongful death action against Dianna and sought a declaration from the court that the homeowner's policy issued by Owner's Insurance Company covered the claims against Dianna Hart. The court noted that the declaration page of the policy named the insured as "Sidney E. Kelsey Trust in c/o Frank Reinheimer % Andrea J. Hart". Mr. Reinheimer was a member of the three person trustee board. The same identical language defining an insured person as is at issue in the instant case was involved there. In interpreting this language, the court affirmed the trial court's ruling that "...the Kelsey Trust was the only named insured on the policy..." and that because "...a trust can have no relatives..." the Hart's were not insured persons to whom indemnity was owed. 832 N.E.2d at 756. While the *Winters* case involved a testamentary trust as opposed to an estate, the principle is the same.

Plaintiff has cited the case of *Lombardi v. Allstate Insurance Company,* 2011 WL 294506 (W. D. Pa.) in support of his position that Mr. Turner, as a relative of the "insured" [Gladney], is likewise an insured under the Homeowner's Policy. However, this rather unusual case is not helpful and does not support Plaintiff's position here. In *Lombardi*, the plaintiff was appointed as Administrator of his sister's estate. Among the assets of the estate was his sister's house which was insured under a homeowner's policy issued by Allstate Insurance Company. During the pendency of the estate, they house suffered significant water damage

presumably because it had not been properly winterized. Allstate denied the claim and Lombardi initiated an action to recover under the policy.

Allstate asserted in defense of the claim an exclusion (section 14) that removed from coverage under the policy any losses caused by frozen plumbing, the failure to maintain heat, or the failure to shut off the water supply and drain the system. *Lombardi* contended that he had no obligation to comply with the requirements of section 14 because he was not an "insured" under the policy. The court looked at the definition of "you" and "your" and determined that, for purposes of the section 14 obligations, the term "you" must include the named insured's legal representative. It reasoned as follows:

> "There is no meaningful distinction between Nancy Morocco and the Estate of Nancy Morocco. Upon the death of the insured, the named insured on the Policy becomes the Estate of Nancy Morocco. Because the Estate is incapable of acting on its own, it must act – or fail to act – through its administrator – here, Anthony Lombardy. Thus, "you" as used in section 14 is understood to mean "the legal representative".
>
> * * *
>
> "I similarly reject Lombardi's "public policy" argument. Requiring an administrator or executor to take reasonable steps to protect the property from the known dangers associated with frozen pipes in an unoccupied, unheated building hardly seems contrary to public policy."

Id., at 4. The Court therefore held as a matter of law that the exclusionary language of section 14 applied.

Plaintiff attempts here to bootstrap the holding and reasoning of the *Lombardi* case to install Ms. Gladney as the insured, as well as her son as a resident relative insured, under State Farm's Homeowner's Policy. This effort must fail for two principal reasons. First, the holding in *Lombardi* address a legal representative's attempt to avoid his obligations for maintaining the property under the policy. This was recognized by the Court as a uniquely appropriate role for the "legal representative" to maintain. In doing so, the court held only that since an estate cannot act on its own the legal representative is the only person who could discharge those basic responsibilities. It did not hold either generally that a legal representative of an estate is an insured for all purposes or specifically that the Administrator is an insured for indemnity purposes. Second, even if the *Lombardi* case stood for the latter proposition, it does not establish that the son of the legal representative of the estate is an insured under the liability provisions of the homeowner's policy. In short, Plaintiff has relied upon *dicta* from a factually inapposite case to further conflate the role of Ms. Gladney as a legal representative of Ms. Richardson's estate with her status as an individual in her right.

In summary, the Homeowner's Policy was issued by State Farm to insure Jean E. Richardson during her lifetime and her Estate after her death. It was not issued to insure Shirley Gladney as an individual and her son as a resident relative of the household.

B. PLAINTIFF'S ARGUMENT AS TO THE "OWNERSHIP" OF THE REAL PROPERTY IS BARRED BY SUPREME COURT RULE 8

During the proceedings below, Plaintiff argued that Mr. Turner was an "insured" under State Farm's Homeowner's Policy because he was a relative resident of the household at the time of the fire on May 13, 2003.[5] As noted above, the argument is based on the relevant policy language found under the DEFINITIONS section on page 1 of the policy. Plaintiff argued that since Ms. Gladney in her capacity as legal representative of the estate was an insured under the policy, then her son, as a resident relative of the household, must also be an insured under the policy. The question before the Superior Court therefore was whether an estate of a deceased individual could have a "relative" within the meaning of the definition. The Superior Court determined that it could not and concluded as a matter of law that Mr. Turner was not an insured.

Plaintiff now comes before this Court on appeal with a "new" argument, based in part on evidence not placed before the trial court below. This "new" argument is based on Ms. Gladney's "ownership" of the residence. In that regard, Plaintiff now contends that Ms. Gladney became the "owner of the [real] property from the moment of Richardson's death on October 3, 2002 and that the Estate of

[5] Plaintiff also contended below that coverage was provided under Section 9b. of the Liability Conditions, but abandoned that argument during oral argument on the summary judgment motion. [A-39]. That issue is not before the Court on this appeal, although Plaintiff makes repeated references to the provision.

Jean E. Richardson "...did not and could not own] the property". Opening Brief at 10.[6] According to Plaintiff, it stands to reason that Ms. Gladney, as the "owner" of the property, was "...for all intents and purposes" the named insured and Mr. Turner, as a "relative" of the named insured and "resident of the household", was also an insured within the meaning of the policy.

This argument by Plaintiff, which hinges on Ms. Gladney's **ownership** of the property, as opposed to her status as legal representative, was never presented for consideration by the trial court. It is well-settled that "[o]nly questions fairly presented to the trial court may be presented for review...". See Supreme Court Rule 8; *Karn v. Doyle,* 406 A.2d 36 (Del. 1979); *City of Wilmington v. Spencer,* 391 A.2d 199, 203 (Del. 1978) ("This argument was not made in the Superior Court and it comes too late here").

In the event that the Court elects to consider this matter, it does not assist Plaintiff in establishing that Mr. Turner is an insured under the Homeowner's Policy. The "ownership" argument proceeds as follows: Ms. Richardson devised the residence to Ms. Gladney through her Last Will and Testament, vesting title in Ms. Gladney as of the date of her death on October 3, 2002. Opening Brief at 10.

[6] As noted previously, the only factual evidence that Ms. Gladney became the owner of the insured property on October 3, 2002, is the land parcel document submitted by Plaintiff at A-97-99 of his Appendix. Not only does this document constitute hearsay evidence, it was not presented as part of the record below and should therefore be disregarded by the Court on this appeal. See *Getty Oil Company v. Heim,* 372 A.2d at 534. Moreover, the factual submission itself is inconsistent with Ms. Gladney's own deposition testimony in the underlying action that she took ownership of the residence sometime in 2003. [B-15]. Finally, the factual assertion is contradicted by settled law set forth below.

Since the Estate of Jean E. Richardson could not and would not own property, it can only mean that State Farm "...intended to insure the **owner** of the property [Ms. Gladney] for the remainder of the policy period". Id. at 10-11 (emphasis added). And since Ms. Gladney was an insured as the owner of the residence, when Mr. Turner, subsequently moved into the home, as a resident relative of the household he became an insured as well.

Plaintiff cites no statutory or decisional authority for this legal legerdemain. There is certainly good reason for this. First, Plaintiff's argument constitutes an attempt to re-write the contract which cannot be allowed. Second, the record established that Ms. Gladney took ownership of the real property sometime in 2003 and not upon the death of Ms. Richardson on October 3, 2002. The real property remained an asset of the Estate until such time as the title was transferred. See *Chambers,* 108 A.2d at 255. Third, the change in the named insured from Jean E. Richardson to Estate of Jean E. Richardson reflected the routine recognition that Ms. Richardson had died and that the insured property was now held by her Estate. See *Lombardi*, supra at 4. Nothing about this change in the named insured constituted an acknowledgement on the part of State Farm that it now insured Ms. Gladney as the "owner" of the property. The unambiguous language of Section 9a. on page 20 of the policy establishes that Ms. Gladney was insured only as a "legal representative" of the Estate and not in her individual capacity. Third, insuring the

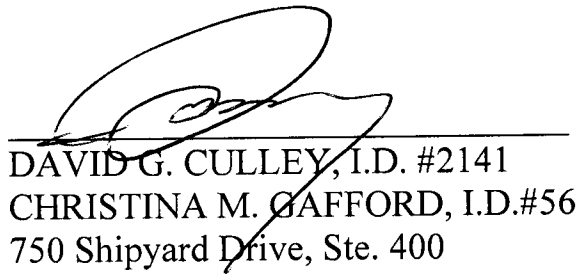
"Estate of Jean E. Richardson" as opposed to Ms. Richardson herself does not transform Mr. Turner into an insured under the policy, especially since he had no familial relationship with Mr. Richardson.

In summary, the unambiguous terms of the Homeowner's Policy support the Superior Court's conclusion that Mr. Turner is not an insured under the policy.

CONCLUSION

For the foregoing reasons, Appellee/Defendant Below, State Farm Fire and Casualty Company, respectfully requests that this Honorable Court affirm the Superior Court's decision below.

TYBOUT, REDFEARN & PELL



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