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IN THE SUPREME COURT OF THE STATE OF DELAWARE

VIDA LONGEVITY FUND, LP, Defendant-Appellant, v. ESTATE OF MARTHA BAROTZ, Plaintiff-Appellee.	)))))))))	No. 366,2023 Court Below: Superior Court of the State of Delaware C.A. No. N20C-05-144-EMD-CCLD

APPELLANT'S CORRECTED OPENING BRIEF

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NATURE OF PROCEEDINGS

The Plaintiff-Appellee, the Estate of Martha Barotz ("Estate"), commenced this lawsuit in 2020, alleging that the subject life insurance policy, which Defendant-Appellant Vida Longevity Fund, LP ("Vida") purchased in a portfolio of policies in 2018, lacked insurable interest and was an illegal wager, contrary to the representations and warranties that Martha Barotz ("Martha," the insured) made when the policy was sold in 2008. The Superior Court below incorrectly decided disputed issues of material fact on a motion by the Estate for summary judgment. It entered judgment in favor of the Estate under title 18, section 2704(b) of the Delaware Code ("Section 2704(b)"), awarding it the death benefit and prejudgment interest compounding quarterly.

The Superior Court misinterpreted *Lavastone Capital LLC v. Estate of Berland*, 266 A.3d 964, 972 (Del. 2021) ("*Berland*"), as it applies to the premium finance loan that was used by the Barotz family to finance the premiums for the policy, and Delaware law as it applies to prejudgment interest. Reversal is required so that a trial can decide the fact issues. In addition, guidance from this Court with respect to *Berland* and prejudgment interest in the context of this case is necessary.

SUMMARY OF ARGUMENT

1. *First*, the Superior Court misapplied the insurable interest analysis as it pertains to nonrecourse premium financing and improperly decided disputed material issues of fact.

Martha purchased the subject life insurance policy with the help of her son, Nathan Barotz ("Nathan"), a lawyer, using the same loan program that this Court examined on certified questions in *Berland*.

The Superior Court held that because Martha did not pay premiums for the policy, it was a void wager because it was "procured" by strangers who did not have an insurable interest in her life. Ex. 1 at 15-18. But the Superior Court ignored that title 18, section 2704(a) of the Delaware Code ("Section 2704(a)"), expressly *permits* a third party to procure a life policy on an insured's life so long as the benefits are payable to someone with insurable interest in the insured's life, as here. At all relevant times, the beneficiary of the policy was the insured's family trust, of which Nathan was trustee and the beneficiaries were Martha's spouse and issue. The Superior Court's holding therefore directly contradicts the plain language of Section 2704(a).

If this Court had intended to hold that the mere involvement of the loan at issue in *Berland* violated insurable interest or *per se* constituted illegal wagering, it would have answered the certified question in *Berland* to that effect, rather than

sending the case back to the federal district court for factual findings concerning the insured's intent and whether the circumstances amounted to an unlawful wager. Yet the Superior Court here decided, based exclusively on the same set of loan documents examined in *Berland*, that the policy was void. The Superior Court's grant of summary judgment to the Estate ignores *Berland* and *PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust*, 28 A.3d 1059, 1078 (Del. 2011) ("*Price Dawe*"), each of which permit an insured to acquire a life policy for the express purpose of selling it, and only restrict a pre-arranged transfer that is tantamount to a wager.

2. *Second*, the Superior Court's decision that Vida's common law defenses are barred as a matter of law where the policy is declared void is a misapplication of *Wells Fargo Bank, N.A., as Securities Intermediary v. Estate of Phyllis M. Malkin*, 278 A.3d 53, 59 (Del. 2022) ("*Malkin*") and *Price Dawe*. Vida's defenses do not seek to enforce any terms of *the policy*; rather, Vida seeks to enforce subsequent, arms-length agreements based on additional consideration that are valid and binding on the Estate.

3. *Third*, the Superior Court erred in awarding prejudgment interest to the Estate for a number of reasons. Assuming the Estate could recover the death benefit, it was not harmed as a result of any unlawful conduct by Vida (a tertiary market purchaser of the policy); it had no property interest in the policy if it was void; and

Vida never unjustifiably refused to satisfy any obligation to the Estate. Moreover, the accrual of prejudgment interest would begin when the Estate commenced this action (not when the insured died), and the Superior Court lacks authority to compound interest.

STATEMENT OF FACTS

On December 12, 2018, Vida purchased a portfolio of life insurance policies,[1] which portfolio included an $8 million policy issued on April 20, 2006, by Pacific Life Insurance Company ("Pac Life") insuring the life of Martha, and bearing policy number VF5149922-0 (the "Policy"). That acquisition granted to Vida all rights assigned by Martha and her family. Martha and her family financed the premiums for the Policy through a short-term nonrecourse loan issued by LaSalle Bank, N.A. under its Premium Finance Plus Program ("PFP Program").[2] In July 2008, Martha's family, through a trust that was the owner and beneficiary of the Policy, sold the Policy to Midas, LLC ("Midas"), an entity unrelated to the premium finance lender.[3] The Purchase Agreement between the trust (as seller) and Midas (as buyer) included the following representations and warranties by the seller:

- § 2.6(f): Neither at the time of the formation of the Trust, nor issuance of the Policy, did the trustee or the seller have an intention of selling, transferring, or otherwise disposing of any right, title or interest in the Trust or the Policy. A865.
- § 2.6(i): When the Trust applied for and purchased the Policy, each beneficiary of the Trust was the spouse of the Insured or a child of the Insured. A866.
- § 2.17: That the buyer, and subsequent buyers, of the Policy could rely upon the representations and warranties of the seller, and would be third-

[1] A205, A216, A240, A244.

[2] A1515, A1523.

[3] A863; A974-76 at 68:1-70:20.

party beneficiaries thereof. A867.

- § 5.12: The buyer could assign its rights under the sale transaction documents. A875.

In connection with sale of the Policy, Martha also executed an Acknowledgment and Consent,[4] in which she made certain critical representations and warranties to the buyer:

- § 1.4: Martha represented and warranted that all information provided by the Trust to the buyer in connection with the Policy's sale was accurate in all respects. A1480.

- § 1.6: Martha acknowledged that the buyer and subsequent owners would rely on her representations. A1480.

- § 1.7: Martha represented and warranted that the Trust was selling the Policy under its own free will and that Martha agreed with the decision to sell the Policy. A1480-81.

- § 1.10: Martha represented and warranted that she did not have any agreement to sell or assign the Policy at the time she procured it, the Policy was transferable, and Martha had not engaged in any conduct that would preclude buyer's recovery of benefits under the Policy. A1481-82.

- § 2.3: Martha, on her own behalf and on behalf of her successors, released the buyer and its successors and assigns for any claims related to the Policy. A1483.

- § 2.4: Martha agreed to indemnify the buyer and its successors and assigns for any losses suffered as a result of any breach of any representation, warranty or covenant made by Martha in any Transaction Document; any violation of law by the Martha in connection with or related to the sale transaction; and "any lack by the Trust of an insurable interest in the life of the Insured at the time of the issuance of the Policy." A1483.

[4] A1479; A1210 at 132:12-19.

- § 2.11: Martha agreed to use her "best efforts and cooperate with the Buyer . . . to obtain any and all documentation from the Trust or Insurer or otherwise as may aid the Purchaser in gaining the full benefit of its purchase." A1484.

On December 22, 2018, Martha passed away. A268 ¶ 28. Vida, via a securities intermediary, submitted a claim for payment of the Policy's death benefit. Pac Life paid the death benefit to Vida's securities intermediary on January 17, 2019, for Vida's account. A375.

In 2020, the Estate commenced this action, seeking recovery of the death benefit pursuant to Section 2704(b). A67.

Martha is survived by her husband, Peter, who is incompetent to testify as a result of a medical issue,[5] and her three children, none of whom have any knowledge of Martha's purpose in buying the Policy. A1107-09 at 29:9-31:24; A1286 at 7:22-25, A1291-92 at 12:9-13:1, A1292 at 13:11-17; A1328 at 21:17-21, A1330-31 at 23:3-24:18.

[5] A378.

ARGUMENT

I. DELAWARE LAW DOES NOT REQUIRE AN INSURED TO PAY PREMIUM TO SATISFY THE INSURABLE INTEREST REQUIREMENT

A. Question Presented

Did the lower court misconstrue *Berland* in holding that the Policy was void solely because the insured was not required to pay premiums? A444-47.

B. Scope of Review

This Court reviews the Superior Court's grant of summary judgment *de novo*. *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).

C. Merits of Argument

The Superior Court held that the Policy is void for a lack of insurable interest because "**Mrs. Barotz did not actually pay the Policy's premiums**." Ex. 1 at 15 (emphasis in original). In doing so, it misinterpreted *Price Dawe*, *Berland*, and the plain language of Section 2704(a).

Price Dawe explained that Section 2704(a) "has two parts." *Price Dawe*, 28 A.3d at 1073. "The first clause provides that a person may procure or effect insurance on his own life for the benefit of anyone," and "[t]his clause has no limiting language concerning intent, or even requires the beneficiary to have an insurable interest in the life of the insured." *Id.* Section 2704(a)'s second clause "concerns *procuring insurance on the life of another*," and requires that "policies

'*procure[d] or cause[d] to be procured*' *on the life of someone other than the person seeking the insurance* must be payable to the 'insured or his/her personal representatives or to a person having, at the time when such contract was made, an insurable interest in the individual insured.'" *Id.* (emphasis added) (quoting § 2704(a)). Delaware's insurable interest requirement may be satisfied by complying with either clause of Section 2704(a).

Subsequently, in *Berland*, this Court was asked to address the effect of a nonrecourse premium-financed policy on Section 2704(a)'s first clause:

> Does 18 Del. C. § 2704(a) and (c)(5) forbid an insured or his or her trust *to procure or effect a policy on his or her own life using a non-recourse loan . . . ?*

Berland, 266 A.3d at 965-66 (emphasis added). And this Court answered—consistent with *Price Dawe*'s holding that an insured does not "procure or effect" a policy under Section 2704(a)'s first clause without "actually paying the premiums," (28 A.3d at 1075-76)—as follows:

> No, so long as the use of nonrecourse funding did not allow the insured or his or her trust to obtain the policy "without actually paying the premiums" and the insured or his or her trust procured or effected the policy in good faith, for a lawful insurance purpose, and not as a cover for a wagering contract.

Berland, 266 A.3d at 966 (quoting *Price Dawe*, 28 A.3d at 1076). *Berland* therefore did not address Section 2704(a)'s second clause—which applies if someone other than the insured procured the policy (*i.e.*, paid the premiums)—because the certified

question specifically asked the Delaware Supreme Court to assume the "insured or his or her trust . . . *procure[d] or effect[ed] a policy on his or her own life*." *Berland*, 266 A.3d at 965-66 (emphasis added). And given that the certified question assumed that it was the insured or his or her trust who "procure[d] or effecte[d] a policy on his or her own life," *id.*, *Berland* does not speak to a situation where *someone other than the insured procured or effected the policy*.

Both *Price Dawe* and *Berland* direct lower courts to determine "who procured a policy by examining 'who pays the premiums.'" *Berland*, 266 A.3d at 972 (citing *Price Dawe*, 28 A.3d at 1075). *Price Dawe* reasoned that "[l]ife insurance policies . . . do not come into effect without premiums, so an insured cannot 'procure or effect' a policy without actually paying the premiums." 28 A.3d at 1076. *But critically*, even if the insured did not "procure or effect" the policy because the insured did not "actually pay[] the premiums," a policy still can be valid under Section 2704(a)'s second clause, which "concerns procuring insurance *on the life of another*." *Id.* at 1059, 1073 (emphasis added). And under Section 2704(a)'s second clause, if someone other than the insured "procures" a policy—*i.e.*, "actually pay[s] the premiums" on the policy—the policy is valid as long as "the insurance [is] payable to the 'insured or his/her personal representatives or to a person having, at the time when such contract was made, an insurable interest in the individual insured.'" *Id.* (quoting § 2704(a)). The only caveat is that, even if one of Section

2704(a)'s two clauses are satisfied, the policy still cannot be a "cover for a wager." *Id.* at 1075 ("Stated differently, if an insured procures a policy as a mere cover for a wager, then the insurable interest requirement is not satisfied.") (citation omitted). Here, there is no dispute that the initial beneficiary of the Policy had an insurable interest in the life of the insured.

Under the plain language of Section 2704(a), *Price Dawe*, and *Berland*, the validity of a policy does *not* rise and fall on whether the insured, a lender, or some other third party "actually pays the premiums." Instead, a policy's validity rises or falls on whether the policy is a "cover for a wager." *Price Dawe*, 28 A.3d at 1075-78. To be sure, whether the insured or someone else pays the premiums is certainly relevant in determining whether the policy is a cover for a wager, but it is "not dispositive." *Berland*, 266 A.3d at 972; *see Price Dawe*, 28 A.3d at 1078 ("In cases where a third party either directly or indirectly funds the premium payments as part of a pre-negotiated arrangement with the insured to immediately transfer ownership, the policy fails at its inception for lack of an insurable interest"). As *Berland* explained, the manner in which premiums are paid is only a factor in the broader wagering analysis:

> If used to facilitate procurement of a policy for a legitimate insurance purpose, such as estate planning, then premium financing is a recognized and permissible tool. But the use of such financing might also be evidence of an impermissible STOLI scheme, especially where the use of a nonrecourse loan means that a third party, and not the insured, bears the entire financial liability for obtaining the policy. *The*

> *use of a nonrecourse loan to fund the premium therefore is not dispositive, but should be viewed in the context of the entire transaction and in conjunction with consideration of whether the insured intended, when obtaining the policy, "to purchase the policy for lawful insurance purposes, and not as a cover for a [wagering] contract."*

266 A.3d at 972 (emphasis added) (footnotes omitted) (quoting *Price Dawe*, 28 A.3d at 1078).

Separately, the idea that *Berland* held that a nonrecourse premium-financed policy is automatically invalid if "the use of nonrecourse funding . . . allow[ed] the insured or his or her trust to obtain the policy 'without actually paying the premiums,'" *id.* at 973, is nonsensical. The entire point of a nonrecourse loan is that a lender (not the insured) is "actually paying the premiums" and the insured's assets are not at risk. If the Superior Court was correct that an insured's use of a nonrecourse loan to pay premiums renders a policy invalid without regard to whether the policy is a wagering contract, then every single nonrecourse premium-financed policy is now invalid under Delaware law. And that cannot be true, given (1) this Court clearly stated in *Berland* that "[t]he use of a nonrecourse loan to fund the premium . . . is *not dispositive*," *id.* at 972 (emphasis added), and (2) the Delaware statutes permit premium financing. *See* 18 *Del. C.* §§ 4801-4812.

Moreover, if taken to the logical conclusion that an insured must pay premium in order for her policy to satisfy Delaware's insurable statute, then every policy purchased by a third party on the life of an insured would be void. This would

include all policies funded by companies on the lives of their employees and key executives, irrespective of whether those employees' families are the beneficiaries or not. Such a result is contradicted by the second clause of Section 2704(a).

On the record here, there is a genuine dispute of material fact over whether the Policy was purchased for a lawful insurance purpose or merely as a cover for a wager. Martha signed representations and warranties in connection with the Family Trust's sale of the Policy that wholly contradict what the Estate (her successor) has alleged in this action. This dispute of material facts mandates reversal of the Superior Court's grant of summary judgment to the Estate and a remand for trial.

II. GENUINE DISPUTES OF MATERIAL FACT CONCERNING THE POLICY'S VALIDITY MANDATE REVERSAL OF THE SUPERIOR COURT'S DECISION, DENIAL OF THE ESTATE'S MOTION, AND A TRIAL TO DETERMINE WHETHER THE POLICY IS VALID

A. Question Presented

Did the lower court err in granting summary judgment for the Estate where the record contains genuine disputes of material fact over whether the Policy was procured for a lawful purpose and not as a cover for a wager? A430-42.

B. Scope of Review

This issue is subject to *de novo* review. *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).

C. Merits of Argument

In the Superior Court, Vida opposed the Estate's motion for summary judgment with admissible evidence that disputed the Estate's theory that the Policy was not procured for a lawful insurance purpose and was merely a cover for an unlawful wager. A430-42. The Superior Court ignored these material facts, erroneously concluding that they "are irrelevant to the operative question of whether [Martha] actually paid the premiums under her Policy," and granted the Estate's motion for summary judgment on that basis. Ex. 1 at 18. But, as explained above, the operative question under *Berland* and *Price Dawe* is not simply who paid the premiums. Those decisions require a factual analysis of the context of a nonrecourse loan transaction to determine whether "the insured intended, when obtaining the

policy, 'to purchase the policy for lawful insurance purposes, and not as a cover for a [wagering] contract.'" *Berland*, 266 A.3d at 972 (quoting *Price Dawe*, 28 A.3d at 1078). Under Delaware's summary judgment standard, and as the movant under *Berland*, the Estate was required to produce admissible evidence that demonstrates the Policy had *no* lawful insurance purpose and was merely a cover for a wager. The Estate only submitted circumstantial evidence, premised primarily upon the PFP Program loan documents (for which *no witness* with personal knowledge has been deposed or testified to in this case), to support its allegations that the Policy lacked insurable interest.

Vida, in opposition to the Estate's motion for summary judgment, submitted evidence, including the Acknowledgement and Consent that was admittedly signed by Martha and on which Vida was entitled to rely, which states that the Policy was purchased for legitimate reasons and had insurable interest. In weighing the conflicting evidence, the Superior Court was required to draw *all reasonable inferences* in favor of Vida, as the non-moving party, and, therefore, that the Policy *had* a lawful insurance purpose and was not an unlawful wager. The Superior Court erred by usurping the role of the jury in weighing and deciding the evidence, and drawing inferences in favor of the Estate. In doing so, the Superior Court violated Vida's due process rights and right to a jury trial under the Delaware Constitution and the Seventh Amendment to the U.S. Constitution.

1. The Summary Judgment Standard and Delaware Public Policy.

Summary judgment is a harsh remedy that must be cautiously invoked and is not a mechanism for resolving contested issues of fact. *GMG Cap. Invs., LLC*, 36 A.3d at 783. The moving party initially bears the burden of showing, through admissible evidence, that there are no material facts in dispute. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citations omitted); *Phillips v. Del. Power & Light Co.*, 216 A.2d 281, 285 (Del. 1966). The Court *must* view the evidence in the light most favorable to the nonmoving party, "accept the non-movant's version of any disputed facts," and "draw *all* rational inferences which favor the non-moving party." *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99-100 (Del. 1992) (emphasis added; citation omitted).

If there is *any* reasonable hypothesis by which the nonmoving party may recover, or if there is a dispute as to a material fact or the inferences to be drawn therefrom, then summary judgment is inappropriate (*Vanaman v. Milford Mem'l Hosp., Inc*., 272 A.2d 718, 720 (Del. 1970)), particularly "[w]here the inference or ultimate fact to be established concerns intent or other subjective reaction." *AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 446 (Del. 2005) (citation omitted).

More importantly, granting summary judgment *despite* there being issues of material fact in dispute is a violation of Delaware's public policy and Constitution,

which enshrine the right to a trial by jury to determine issues of fact in *all civil cases*. *McCool v. Gehret*, 657 A.2d 269, 282 (Del. 1995); *see Baird v. Owczarek*, 93 A.3d 1222, 1227 (Del. 2014) ("'Judges shall confine themselves to their business, which is to adjudge the law and leave *juries to determine the facts*.'") (citation omitted). It is also a violation of the Seventh Amendment of the United States Constitution, which preserved Vida's right to a jury trial in this civil action. *Allscripts Healthcare, LLC v. Andor Health, LLC*, No. CV 21-704-MAK, 2022 WL 2254358, at *8 (D. Del. June 21, 2022) ("The Seventh Amendment provides civil litigants the right to a jury trial").

2. Vida Produced Ample Admissible Evidence that Martha Had a Lawful Insurance Purpose in Opposition to the Estate's Motion.

In *Berland*, this Court held that a policy produced with non-recourse financing must be procured for a "lawful insurance purpose[]" like "estate planning" but did not provide an exhaustive list of what qualifies as such a purpose. *Berland*, 266 A.3d at 972 (quoting *Price Dawe*, 29 A.3d at 1078). Here, Vida presented the Superior Court with the *only admissible*[6] evidence of Martha's purpose and intent

[6] While the Estate relied upon the PFP Program loan documents in support of its allegations that the Policy lacked insurable interest, it has not deposed *any* fact witness with personal knowledge of those documents. The Estate's counsel's argument and innuendo as to the meaning and intent behind the PFP Loan documents (*i.e.*, the intent of people and entities who are not parties to this action and have not been deposed in this case) is not admissible evidence upon which summary judgment can properly be granted.

for buying the Policy: the documents that she signed which clearly support the inference (indeed, say) that the Policy had a lawful insurance purpose and contradict the Estate's entire theory. Thus, there is a question of material fact concerning whether the Policy had a legitimate insurance purpose, which question must be resolved by a jury under Vida's fundamental due process rights.

The admissible evidence that Vida submitted in opposition to the Estate's motion shows that, when the Family Trust sold the Policy, *Martha made specific representations and warranties to the buyer showing that she had a legitimate insurance reason to procure the Policy*. As a "subsequent purchaser," Vida was entitled to rely on these representations. Martha represented that:

- she had reviewed and consented to the terms of all Transaction Documents related to the sale, which includes the Policy (A1479 § 1.1, A1486 (Exhibit A));
- she concurred with the decision to sell the Policy, which had been made "on a fully informed basis after consulting with the [Family] Trust's tax, estate planning, legal, financial or other advisors" (A1480-81 § 1.7);
- all Transaction Documents to which she was a party would be her legal, valid and binding obligations (A1479-80 § 1.2);
- the buyer and subsequent purchasers could rely on her representations (A1480 § 1.6); and

- the Policy was enforceable (*and that she had no preexisting agreement to sell or assign the Policy to anyone*) (A1481 § 1.10(f)).

Martha also represented that the *only* beneficiaries of the Policy when it was applied for and issued were her spouse or her children, further supporting that she had a legitimate insurance purpose to provide for their security. In the Acknowledgement and Consent, Martha represented that "all information provided or furnished by or on behalf of the Insured or the [Family] Trust to Buyer in connection with this Acknowledgement *and the transactions contemplated hereby* is true, complete and accurate in all respects." A1480 § 1.4 (emphasis added). In turn, the Family Trust represented that "[w]hen the [it] applied for and purchased the Policy, each beneficiary of the [Family] Trust was the spouse of the Insured or a child of the Insured." A866 § 2.6(i). These representations contradict the Estate's theory.

In connection with the Policy's sale, Martha also represented that all representations made by her to Pac Life in the application for the Policy were "true, correct and complete in all respects," including "the intent of the applicant for the Policy." A1480 § 1.4. In the Policy application, Martha represented that the Policy applied for "will meet my insurance needs and financial objectives" (A415 ("Declarations" ¶ 7)), and that the intended beneficiary of the Policy was the Family

Trust, which ultimately benefitted only her family members, not any investors. A407 ("Owner" and "Primary Beneficiary").

Nathan's representations in connection with the Loan also confirm Martha's legitimate plan and intent. Nathan executed a Settlor and Co-Trustee Disclosure Statement and Acknowledgement in which he represented that "each of the beneficial owners named in the [Family] Trust Agreement and in the Supplement to [Family] Trust Agreement is either related to or otherwise has an insurable interest in the insured." A202 ¶ 7.

The structure of the trusts used in connection with the purchase of the Policy and its financing further demonstrate that the Policy was procured for a legitimate purpose. The Family Trust acted as the nominal borrower under the Loan, but it was formed *by the Insurance Trust*, of which Nathan was the sole Trustee. *Compare* A848 (Preamble) *with* A1547 (Preamble). Nathan, as Trustee of the Insurance Trust, named the Insurance Trust as the beneficiary of the Family Trust. Martha had formed the Insurance Trust on March 16, 2006, and had named her husband, Peter, as that trust's beneficiary. A848 (Section 1.1). The Insurance Trust further provided that after the death of Martha and Peter, the Insurance Trust's remaining principal would be distributed to LAM (the family partnership), and if such company was not in existence, to Martha's descendants. A848 (Section 1.1). As Nathan testified, LAM is the family's investment partnership that Peter formed whose partners are

Nathan and his sisters (Martha's daughters), Naomi and Cecilia. A1098 at 20:12-20. Thus, as part of the family's insurance strategy, Nathan specifically named Martha's Insurance Trust, and in turn his father, the family investment partnership, himself, and his siblings, as the ultimate beneficiaries of the Policy.[7] When the Policy was sold, Nathan, as Co-Trustee of the Family Trust, and Martha, directed that the proceeds of the sale be disbursed, first, to repay the Loan and then, to the Insurance Trust. A879-81.

Under the transaction structure established by Nathan and Martha, if Martha had passed away at any time before the Loan matured, the $8 million death benefit under the Policy, less the balance of the loan, would have been paid to Martha's family or at Nathan's direction pursuant to the terms of the Family Trust, not to any investor. A201 ¶ 2; A1551-52 (Section 16); A1556 (Section 3), A1558 (Section 2), A1560 (Section 7). It may be reasonably inferred that Martha wanted to use the

[7] The Superior Court held that "[Vida] cannot reasonably argue that the nonrecourse loan here was 'used to facilitate procurement of a policy for a legitimate insurance purpose, such as estate planning'" because "Mrs. Barotz was explicitly warned from the outset that 'the Trust Agreement and the Supplement to Trust Agreement are not intended to satisfy [her] estate planning needs and have not been designed as an estate planning tool.'" Ex. 1 at 20 (quoting A201-02 at 1-2 (¶ 6)). The form relied on by the Superior Court merely shows that the lender's Program Administrator did not intend to provide any estate planning services to the Barotz family. *Id*. The record, however, is replete with other evidence that the Barotz family used the Loan and the Policy as part of an estate plan to protect the family in the event of Martha's death. In any event, this is a material issue of fact that the jury should decide.

Policy to protect her family and for legitimate estate planning purposes. *See* Michael J. Feinfeld, *Planning an Estate*: *A Guidebook of Principle and Techniques* § 1:1 (4th ed.) ("proper estate planning is the protection of the estate owner, his or her family, and their assets").

The record therefore contains ample evidence that refutes the Superior Court's conclusion that "[Vida] cannot reasonably argue that the nonrecourse loan here was 'used to facilitate procurement of a policy for a legitimate insurance purpose, such as estate planning.'" Ex. 1 at 20.

And even if the factfinder were to ultimately conclude that Martha took out the Policy for the exclusive purpose of selling it on the secondary market, that would not mean she lacked a lawful purpose for the Policy. Indeed, *Price Dawe* makes clear that—as long as the policy is not a "cover for a wagering contract"—an insured can lawfully take out a policy for the sole purpose of selling it 'immediately.'" 28 A.3d at 1075 ("An insured's right to take out a policy with the intent to immediately transfer the policy is not unqualified. That right is limited to bona fide sales of that policy taken out in good faith. A bona fide insurance policy sale or assignment requires that the insured take out the policy in good faith—not as a cover for a wagering contract.") (footnote citations omitted). Here, as explained below, Vida submitted ample evidence showing that the Policy was not a "cover for a wagering contract" under Delaware law.

3. Vida Submitted Ample Admissible Evidence that the Policy was Not an Unlawful Wager.

Price Dawe recognized that a life insurance policy is an unlawful wager if an investor lacking an insurable interest in the insured's life owns the policy and the right to its death benefit at the policy's inception, or uses the insured as a mere straw-person to purchase a policy for that investor's benefit. *Price Dawe*, 28 A.3d at 1075-77. That case explained that the defining characteristic of a "wagering contract" is the existence of a pre-negotiated agreement, at the moment of the policy's inception, in which the insured has agreed to take out a policy in order to sell it to a third-party buyer. *See, e.g.*, *id.* at 1078 ("In cases where a third party either directly or indirectly funds the premium payments *as part of a pre-negotiated arrangement* with the insured to immediately transfer ownership, the policy fails at its inception for lack of an insurable interest.") (emphasis added).

This reality—that it is the existence of a pre-negotiated agreement between the insured and a specific third-party buyer that renders a policy invalid—is also consistent with this Court's repeated instructions that Section 2704(a) is a codification of the common law prohibition against "wagering contracts" that give the party buying the policy an interest in the insured's early death. In *Malkin*, for example, this Court stated:

> "For hundreds of years, the law has prohibited wagering on human life through the use of life insurance that was not linked to a demonstrated economic risk." In 1881, the United States Supreme Court recognized

> that, absent such risk, "the contract is a mere wager, *by which the party taking the policy is directly interested in the early death of the assured*." As this Court explained in *Price Dawe*, such wagers violate the Delaware Constitution's prohibition on gambling as well as "Delaware's clear public policy against wagering." . . .
>
> Consistently with the Delaware Constitution and the State's public policy, the General Assembly has codified in 18 *Del. C.* § 2704 the requirement that a person procuring a life insurance policy have an "insurable interest" in the life of the insured.

Malkin, 278 A.3d at 59 (emphasis added; footnotes and citations omitted); *see also Berland*, 266 A.3d at 970 ("In *Price Dawe*, this Court determined that the General Assembly intended to codify . . . the common law insurable interest requirement when it enacted § 2704(a)." (citing *Price Dawe*, 28 A.3d at 1072-73)).

Price Dawe recognized that, at common law, if an insured took out a policy on his own life pursuant to a pre-negotiated agreement to transfer it to a third party, there was an illegal wagering contract. When *Price Dawe* explained that "[a] bona fide insurance policy sale or assignment requires that the insured take out the policy in good faith—not as a cover for a wagering contract," the Court cited *Chamberlain v. Butler*, 86 N.W. 481, 483 (Neb. 1901), for the proposition that "if the transfer 'agreement had existed prior to the issuance of the policy, or contemporaneous therewith' the policy would be void." *Price Dawe*, 28 A.3d at 1075 & n.77. And when *Price Dawe* found that "[a]n insured's right to take out a policy with the intent to immediately transfer the policy is not unqualified," the Court cited *Clement v. New York Life Insurance Co.*, 46 S.W. 561, 564 (Tenn. 1898), for the point that the

Clement policy was invalid where the "insured had pre-arranged a deal to obtain the policy and transfer it to a third-party with no insurable interest immediately after issuance." *Price Dawe*, 28 A.3d at 1075 & n.76. *Price Dawe* also made clear that Delaware law "comports with the United States Supreme Court decision in *Grigsby v. Russell*," which recognized that life insurance policies are investment assets that courts should treat like any other property right. *See Price Dawe*, 28 A.3d at 1074 & n.67 (citing *Grigsby*, 222 U.S. 149, 155 (1911)).

In this case, the record clearly supports the inference that the Policy was not a "cover for a wager" by any stranger because Martha, Nathan, and the Family Trust did not have a "pre-negotiated agreement" at the moment of the Policy's inception to sell it to anyone. Indeed, when Martha and Nathan ultimately decided to sell the Policy, *they sold it to someone other than (and unrelated to) the lender* for a price that both Nathan and Martha represented was "fair, reasonable and adequate consideration" for the Policy. A863, A868 (Section 2.19); A1481 (Section 1.8); A974-76 at 68:1-70:20.

The record reflects that the Insurance Trust had three options with respect to the Policy at its inception and under the terms of the Loan: (1) pay off the loan and keep the Policy at any time; (2) relinquish the Policy in satisfaction of the loan; or (3) sell the Policy in the life settlement market to the highest bidder, and use the sale

proceeds to repay the loan. A952-53 at 46:4-47:9; A201 ¶ 3; A1551-52 (Section 16); A1556 (Section 3), A1560 (Section 7).

Although Martha and Nathan ultimately elected to sell the Policy, and pocketed over $60,000, that was not required at the Policy's inception. If Martha had died while the Loan was outstanding, her family would have received the Policy's proceeds, after repayment of the loan balance. If Martha had been diagnosed with a terminal illness, she could have repaid the Loan, kept the Policy, and ensured that her family would receive the Policy's death benefit when she passed away. And if, as occurred here, Martha and Nathan elected to sell the Policy, they were free to sell to the highest bidder, assuming the loan was repaid. *The lender did not acquire the Policy and did not have a prearranged agreement to do so*. Thus, this is not a case where the lender "either directly or indirectly fund[ed] the premium payments as part of a pre-negotiated arrangement with [Martha] to . . . transfer ownership" to the lender or any investor. *See Price Dawe*, 28 A.3d at 1078. Had such a pre-negotiated agreement existed, the lender would not have permitted the Policy to be sold to another buyer.

Furthermore, the payment terms and economics of the Loan also demonstrate why the lender had an insurable interest in Martha's life up to the amount of its debt under Delaware law. *Price Dawe*, 28 A.3d at 1072 ("An insurable interest of the beneficiary may be shown by . . . proof of pecuniary interest, such as arise between

partners and between debtors and creditors." (citing *Baltimore Life Ins. Co. v. Floyd*, 91 A. 653, 656 (Del. Super. Ct. 1914), *aff'd*, 94 A. 515 (1915))). Unlike an illegal wagerer, the lender here had a financial interest in Martha's *continued life* as opposed to her early death because the longer she lived, the more interest would accrue under the loan. A1515 ("Promise to Pay and Payment Terms").

Moreover, Martha represented and warranted in connection with the Policy's sale that the Trust was selling the Policy under its own free will and that she did not have any prearranged agreement to sell or assign the Policy at the time she procured it. A1480-81 §§ 1.7, 1.10(f).

The jury verdict in the *Estate of Rink v. VICOF II Trust*, 2021 WL 6064890, at *6–7 (W.D.N.C. Dec. 20, 2021) ("*Rink*") (A1731), confirms that summary judgment in the Estate's favor on the question of whether a policy procured with a PFP Program loan amounts to an unlawful wager is inappropriate on this record: *the jury found that the policy was valid because it had an insurable interest at its inception and was not a cover for a wager*. The trial court in *Rink* correctly recognized that the question of whether the policy was the product of an illegal STOLI transaction is inherently factual, and therefore must be determined by the jury. And the fact that the *Rink* jury concluded that the policy at issue there, which was financed under the same PFP lending program as the Policy here, was not procured as a cover for a wager, makes it clear that not every life policy that used

the Coventry lending program was an illegal human life wager. It also demonstrates that each case must be judged on its own merits, and the factual issues—including the insured's intent—must be determined by a jury.

In *Rink*, the court *denied* the Rink estate's motion for summary judgment, rejecting the estate's argument that a policy procured with a PFP Loan was void *ab initio* under Delaware law and holding that there were questions of fact on whether the policy was valid under North Carolina law. *See Rink*, 2021 WL 6064890, at *6–7. Although the *Rink* court held that North Carolina law was applicable, the court gave jury instructions that tracked the decisions in *Berland* and *Price Dawe*. *See* A1965-69 at 485:18–489:25 (instructing the jury, among other things, to consider "[w]as the policy taken out in good faith," (488:4), "[w]hat legitimate personal or financial interest or purpose, if any, [the insured] ha[d] in the transaction," (488:7-8), and "[w]ho paid the premiums on the policy," (488:17)). And based on those instructions, the jury found that that the Rink policy had an insurable interest. *See* A1731 ("Was the life insurance policy issued to Ann Rink supported by an insurable interest? Yes.").

If the Estate were correct that no reasonable jury could find that a policy connected to the Coventry PFP Program is valid (A169-70), the *Rink* jury would not have found that the Rink policy was valid—and it did.

A jury should, here as well, decide whether Vida is correct that Martha and her family had a "lawful insurance purpose" for the Policy, or whether the Estate is correct that the Policy was a "wagering contract."

4. The Estate Lacks Admissible Evidence to Support its Theory that the Policy Is an Unlawful Wager.

The Estate *lacks* admissible evidence to support its speculative theory, based on circumstantial evidence and innuendo, that the Policy was an unlawful wager.

a. There Are No Living Witnesses Who Know Why Martha Obtained the Policy.

Under *Berland*, the Estate must prove that Martha's intent with respect to the Policy was improper. But there is nobody alive who knows what Martha "intended, when obtaining the [P]olicy," including whether she had "some *bona fide*, short-term need for insurance such as, for example, ensuring that an estate would have liquidity for an interim period until liquidity would otherwise be achieved from some other source." *Berland*, 266 A.3d at 972-73 (citations omitted).

Martha is dead. Her spouse, Peter, is incompetent to testify.[8] Martha's children—Nathan, Naomi, and Celia—testified that they do not know why their mother obtained the Policy. A1107-09 at 29:9-31:24; A1286 at 7:22-25, A1291-92 at 12:9-13:1, A1292 at 13:11-17; A1328 at 21:17-21, A1330-31 at 23:3-24:18. The

[8] A378.

broker, Spalding, never met or spoke with Martha,[9] and is therefore not competent to testify about Martha's intent. Indeed, the Barotz family became a client of Spalding's firm through Spalding's colleague, Craig Stack, whom the Estate never deposed.[10] As the Superior Court recognized, "the record contains no evidence as to any discussions that may have occurred among the Barotz family and Mr. Stack regarding the family's insurance needs." Ex. 1 at 2. Without *anyone* alive to testify about why Martha obtained the Policy, and the only admissible evidence—the Acknowledgment and Consent signed by Martha—stating the opposite of what the Estate alleges—the Superior Court erred by granting summary judgment to the Estate. At minimum, a question of fact exists as to what Martha "intended, when obtaining the [P]olicy," including whether she "'purchase[d] the [P]olicy for lawful insurance purposes, and not as a cover for a [wagering] contract.'" *Berland*, 266 A.3d at 972 (citing *Price Dawe*, 28 A.3d at 1078).

[9] A1008 at 102:11-15.

[10] A918 at 12:16-21, A919-20 at 13:22-14:17, A925 at 19:5-8, A928 at 22:5-11, A948 at 42:23-24, A987 at 81:2-7.

III. THE COURT IMPROPERLY DENIED VIDA'S DEFENSES AS A MATTER OF LAW

A. Question Presented

Did the lower court err in dismissing Vida's common law defenses and counterclaims? A452-57.

B. Scope of Review

This issue is subject to *de novo* review. *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).

C. Merits of Argument

Malkin held that a downstream purchaser like Vida may assert common-law defenses and counterclaims in response to an estate's claim under Section 2704(b):

> *Section 2704(b) does not expressly limit any defenses or counterclaims that the recipient might assert*.
> . . . .
> . . . a statute conferring a cause of action on one party does not supersede common law defenses or counterclaims that the other party might assert. Rather, *courts must look to the elements of the common-law defenses or counterclaims asserted—and, where appropriate, the public policy underlying the ban on human-life wagering—to decide the viability of such defenses or counterclaims to an estate's action under Section 2704(b)*.

Malkin, 278 A.3d at 61-63 (emphasis added; footnote citation omitted). This Court therefore recognized that general legal principles *do* apply to claims under Section 2704(b), which must be weighed against Delaware's public policy against unlawful wagering.

Applying *Malkin*, the Superior Court incorrectly held that Vida's defenses and

counterclaims based on breaches of contractual representations made by Martha failed as a matter of law because "*Price Dawe* made clear that a life insurance policy lacking an insurable interest is void *ab initio*" and "[i]f [Vida's] defenses of waiver or release were accepted, they would allow a downstream purchaser to retain the death benefit paid under a void policy in clear contradiction to Delaware common law and Section 2704(a)." Ex. 1 at 22-23. The Court's holding is wrong for two reasons.

First, the Superior Court's holding that the Purchase Agreement and all documents associated with it may not be enforced merely because the Policy itself was declared void is a misapplication of Delaware law. *Price Dawe* holds that *a life insurance policy* that lacks insurable interest at its inception is void *ab initio*. *Price Dawe*, 28 A.3d at 1067. But Vida's common-law defenses and counterclaims do not ask the Court to enforce the Policy or any of its terms. Instead, Vida seeks to enforce the Purchase Agreement and the related Acknowledgment and Consent that were entered into between Martha, her Family Trust, and the innocent third party that purchased the Policy on the open market, and not as part of any pre-negotiated sale. At common law, an agreement subsequent to a void contract is enforceable if based on new consideration even if it is related to or arises out of an underlying void contract:

> The principle of the rule [against the enforcement of void agreements] is, that no man ought to be heard in a Court of justice, who seeks to

> enforce a contract founded in or arising out of moral or political turpitude. . . . So far as the rule operates to discourage the perpetration of an immoral or illegal act, it is founded in the strongest reason, but it cannot safely be pushed farther. . . . *[A]fter the act is accomplished, no new contract ought to be affected by it* . . . .

Armstrong v. Toler, 24 U.S. 258, 260-61 (1826) (emphasis added); *see* 8 Richard A. Lord, *Williston on Contracts* § 19:17 (4th ed).

Here, Vida's waiver and ratification defenses, and its breach of contract and specific performance counterclaims, are all legal in nature, premised on the common law, and arise directly from Martha's representations and warranties in an intentional, arms-length sale of the Policy for valuable consideration that occurred years after the Policy was issued. A452. These defenses and counterclaims do not seek to enforce any terms of the Policy and are based on new agreements and new consideration—the Policy purchase price. As such, these defenses and counterclaims are viable as a matter of law, and the decision of the Superior Court to dismiss them because the Policy is void should be reversed.

Second, the Superior Court erred when it concluded that Vida's contractual defenses fail because they "would allow a downstream purchaser to retain the death benefit paid under a void policy in clear contradiction to Delaware common law and Section 2704(a)." Ex. 1 at 23. But such a result is plainly *not* contrary to Delaware public policy because *Malkin* contemplates precisely such a result. *Malkin* states that a downstream assignee *may* raise defenses and counterclaims in response to an

estate's claim under Section 2704(b). By definition, a Section 2704(b) claim asserts that a defendant has received the proceeds of a void policy that lacked insurable interest. If a defendant successfully asserts defenses in response to such a claim, then the estate's claim would fail and the defendant would retain the policy proceeds. If a defendant's successful defense of a Section 2704(b) claim and resulting retention of a policy death benefit violated Delaware public policy against wagering, then *Malkin* would have held that Section 2704(b) precludes all defenses.

Instead, *Malkin* held that courts should consider, "where appropriate, the public policy underlying the ban on human-life wagering—to decide the viability of such defenses or counterclaims to an estate's action under Section 2704(b)." *Malkin*, 278 A.3d at 62-63. Here, the public policy underlying the ban on human life wagering weighs in favor of enforcing Martha's contracts against the Estate.

Martha represented and warranted that the Policy had an insurable interest, and that Martha or her Estate would indemnify subsequent purchasers for any losses suffered as a result of any lack of "an insurable interest in the life of the Insured at the time of the issuance of the Policy." A1483 § 2.4. Vida is not, and never was, part of the activities that might run afoul of Delaware's public policy against wagering. In contrast, Martha and Nathan were active participants in all of the transactions that the Estate now claims violated Delaware law. This Court should not reward the party that was actively involved in the procurement, and subsequent

sale, of a purportedly illegal policy. Judgment for the Estate does not serve to penalize any party actually involved in allegedly improper conduct. Instead, ironically, the Superior Court's grant of summary judgment for the Estate precluding Vida's defenses *rewards* the only party to the litigation that participated in the allegedly illegal transactions.

IV. THE COURT IMPROPERLY AWARDED THE ESTATE PREJUDGMENT INTEREST

A. Question Presented

Did the lower court err in granting the Estate prejudgment interest from the date of death of the insured, compounded quarterly? A1652.

B. Scope of Review

This issue is subject to *de novo* review. *Chrysler Corp. (Del.) v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1032 (Del. 2003).

C. Merits of Argument

Under Delaware law, prejudgment interest is "an extraordinary award" that is only granted as a matter of right in "certain actions at law, tort and contract" in which the defendant's wrongful conduct has caused the plaintiff damages. *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254, 1262 (Del. 2010); *Meade v. Pac. Gamble Robinson Co.*, 58 A.2d 415, 417 (Del. 1948). "The cases in which interest is allowable . . . concern some legal wrong done to the plaintiff; that is, some breach of express or implied contract, violation of duty, unlawful conversion, or other legal transgression or default." *Meade*, 58 A.2d at 417. A successful plaintiff in such cases is entitled to interest on money damages as a matter of right when the defendant "unjustifiably refuses to live up to its obligation after payment is due." *Stonewall Ins. Co.*, 996 A.2d at 1262 (footnote citation omitted). Prejudgment interest "compensates the petitioner for the loss of the use of his or her money" and

"forces the respondent to disgorge any benefit that it has received from employing the petitioners' money in the interim." *Finkelstein v. Liberty Digit., Inc.*, 2005 WL 1074364, at *26 (Del. Ch. Apr. 25, 2005). Accordingly, where prejudgment interest is awarded, it "accumulates from the date payment was due [to] the plaintiff, because full compensation requires an allowance for the detention of the compensation awarded and interest is used as a basis for measuring that allowance." *Moskowitz v. Mayor & Council of Wilmington*, 391 A.2d 209, 210 (Del. 1978) (citation omitted).

The Estate is not entitled to prejudgment interest for three reasons.

1. Vida Has Not Caused the Estate Any Injury Warranting Prejudgment Interest.

First, prejudgment interest is limited to where the defendant has harmed the plaintiff and caused the plaintiff to suffer "damages" as a result of the defendant's unlawful conduct. *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 409 (Del. 1988) ("A successful plaintiff is entitled to interest *on money damages* . . . .") (emphasis added).

> Under Delaware law interest is a part of damages to which a plaintiff is entitled as of right in order that *he may be made whole*— that is to say, in order to give him that full compensation to which the law says he is entitled for a wrong suffered by him.

Superior Tube Co. v. Del. Aircraft Indus., 60 F. Supp. 573, 574 (D. Del. 1945) (emphasis added). Because damages and wrongful conduct are prerequisites to an award of prejudgment interest, where they are absent, prejudgment interest may not

be awarded. This Court has *specifically* held that where a defendant has not engaged in any illegal conduct but a statute nevertheless requires a remedy, prejudgment interest cannot be awarded. *Meade*, 58 A.2d at 418.

Here, as in *Meade*, the statute in question, Section 2704(b), creates the remedy sought by the Estate even though Vida did not engage in any illegal conduct. It is undisputed that Vida had no involvement in the procurement of the Policy, the only illegal conduct alleged. Vida lawfully purchased the Policy on the tertiary market a decade after it was issued and initially sold. *See Price Dawe*, 28 A.3d at 1069 ("The secondary market for life insurance is perfectly legal."); A209, A239, A244.

Nor has the Estate suffered any harm as a result of *Vida's conduct*. Delaware law permits the Estate to maintain an action to recover the death benefit as a matter of public policy, not to remedy any harm suffered by the Estate. *Estate of Joseph Daher v. LSH Co.*, 575 F. Supp. 3d 1231, 1240 (C.D. Cal. Dec. 15, 2021) ("[T]he Estate is seeking to recover, here, the Policy's death benefit because Delaware considers STOLI policies to be contrary to public policy, *not because Daher or the Estate was harmed*.") (emphasis added).

2. Delaware Law Prohibits Prejudgment Interest on Void Policy Proceeds.

Second, the Estate is not entitled to prejudgment interest on the proceeds of a policy that has been declared "void." As noted above, prejudgment interest compensates a successful plaintiff that has suffered damages or been denied use of

its property after payment is due. *Finkelstein*, 2005 WL 1074364, at *26. But *Malkin* held that "[n]obody can have a 'property interest' in a STOLI policy or *its proceeds*" because "such policies are 'nullities'—invalid human-life wagers that never come into legal existence." *Malkin*, 278 A.3d at 65 (emphasis added) (citation omitted). Vida did not owe the Estate anything until this Court declared that the Policy was void.

Indeed, where it is awarded, prejudgment "interest accumulates from the date payment was due [to] the plaintiff." *Moskowitz*, 391 A.2d at 210. Section 2704(b) does not automatically award the Estate the proceeds of a void policy or make any allowance for prejudgment interest;[11] instead it permits an estate to "maintain an action" to recover the proceeds subject to any defenses and counterclaims asserted by the defendant. 18 *Del. C.* § 2704(b); *Malkin*, 278 A.3d at 62. Thus, payment cannot be "due" to an estate under Section 2704(b) unless and until it successfully prosecutes its claim for the Policy proceeds.

The Superior Court erred in relying upon the federal district court's unpublished decision in *Estate of Beverly M. Berland v. Lavastone Capital LLC*, 2022 WL 17084121, at *1 (D. Del. Nov. 18, 2022) ("*Estate of Berland*"), in

[11] Section 2704(b) makes no mention of interest, stating only that an estate may recover the benefits paid on a policy lacking insurable interest. "The statute['s] . . . . express provisions seem rather to negative than to suggest an implication that interest on the value fixed by the appraisers . . . should be allowed . . . ." *Meade*, 58 A.2d at 417.

determining that prejudgment interest accrues from the date of the insured's death. Ex. 2 at 1; Ex. 3 ¶¶ 2-3. It incorrectly distinguished this Court's published decision in *Wilmington Trust, National Association v. Sun Life Assurance Co. of Canada*, 294 A.3d 1062 (Del. 2023) ("*De Bourbon/Frankel*"), on the erroneous ground that the prejudgment interest owed in *De Bourbon/Frankel* arose from a return of premium rather than a death benefit owed to an estate. Ex. 2 at 2 n.1. This Court made no such distinction in *De Bourbon/Frankel*, and the rule articulated in that case (after the federal district court's decision in *Estate of Berland*) applies here:

> "For insurance claims, interest accumulates from the date a party actually demands payment. Where it is difficult to determine to a reasonable degree of certainty when an insured demanded payment, we often rely on the date that the insured filed the complaint."

De Bourbon/Frankel, 294 A.3d at 1078 (quoting *Stonewall*, 996 A.2d at 1262). Thus, if prejudgment interest were due from Vida to the Estate (which it is not), it would accrue from when the Estate first demanded the death benefit—when it filed its Complaint in this action.

3. Vida Did Not Unjustifiably Refuse to Pay the Estate's Claim for the Policy Death Benefit.

Finally, the Estate is not entitled to prejudgment interest because this case does not involve any unjustifiable refusal by Vida to make a payment owed to the Estate.

First, on January 17, 2019—the point in time from which the Superior Court

ordered prejudgment interest to accrue (Ex. 2 at 2)—neither the Estate, Vida, nor the Superior Court could possibly have known whether the proceeds of the Policy should have been paid to the Estate for the simple reason that Delaware law was unsettled on the issue of insurable interest in the context of a nonrecourse loan. That didn't happen until November 16, 2021, when *Berland* was issued. *Berland*, 266 A.3d at 973. In light of this uncertainty, Vida was justified in concluding that it had acquired a valid policy, especially in light of the insured's express representations to that effect. A1479 (§§ 1.1, 1.2), A1480 (§§ 1.4, 1.6) A1481 (§§ 1.8, 1.9, 1.10(f)); A1483 (§ 2.4), A1484 (§ 2.11). Accordingly, Vida *justifiably* retained the death benefit prior to the Superior Court's decision in direct reliance on Martha's—and thus the Estate's—representations that the sale of the Policy was valid and enforceable.

Second, Vida could not have "unjustifiably refused" to transfer the death benefit to the Estate prior to the date on which the Estate first demanded payment. Delaware law requires a defendant's *unjustified* refusal to pay its obligation before prejudgment interest will accrue. *Stonewall Ins. Co.*, 996 A.2d at 1262 ("Stonewall could not have unjustifiably refused to pay until DuPont demanded payment . . . ."). Thus, even if the Estate were entitled to prejudgment interest (which it is not), Vida cannot be charged prejudgment interest prior to May 15, 2020, the date that the Estate commenced this action. *Id.*; *see Citrin v. Int'l Airport Ctrs. LLC*, 922 A.2d 1164, 1168 (Del. Ch. 2006).

Further, *De Bourbon/Frankel* holds that prejudgment interest plays a role in incentivizing parties to act in good faith. *De Bourbon/Frankel*, 294 A.3d at 1078. In a Section 2704(b) case, awarding interest from date of death doesn't incentivize the insured or their estate to act good faith; rather, it encourages them to wait as long as possible to make a claim as interest accumulates.

4. The Superior Court Lacked Discretion to Award Compound Interest.

The Superior Court lacks authority to award compound interest. *See Rehoboth Marketplace Assocs. v. State*, 1993 WL 191465, at *1 (Del. Apr. 26, 1993) ("Compound interest on awards is not permitted under Delaware law.") (citations omitted); *see also LCT Cap., LLC v. NGL Energy Partners LP*, 2023 WL 4102666, at *8 (Del. Super. Ct. June 20, 2023) (analyzing this Court's most recent decisions on prejudgment interest and concluding, under *Rehoboth Marketplace Associates*, that this Court "held that the Superior Court had no discretion to award compound interest. It held that 'compound interest on awards is not permitted under Delaware Law' in a Superior Court action at law." (quoting *Rehoboth Marketplace Assocs.*, 1993 WL 191465, at *1)).

Here, in awarding compound interest, the Superior Court relied on *Menen v. Wilmington Trust Co.*, 2015 WL 1914599 (Del. Ch. Apr. 24, 2015), *aff'd sub nom. Mennen v. Fiduciary Trust International of Delaware*, 166 A.3d 102 (Del. 2017), a

Chancery Court decision. Ex. 2 at 2. *Menen* does not authorize the *Superior Court* to award compound interest.

CONCLUSION

Reversal is required so a jury can decide the disputed issues of material fact, and guidance is required for the foregoing issues, including prejudgment interest.

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