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Case Number 349,2013

IN THE SUPREME COURT OF THE

STATE OF DELAWARE

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

PLAINTIFF-APPELLANT'S AMENDED REPLY BRIEF ON APPEAL

Appeal from a Decision of
The Superior Court of the State of Delaware,
In and for New Castle County
C. A. No. 11C-01-105-MMJ, dated 6/13/13
granting the Defendant-Appellee's
Motion for Summary Judgment

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TABLE OF CONTENTS

TABLE OF CITATIONS AND AUTHORITIES

Cases

Other Authorities

NATURE OF THE PROCEEDINGS

Plaintiff below, Appellant, Henry Bradley Marshall, hereby incorporates the Nature of the Proceedings as contained in his Corrected Opening Brief on Appeal.

SUMMARY OF THE ARGUMENT

I. **THE SUPERIOR COURT ERRED AS A MATTER OF LAW IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN RULING THAT AN "ESTATE" CANNOT HAVE RELATIVES FOR PURPOSES OF INSURANCE COVERAGE AND, THEREFORE, THE ORIGINAL UNDERLYING INDIVIDUAL DEFENDANT WAS NOT COVERED AS AN INSURED UNDER THE DEFENDANT STATE FARM'S POLICY FOR LIABILITY COVERAGE SINCE THE TORTFEASOR WAS AN "INSURED" UNDER THE TERMS OF THE DEFENDANT'S POLICY; OR AT THE VERY LEAST THE POLICY PROVISIONS OF THE DEFENDANT ARE AMBIGUOUS**

STATEMENT OF FACTS

Plaintiff below, Appellant, Henry Bradley Marshall, hereby incorporates the Statement of Facts as contained in his Corrected Opening Brief on Appeal.

ARGUMENT

I. THE SUPERIOR COURT ERRED AS A MATTER OF LAW IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN RULING THAT AN "ESTATE" CANNOT HAVE RELATIVES FOR PURPOSES OF INSURANCE COVERAGE AND, THEREFORE, THE ORIGINAL UNDERLYING INDIVIDUAL DEFENDANT WAS NOT COVERED AS AN INSURED UNDER THE DEFENDANT STATE FARM'S POLICY FOR LIABILITY COVERAGE SINCE THE TORTFEASOR WAS AN "INSURED" UNDER THE TERMS OF THE DEFENDANT'S POLICY; OR AT THE VERY LEAST THE POLICY PROVISIONS OF THE DEFENDANT ARE AMBIGUOUS

A. Question Presented

See Plaintiff's Corrected Opening Brief.

B. Standard and Scope of Review

See Plaintiff's Corrected Opening Brief.

C. Merits of the Argument

1. RONALD TURNER WAS A "RELATIVE" OF THE ESTATE OF JEAN E. RICHARDSON AND IS THEREFORE AN INSURED UNDER THE HOMEOWNER'S POLICY

Defendant contends that Ms. Gladney was only insured as legal representative of the estate and not as an insured in her own individual capacity. Defendant supports this argument by claiming that the language of the policy designates the "Estate of Jean E. Richardson" as the insured, and further alleges that an Estate cannot have a relative. This argument must fail for the following reasons.

While Jean E. Richardson was the original named insured, upon her death, the declaration page of the policy was updated naming the "Estate of Jean E. Richardson" as the insured. By updating the declaration page of the policy, it is logical to conclude that Defendant State Farm intended to continue insuring the property through the designated contracted period. At the time of updating, Ms. Gladney was the property owner, since she became the owner upon the death of Jean E. Richardson. The updated policy is ambiguous as to who it insures and in what capacity it insures. There is no language in the definition section which suggests that the legal representative is only insured in so far as they operate as a legal representative. Therefore, it is logical to conclude that Ms. Gladney was insured under the policy and thus that, as her relative, Mr. Turner was also insured.

Additionally, Defendant points to section 9a of the policy which addresses the issue of the status of the policy if an insured were to die within the contract period. The language of section 9a is as follows:

> 9a. **Death**. If any person shown in the Declarations or the spouse, if a resident of the same household, 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.

(A-74). A reading of the policy language on its face, makes clear that the legal representative, Ms. Gladney, became insured upon the death of Jean E. Richardson, the initial insured. Holding this as true, there was no need for State

Farm to update the policy declaration page to reflect the "Estate of Jean E. Richardson" as it was already included within the policy that the legal representative would become insured. Thus, if Defendant State Farm intended only to insure the legal representative of the Estate, the policy language as was, already insured the legal representative. It follows that since Ms. Gladney was insured under the policy, then her son, Mr. Turner, would too be insured. Therefore, by updating the Declaration page to insure the "Estate of Jean E. Richardson," it created ambiguity as to who Defendant State Farm insured.

Defendant cites to Chambers in support of the proposition that the legal representative of an estate takes title 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. Chambers v. Gallo, 108 A.2d 254 (Del. 1954); Answering Brief at 10. However, this citation is misapplied and misconstrued. In Chambers, the Defendant was the executor of the estate of Carmela Quaranta who, at the time of her death, possessed a mortgage which was a lien against a property in the city of Wilmington. Id. The mortgagors of the property conveyed the property to Defendant for consideration of $10 for the purpose of saving "the estate the expense which would have been incurred by a foreclosure of the mortgage and sale of the peroprty." Chambers, 108 A.2d 254. Defendant, while named executor of Carmela Quaranta's estate by her will, was not given authority to buy or sell real

estate. Id. The Court held that it is the duty of an executor or administrator to protect the estate of the decedent. Id. Thus, the Court held that if Defendant were to take title to real estate in his administrative capacity, he [took] it temporarily for the benefit of the creditors." Id. This holding only extends as far as to adopting title for the benefit of the creditors. The case does not hold that a legal representative takes title absent to benefit the estate. In the present case, Ms. Gladney did not take title to satisfy a creditor or for the benefit of the heirs. Rather, she took title as was devised and bequeathed via Jean E. Richardson's will.

Defendant further relies on Winters v. Hart, 832 N.E.2d 753 (Ohio App. 2005). Winters is an Ohio case which can be distinguished for the fact that it deals with a trust as opposed to an estate. The Court in Winters held that a *trust* can have no relatives. Id. The case does not make a determination as to whether an *estate* can have relatives which would be insured under the policy.

The Court in Lombardi comes to a contrary conclusion to that of the Winters Courts. Lombardi stands for the proposition that an Estate cannot be a legal entity. Defendant attempts to distinguish Lombardi from the case at bar, by arguing that the holding extends only to address a legal representative's attempt to avoid obligations in maintaining the property under the policy. Anthony Lombardi, individually and as Administrator for the Estate of Nancy Morocco v. Allstate Insurance Company, 2011 WL 294506 (WD Pa). However, no where in its ruling,

does the Court limit its holding to such a narrow application of the holding. Rather, the Court holds that an estate is incapable of acting on its own, and therefore, it must act through its administrator. Id at *4. It further held that "your legal representative" is the equivalent of the insured; to hold to the contrary would to leave third parties unable to contractually settle any covered loss with the insurer. The case involved the same definitions and policy language concerning "you", "your", and "resident of your household" as in the instant case. As determined by Lombardi, as the administrator of the Estate, one stands in the shoes of the policyholder and are bound by the policy. Thus, Ms. Gladney would stand in the shoes of the policyholder and upon designating Ms. Gladney as the insured, it would follow that her son, Mr. Turner, would be a relative insured under the policy.

For the aforementioned reasons, the Plaintiff respectfully submits that as to the fire on 5/13/03 Ms. Gladney, under the provisions of the Defendant's policy, and for all intents and purposes, was the "insured" and, consequently, the tortfeasor Mr. Turner, as a relative/member of the household, was also insured under the policy in question. Therefore, the Plaintiff's claims would be consequently covered under the policy.

2. PLAINTIFF'S ARGUMENT AS TO THE "OWNERSHIP" OF THE REAL PROPERTY IS NOT A "NEW" ARGUMENT AND IS NOT BARRED BY SUPREME COURT OF THE STATE OF DELAWARE RULE 8

Defendant contends that Plaintiff asserts a new argument on appeal, namely the issue of ownership, and is barred from doing so by Supreme Court of the State of Delaware Rule 8. The Rule provides:

> **Rule 8. Questions which may be raised on appeal.**
> Only questions fairly presented to the trial Court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any questions not so presented.

Rule 8 only bars new questions from coming to light before the Supreme Court when such questions were not fairly presented to the trial Court. Del. Sup. R. 8. In determining whether an issue has been fairly presented to the trial Court, this Court has held that the mere raising of the issue is sufficient to preserve it for appeal. Watkins v. Beatrice Companies, Inc., 560 A.2d 1016, 1020 (Del. 1989)(citing Sergeson v. Delaware Trust Co., 413 A.2d 880, 881-82 (Del. Supr. 1980) (*per curiam*).

The Plaintiff in the underlying matter raised the issue as to what constituted ownership of the premises by the Estate and, consequently, who would be an insured under the terms of the policy with the Defendant. (See transcript of motion at A-42).

The argument that Defendant labeled as "new" has been before the Court

throughout the proceeding. It has been admitted by both parties that Ms. Richardson devised and bequeathed the house at 2615 North Heald Street to Ms. Gladney upon her death. In Defendant's Statement of Facts, Defendant concedes, "[i]t is not disputed that Ms. Gladney owned the residence on May 13, 2003." Answering Brief at 4. Furthermore, in Defendant's post-argument letter dated 4/22/13, the Defendant stated, "[h]ad Ms. Gladney become the title owner and possessor of the property as an individual as opposed to her capacity as the legal representative of the Estate, then a new policy based upon a different exposure analysis would have to be issued..." (See Defendant's letter dated 4/22/13 to the underlying Court at page 2). Therefore, the issue of ownership of the premises and how that would be covered under the policy compared to the issue of the named insured under the declarations page of "The Estate of Jean E. Richardson" was before the underlying Court. The Plaintiff contends that this pertains to the issue of whether the terms of the policy are ambiguous, which clearly was argued before the underlying Court.[1]

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[1] The Defendant contends that the Plaintiff further is presenting an issue whether coverage was provided under §9(b) and this is also not an issue before the Court on appeal. (See Defendant's brief at page 14, footnote 5.) This clearly is not correct. The Plaintiff below repeatedly made references that under §9(b) there was an issue as to whether the policy was ambiguous comparing this section to the balance of the policy provisions. (See A-22-45, in particular A-39-40).

The Defendant, in its footnote 6 on page 15 of its answering brief objects to the land parcel document submitted by the Plaintiff in its appendix at A-97-99.

The Defendant cites the three cases to support its argument. These are clearly distinguishable from the case at bar. In Karn v. Doyle, 406 A.2d 36 (Del. 1979), one party raised eleven issues on appeal that had not been raised in the underlying Court. Additionally, the Court ruled the underlying Chancelor had not abused his discretion so there was no basis for reversal so the point of the objection under Rule 8 was moot. Secondly, in City of Wilmington v. Spencer, 391 A.2d 199 (Del. 1978), a party first raised an issue as to the statute of limitations on appeal. Clearly this is an issue far different that the issue presented before this Court in the instant Case. Lastly, in Getty Oil Company v. Heim, 372 A.2d 529 (Del. 1977), a party attempted to submit a deposition transcript that was not submitted to the Trial Court. The Court held that "as a matter of general practice this Court refuses to consider evidence which was not part of the record below. On appeal, [its] function is to review the record, not to provide a form for making it. However, the circumstances here are exceptional and, given the age of the case, the imminence of trial and the significance of our ruling on the trial, we will measure the impact of [the] testimony against the soundness of our conclusion on the

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However, this document only verifies what both parties have stipulated, namely that Ms. Gladney owned the premises in question at the time of the fire on 5/13/03. The Plaintiff also cited to the New Castle County Will Search in its appendix at A-99, confirming also what the Defendant previously stipulated, namely that by codicil Henry Washington resigned as Executor and that Ms. Gladney succeeded him as Executrix, yet the Defendant makes no objection to this.

assumption of risk issue."

Even if this Court agrees with the Defendant's position that this was an entirely new question not presented in the Court below, Rule 8 provides that when "the interests of justice so require, the Court may consider and determine any question not so presented". In Robino-Bay Court Plaza, LLC v. West Willow-Bay Court LLC, 985 A.2d 391 (Del. Supr. 2009), this Court considered an issue very similar to the one before it now. The Defendant-Appellant conceded it did not raise an issue concerning the interpretation of the provisions of the contract between the parties in its appeal and urged for the first time on appeal that in the "interests of justice", the Court should consider extrinsic evidence of either mutual mistake or unilateral mistake. The Appellant further asserted that "while neither party urged these precise reasons for considering extrinsic evidence in this case, they did not put forth arguments based upon one established exception to the parole evidence rule (ambiguity)." The Appellant argued that it "was not raising an entirely new theory of its case, but is only presenting an additional reason in support of its proposition urged below, namely that the Trial Court should have considered the extrinsic evidence based upon mutual mistake." This Court, despite indicating to the extent a party presents arguments on appeal that were not fairly presented in the Court below and therefore should be waived, nevertheless held "when the interests of justice so require, the Court may consider and determine any

question not so presented. Therefore, this Court will not permit a litigant to raise in this Court, for the first time, matters not argued below where to do so would be to raise an entirely new theory of his case; *but where the argument is merely an additional reason in support of a proposition that was urged below, we find no reason why, in the interest of a speedy end to litigation, the argument should not be considered. In this unusual case, we agree that the issues relating to the actual purchase agreement and the intent of the parties were presented generally to the Court...[the Appellant] argued at trial that the language was unambiguous and, to the extent it was ambiguous, extrinsic evidence in the form of the pre-second amendment correspondence supported [the Appellant's] interpretation. Factual arguments that would support mutual or unilateral mistake were presented to, and addressed by, [the underlying Court]. We conclude that in the interests of justice, the claims relating to mistake should be considered." [emphasis added]*

Clearly, the Plaintiff in the underlying Court raised ambiguity of the contract provisions in support of his argument. The issue of ownership versus the named insured as the Estate of Jean E. Richardson is merely a factual issue presented generally to the underlying Court and, in the interests of justice, should be allowed to be argued before the Court in the instant case.

Moreover, Defendant asserts that there is no legal basis for the argument if it is considered. In support thereof, Defendant claims that Plaintiff is attempting to

re-write the contract. However, Plaintiff is merely showing that the contract is ambiguous and susceptible to multiple reasonable interpretations. Additionally, Defendant alleges that the "record establishes only that Ms. Gladney took ownership sometime in 2003 and not upon the death of Ms. Richardson on October 3, 2002." Answering Brief at 16. However, at the hearing for the Motion, Defendant counsel conceded that Section (a) "makes it clear that as of the time of Ms. Richardson's death, the risk or the exposure is fixed" and for that reason "the legal representative becomes insured at that point" so as to administer the estates, including the home. (A-29). Defendant, further states that, "insuring the 'Estate of Jean E. Richardson' as opposed to Ms. Richardson herself does not transform Mr. Turner into an insured." Answering Brief at 16-17. That is not Plaintiff's argument. Rather, Plaintiff asserts that by insuring the 'Estate of Jean E. Richardson", State Farm insures Ms. Gladney. In insuring Ms. Gladney, State farm insures Mr. Turner as he is her son and the policy purports to insure relatives of the insured within its declaration page. Finally, Defendant argues that the change in the declaration does not constitute an acknowledgement on the part of State Farm that it insured Ms. Gladney. However, the policy merely states that State Farm insured the "Estate of Jean E. Richardson." Whom State Farm acknowledged as an insured, and in what capacity it insured said party, is ambiguous by the language of the contract. Ambiguously construed contracts

should be interpreted as against the insurer who drafted it. Timothy J. Wygant v. Geico General, 27 A.3d 553 (Del. Supr. 2011).

For the aforementioned reasons, the issue of ownership raised by the Plaintiff in his opening brief is not barred by Supreme Court of the State of Delaware Rule 8, as it was fairly presented to the Trial Court and should be considered by this Court in the interests of justice.

CONCLUSION

The Plaintiff-Appellant respectfully submits that the Court below erred as a matter of law in granting the Defendant's Motion for Summary Judgment because the underlying tortfeasor was an insured" of the Defendant's policy provisions or, at the very least, the provisions were ambiguous and should be construed in favor of the Plaintiff. Therefore, the Court's order should be reversed.

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