IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
April 21, 2010 Session

GLADYS TUTUREA, Individually and as Representative of GEORGE TUTUREA v. TENNESSEE FARMERS MUTUAL INSURANCE COMPANY

Direct Appeal from the Circuit Court for Benton County
No. 5CCV-1045 Charles C. McGinley, Judge

No. W2009-01866-COA-R3-CV - Filed June 29, 2010

This case arises out of the burning of a residence by the plaintiff's terminally ill husband—now deceased—during an unsuccessful suicide attempt. The plaintiff filed this suit to recover under three separate insurance policies for the loss of the residence, two vehicles, and personal property destroyed in the fire. The trial court held that the plaintiff, who it found was a resident of the decedent's household, was not entitled to recover under the terms of the policies. The court further held that the plaintiff was not entitled to recover under the innocent co-insured doctrine. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed, and Remanded

DAVID R. FARMER, J., delivered the opinion of the Court, in which HOLLY M. KIRBY, J. and J. STEVEN STAFFORD, J., joined.

Sam J. Watridge, Humboldt, Tennessee, for the appellant, Gladys Tuturea.

Charles L. Trotter, Jr., Huntingdon, Tennessee, for the appellee, Tennessee Farmers Mutual Insurance Company.

OPINION

I. Background and Procedural History

This dispute was the subject of our prior decision in *Tuturea v. Tennessee Farmers Mutual Insurance Co.*, No. W2006-02100-COA-R3-CV, 2007 WL 2011049 (Tenn. Ct. App. July 12, 2007). The relevant facts as set forth in that opinion and supported by the record in

this case are as follows:

> This case concerns coverage under three insurance policies: two homeowner's policies and one automobile policy. George Tuturea (Mr. Tuturea) and Plaintiff Gladys Tuturea (Mrs. Tuturea) were a married couple who lived in separate houses located about one mile apart. The [residence on Branch Road] primarily occupied by Mrs. Tuturea was titled in her name, and the [residence on White Oak Drive] primarily occupied by Mr. Tuturea was titled in his name. Mrs. Tuturea's house was insured by Defendant Tennessee Farmers Mutual Insurance Company ("TFMI") under homeowner's policy number HP 5217490. Mrs. Tuturea was the only named insured listed on the policy. Mr. Tuturea's home was insured by TFMI under homeowner's policy number HP 5445550. Mr. Tuturea was the only name[d] insured listed on the policy. Additionally, TFMI issued an automobile insurance policy to Mrs. Tuturea d/b/a Kentucky Lake Realty. The automobile policy covered a Lincoln Town Car and a Dodge Ram, and Gladys Tuturea and George Tuturea were listed on the policy as "covered drivers."
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> In September 2004, Mr. Tuturea, who was suffering from terminal cancer, set fire to his house in an unsuccessful attempt to commit suicide. The home, personal property, and the two automobiles covered by the policies issued by TFMI were destroyed. At the time, Mrs. Tuturea had [moved] into Mr. Tuturea's home to care for him in his illness. Mr. Tuturea subsequently died in December 2004. TFMI denied insurance coverage for the loss of Mr. Tuturea's house and the two automobiles on the grounds that the policies did not cover the losses because Mr. and Mrs. Tuturea were members of the same household and because the fire set by Mr. Tuturea was not "accidental."
>
> On September 7, 2005, Mrs. Tuturea, individually and as the Representative of George Tuturea, filed a complaint against TFMI in the Circuit Court of Benton County. In her complaint, she alleged TFMI was liable under the policies of insurance for the losses of real and personal property caused by the fire. She also alleged that the fire set by Mr. Tuturea was accidental because he "suffered an insane attack prior to the fire and . . . his mental state remained that way for a period of time after the fire" and because he "was not in control of his actions due to his mental state." She asserted damages in excess of $300,000 and sought costs and reasonable attorney's fees. TFMI answered and denied liability under the policies and counterclaimed for policyholder bad faith under Tennessee Code Annotated § 56-7-106. TFMI also sought subrogation against the Estate of George

Tuturea.

Following discovery, TFMI filed a motion for summary judgment asserting there was no coverage under the policies where, at the time of the fire, Mr. Tuturea and Mrs. Tuturea were lawfully married residents of the same household and Mrs. Tuturea was an insured by definition under each policy. TFMI further asserted there was no coverage under the policies where the fire which destroyed the real and personal property was not accidental, but intentionally set by Mr. Tuturea. In her response, Mrs. Tuturea asserted she and Mr. Tuturea were not members of the same household where "[s]ometimes they would stay in the same house and at other times they would reside apart." She further asserted the fire was accidental because Mr. Tuturea "was determined to be mentally insane at the time in which the fire occurred." She further asserted that the issue of whether Mrs. Tuturea was an "insured" under the policy had "no bearing on whether or not there is coverage under the policies for the house. . . ." She asserted that the issue involved a determination of under which homeowner's policy she was entitled to pursue her claim to recover for personal property that was destroyed. She also submitted that she was entitled to recover under the automobile policy where, first, the fire was not intentionally set by reason of mental illness and second, where although the policy excluded loss caused by the intentional act of a covered person, it stated, "however the interest of the loss payee shown in the declarations shall not be invalidated by such act or omission by a covered person."

Following a hearing . . . on June 1, 2006, the trial court entered judgment on the matter on July 14, 2006. The trial court concluded that Mr. Tuturea intentionally set the fire that destroyed his house and that, as a member of the household, Mrs. Tuturea could not recover for the loss of the real estate. The trial court further concluded that Mr. Tuturea intentionally burned the motor vehicles when he intentionally burned the house. The court determined that, as a member of the household, Mrs. Tuturea could not recover under the automobile policy for loss of the automobiles. Finally, the trial court determined that the policies were "ambiguous and as a matter of fact come very close to defying comprehension by the average person." It concluded that Mrs. Tuturea's right to recover for the loss of her personal property under the homeowner's policies was controlled by the "innocent coinsured" doctrine under *Finch v. Tennessee Farmers Mutual Insurance Company*, No. 01A01-9607-CV-00342, 1997 WL 92073 (Tenn. Ct. App. Mar. 5, 1997) (*no perm. app. filed*).

Tuturea v. Tenn. Farmers Mut. Ins. Co., 2007 WL 2011049, at *1-2. Concluding that its decision presented questions of law in need of appellate review, the trial court ordered the parties to pursue an interlocutory appeal and, in the alternative, directed entry of final judgment pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure. *Id.* at *2.

This Court determined on appeal that the entry of judgment pursuant to Rule 54.02 was improper. *Id.* at *4. We consequently vacated the entry of judgment and remanded the case for further proceedings. *Id.* at *5. On remand, the trial court denied TFMI's renewed motion for summary judgment and set a trial date. Prior to trial, TFMI voluntarily dismissed its counterclaim for policyholder bad faith but retained its counterclaim for subrogation against Mr. Tuturea's estate should Mrs. Tuturea recover individually.[1]

At trial, the parties again focused their arguments on whether the burning was an accident, whether Mrs. Tuturea was a resident of Mr. Tuturea's household, and whether Mrs. Tuturea was entitled to recover as an innocent co-insured. Mrs. Tuturea argued that the policies' intentional acts exclusions did not apply because the burning of the residence was an accident. She argued in the alternative that, even if her husband intentionally burned the residence, she was entitled to recover as an innocent co-insured. She further submitted that she was entitled to coverage under the terms of her individual homeowner's policy because she was a not resident of Mr. Tuturea's household and, thus, his intentional burning of the residence on White Oak Road was not the act of an insured under that policy.

The trial court rejected Mrs. Tuturea's arguments and issued an oral ruling in favor of TFMI at the conclusion of trial.[2] The court ruled, in pertinent part:

> There are two significant questions, and it's been identified by both the attorneys in their briefs and part has come yet again this afternoon. One of them is was Mrs. Gladys Tuturea a member of the household of George Tuturea, and in this particular case the Court finds without question that she was.

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[1]The trial court's order does not specifically address TFMI's counterclaim for subrogation, but its award of judgment in favor of TFMI on all issues amounts to an implicit denial of TFMI's right to recover because there were no payments for which TFMI could recover. Thus, the order is a final judgment because it resolved the parties' claims and left the court with nothing more to do. *See In re Estate of Henderson*, 121 S.W.3d 643, 645 (Tenn. 2003) (quoting *State ex rel. McAllister v. Goode*, 968 S.W.2d 834, 840 (Tenn. Ct. App. 1997) ("A final judgment is one that resolves all the issues in the case, 'leaving nothing else for the trial court to do.'").

[2]Judge C. Creed McGinley replaced Judge Julian P. Guinn as the presiding judge in this case after the first appeal.

That is confirmed throughout her own testimony. Although they have had two separate residences, she used one of them on occasion, earlier apparently as an escape conduit, a madhouse or whatever whenever there would be marital rifts or he would lose his temper or any number of other things, but it was a haven for her.

It had been picked up probably because of the fact that she's in the real estate business and has a long history of real estate dealings, but her testimony indicates that since his diagnosis that essentially she was a resident of that house.

She made various statements, and one of them was when the dogs moved in. Another one was that essentially all her -- not all her goods, but a lot of her goods had been moved out of the house on Branch Road since such that -- and these are her words; not the Court's; not Mr. Trotter's -- that it was more or less a warehouse.

This was further confirmed by the testimony of her daughter who testified in this case essentially that dad got sick in 2001 or 2002, the living arrangements in the house, when I visited, she stayed at White Oak and that, in fact, that Gladys lived at White Oak in 2001.

It was further confirmed by the testimony of Betty Hunt who came down from Michigan, a very close friend of Mrs. Tuturea . . . .

. . . .

The neighbors testified somewhat consistently, but they were a little more equivocal, and their testimony was more to the events that occurred the night of the fire as far as what had been said or anything, but the Court finds without question that she was, in fact, a member of the household of George Tuturea.

The other question is the one that we've been dealing with throughout: was the act of the insured an intentional act, or could it be construed as an accidental or unsuspected happening because of the possible lack of intent or, quote -- and he moved away from this several times -- "insanity."

And Dr. Monette didn't like to touch on that at any rate, but he gave

long testimony. Dr. Monette in a very lengthy deposition talked about the break with reality, all the different things, could not help it, psychosis was in control of Mr. Tuturea, that he could not have committed an intentional act when he was insane.

I read that testimony. You learn some other things in reading that. You learn apparently that Mr. Tuturea was Romanian, that he had been part of World War II, some fairly harsh military conditions that apparently were revisiting themselves with posttraumatic stress and possibly served in Korea as well.

Against the background of Dr. Monette, you've got the -- the -- I was going to say paramedics, but the emergency people, particularly Mr. Baucum [sic] that we did find after I had read the deposition and said there were absolutely no problems, that at the time of this he was mentally alert and oriented. He answered all those questions of the forms that were presented to him without any difficulty, the first five questions as he testified, but others applying only if you're under a certain age that he was able to give correct information concerning birth, nationality, social security number, medicare number, so forth and so on, didn't notice any problem whatsoever.

Also weighing in favor of the fact that this was an intentional act, you've got to look at the prior threats that the deceased had made, and one of the witnesses -- I don't remember which one -- testified that at Mr. Baucum's [sic] -- I think it was a neighbor that testified that at Mrs. Tuturea's real estate office some month or weeks prior to this that Mrs. Tuturea had indicated that George had told her that he intended to burn the house.

Sometimes the best indications of someone's intentions are what has happened previous to that, and it wasn't something of short term, and there were no actions apparently taken to prohibit this from happening, although I'm not sure that they would have been of any great moment.

I've reviewed all the evidence in this case, and I think it's inescapable that this was an intentional act, that the insanity was not an overwhelming influence . . . .

. . . .

As I said, if you look at this whole case, I think that the proof is overwhelming

> that the act of Mr. Tuturea was intentional and, as such, would void the insurance policies in this particular case.
>
> You've got the same reasoning that applies to the cars as well. You've got the definitional aspects that refers [sic] to the named insured as shown on the declarations and his or her spouse if a resident of the same household.
>
> I've already made findings that they are residents of the same household, and then the exclusion would be the intentional act or omission of a covered person who comes under the definition.
>
> So the same ruling would apply concerning the cars that applied to her personal property and the property under his policy as well. . . .
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> . . . .
>
> And then there's some mention of innocent coinsured. That doesn't apply to this case. First of all, you've got to have ambiguities in the policy, and then you go from there.
>
> These policies are -- there's no ambiguities as applies to the situation. As a result, judgment will be rendered in favor of the defendant.

The court incorporated its oral ruling into a written order and later granted, in part, a motion for discretionary costs that TFMI filed. Mrs. Tuturea timely appealed.

II. Issues Presented

Mrs. Tuturea presents the following issues, as we perceive them, on appeal:

(1) Whether Mrs. Tuturea was a resident of Mr. Tuturea's household for the purposes of coverage under the insurance policies;

(2) Whether Mr. Tuturea's burning of the residence was an accident for which the insurance company was required to provide coverage;

(3) Whether Mrs. Tuturea was entitled to recover under the innocent co-insured doctrine.

Mrs. Tuturea does not appeal the award of discretionary costs.

III. Standard of Review

This Court reviews the judgment of a trial court in a bench trial *de novo* upon the record, according a presumption of correctness to the factual findings of the court below. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993) (citation omitted). The general rule is that an appellate court will not disturb a trial court's findings of fact unless a preponderance of the evidence is to the contrary. *Berryhill v. Rhodes*, 21 S.W.3d 188, 190 (Tenn. 2000) (citation omitted). Factual findings based on a trial judge's assessment of witness credibility, however, receive a higher degree of deference; we will uphold such findings unless clear and convincing evidence shows the trial court to be in error. *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999) (citations omitted). Questions of law, on the other hand, are reviewed *de novo* with no presumption of correctness. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000) (citation omitted). "'In general, the interpretation of an insurance policy is a question of law and not fact.'" *Metro. Prop. and Cas. Ins. Co. v. Buckner*, 302 S.W.3d 288, 295 (Tenn. Ct. App. 2009) (quoting *Charles Hampton's A-1 Signs, Inc. v. Am. States Ins. Co.*, 225 S.W.3d 482, 487 (Tenn. Ct. App. 2006)).

IV. Analysis

The overarching issue in this appeal is whether TFMI is required to compensate Mrs. Tuturea individually or as a representative of Mr. Tuturea's estate for the loss of the residence, its contents, and the two vehicles destroyed therein. Mrs. Tuturea argues that TFMI is required to provide coverage for all of the losses suffered in this case. She submits that the burning of the residence was a direct and accidental loss caused by Mr. Tuturea's alleged acute break from reality. Because the burning was an accident, she submits that the intentional acts exclusions of the applicable policies do not apply. Mrs. Tuturea argues, in the alternative, that TFMI should be required to compensate her under either the innocent co-insured doctrine or the terms of her individual homeowner's policy. TFMI contends, to the contrary, that Mr. Tuturea intentionally burned the residence and that Mrs. Tuturea should not recover for the loss either individually or as a representative of Mr. Tuturea's estate. TFMI further submits that the innocent co-insured doctrine does not apply because the insurance policies clearly preclude recovery for the intentional acts of another insured.

The resolution of the parties' dispute will depend to a great degree on our interpretation of the applicable insurance policies. The Tutureas' homeowner's policies provide, in pertinent part:

Insured means:

1. **you**; or
2. a person who is a resident of **your** household and who is either:

   a. related to **you** by blood, marriage, or adoption;
   b. **your** ward; or
   c. **your** foster child.

. . . .

Residence means the one or two family dwelling owned by **you**, described in the Declarations, and occupied by **you** as **your** personal dwelling. It includes structures attached to the dwelling.

. . . .

You or **your** means the person or entity identified as "INSURED NAME" in the Declarations and that person's spouse if a resident of the same household.

. . . .

The coverage afforded by this policy applies only to losses under **SECTION I** and occurrences under **SECTION II** that take place during the policy period.

. . . .

ACTS WHICH AUTOMATICALLY VOID THE POLICY

Concealment or Fraud

The policy shall be automatically void as to all **insureds** if any **insured**, whether before or after a loss or **occurrence**:

1. conceals or misrepresents any material fact or circumstance relating to this policy;

2. makes false statements relating to this policy; or

3. commits fraud relating to this policy.

. . . .

Losses Insured and Exclusions to Those Losses

We cover accidental direct physical loss to property insured under **Coverage A - Dwelling** . . . .

. . . .

We cover accidental direct physical loss to property insured under **Coverage C - Personal Property** caused by the following perils unless excluded in this policy:

1. FIRE or LIGHTNING

. . . .

Additional SECTION I Exclusions

Under **SECTION I we** do not cover any loss resulting directly or indirectly from any of the excluded events listed below. **We** do not cover such loss for anyone regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss.

. . . .

5. Failure of any **insured** to use all reasonable means to save and protect covered property at and after the time of loss or when the property is threatened or endangered.

. . . .

8. Any action, other than accidental, committed by or at the direction of any **insured**:

a. resulting in a loss; or
b. with the intent to cause a loss.

The automobile policy provides, in pertinent part:

Tennessee Farmers Mutual Insurance Company, Columbia Tennessee, agrees to insure **you** according to the terms and conditions of this policy based on **your** payment of the premium(s) for the coverage(s) **you** have chosen and in reliance on **your** statements in the application(s) for insurance and in the Declarations to this policy.

. . . .

Named insured means the person or entity shown as the insured in the Declarations. It also includes the person's spouse if a resident of the same household.

. . . .

You or **Your** means the **name insured(s)** shown in the Declarations and his or her spouse if a resident of the same household.

. . . .

Your covered auto means:

1. any auto described in the Declarations that is **owned** by **you**.

. . . .

When Coverage Applies

The coverage afforded by this policy applies only to accidents and losses that take place during the policy period.

. . . .

PART F COMPREHENSIVE COVERAGE

. . . .

What is Covered

Loss to Your Covered Auto

We will pay for direct and accidental loss to **your covered auto**, except loss caused by collision or upset, but only for the amount of each such loss in excess of the deductible amount, if any.

Breakage of glass, or loss caused by missiles, falling objects, fire, theft, larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, riot or civil commotion is payable under this coverage. . . .

. . . .

WHAT IS NOT COVERED UNDER PARTS F, G, H AND I

We will not pay for any:

. . . .

9. loss caused by the intentional act or omission of, or at the direction of, a covered person, however the interest of the loss payee shown in the declarations shall not be invalidated by such act or omission by a covered person.

We must remember when interpreting these policies that insurance agreements are contracts, *PacTech, Inc. v. Auto-Owners Ins. Co.*, 292 S.W.3d 1, 11 (Tenn. Ct. App. 2008) (citing *Nat'l Ins. Ass'n v. Simpson*, 155 S.W.3d 134, 138 (Tenn. Ct. App. 2004)), and courts interpret insurance policies under contractual principles, *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.* 216 S.W.3d 302, 305-06 (Tenn. 2007) (citing *McKimm v. Bell*, 790 S.W.2d 526, 527 (Tenn. 1990)). As with all contracts, courts should construe insurance policies in a fair, reasonable, and logical manner, giving the policy language its usual and ordinary meaning. *Id.* at 306 (citations omitted). Parties to an insurance contract are free to bargain for and agree upon such terms as they see fit, unless their agreement is repugnant to public policy. *State Farm Fire and Cas. Co. v. White*, 993 S.W.2d 40, 43 (Tenn. Ct. App. 1998) (citing *Setters v. Permanent Gen. Assurance Corp.*, 937 S.W.2d 950, 953 (Tenn. Ct. App. 1996)). In the absence of fraud or mistake, courts should give effect to contracts as written. *Standard Fire Ins. Co. v. Chester-O'Donley & Assocs., Inc.*, 972 S.W.2d 1, 7 (Tenn. Ct. App. 1998) (citing *Allstate Ins. Co. v. Wilson*, 856 S.W.2d 706, 708 (Tenn. Ct. App.

1992)). If the language of a policy is unambiguous, a court must apply its terms, *see Tata v. Nichols*, 848 S.W.2d 649, 650 (Tenn. 1993), even if application of the controlling language will produce a harsh result, *PacTech*, 292 S.W.3d at 12 (citing *Wilson*, 856 S.W.2d at 708). When policy terms are clear, courts are not permitted to favor one party over another and must avoid extending or restricting the intended scope of coverage through the guise of construction. *Simpson*, 155 S.W.3d at 138 (citations omitted).

Our duty differs, however, when the language of an insurance policy is ambiguous, particularly if the ambiguity purports to limit coverage. Language in an insurance policy is ambiguous if it is susceptible of more than one reasonable interpretation. *Tata*, 848 S.W.2d at 650 (Tenn. 1993) (citing *Moss v. Golden Rule Life Ins. Co.*, 724 S.W.2d 367, 368 (Tenn. Ct. App. 1986)). "Where the ambiguous language limits the coverage of an insurance policy, that language must be construed against the insurance company and in favor of the insured." *Id.* (citing *Allstate Ins. Co. v. Watts*, 811 S.W.2d 883, 886 (Tenn. 1991)). But courts should not place a strained construction on the language of an insurance policy to find ambiguity where none exists. *See Farmers-Peoples Bank v. Clemmer*, 519 S.W.2d 801, 805 (Tenn. 1975). And courts will not rewrite insurance policies. *Naifeh v. Valley Forge Life Ins. Co.*, 204 S.W.3d 758, 768 (Tenn. 2006) (citing *Christenberry v. Tipton*, 160 S.W.3d 487, 494 (Tenn. 2005)); *Tenn. Farmers Mut. Ins. Co. v. Witt*, 857 S.W.2d 26, 32 (Tenn. 1993)). Ambiguous exclusionary clauses, for example, must be read in light of their apparent purpose even though they are strictly construed against the insurer. *Simpson*, 155 S.W.3d at 138 (citations omitted). "When the purpose of an exclusion can be ascertained, the courts should avoid construing the language of the exclusion so narrowly that its purpose is undermined." *Id.* (citing *Standard Fire*, 972 S.W.2d at 8). With these principles in mind, we turn to the analysis of the questions presented.

A. Was Mrs. Tuturea a resident of Mr. Tuturea's household?

The first question before this Court is whether Mrs. Tuturea was a resident of Mr. Tuturea's household, which the parties submit is determinative of whether Mrs. Tuturea was an insured under Mr. Tuturea's homeowner's policy and vice versa. The resolution of this issue is important because it will determine the scope of our inquiry in the present appeal. As the argument is presented, Mrs. Tuturea is entitled to the following coverage if Mr. Tuturea did not intentionally burn the residence, regardless of whether the spouses were co-insureds under their respective polices: (1) full coverage for losses under Mr. Tuturea's homeowner's policy, (2) full coverage for losses under the automobile policy, and (3) coverage for a percentage of her personal property under her individual homeowner's policy. The analysis changes, however, if Mr. Tuturea is found to have intentionally burned the residence. If the spouses were not co-insureds under their respective policies and Mr. Tuturea intentionally burned the residence, Mrs. Tuturea may only recover for a percentage

of her personal property under her individual homeowner's policy. But, if the spouses were co-insureds under their respective homeowner's policies and Mr. Tuturea intentionally burned the residence, an argument exists that Mrs. Tuturea should recover as an innocent co-insured.

The controlling framework for our analysis of this issue is found in *National Insurance Association v. Simpson*, 155 S.W.3d 134 (Tenn. Ct. App. 2004), *perm. app. denied* (Tenn. Dec. 6, 2004). This Court in *Simpson* explained that the phrase "resident of your household" has appeared often in insurance contracts, has been construed frequently, and is not ambiguous. *Simpson*, 155 S.W.3d at 138 (citations omitted). While the phrase is "necessarily elastic," *id*. (citations omitted), the following non-exhaustive list of factors are relevant to whether a person is a resident of another's household in a given case:

> (1) the person's subjective or declared intent to remain in the household either permanently or for an indefinite or unlimited period of time, (2) the formality or informality of the relationship between the person and the other members of the household, (3) whether the place where the person lives is in the same house or on the same premises, (4) whether the person asserting residence in the household has another place of lodging, and (5) the age and self-sufficiency of the person alleged to be a resident of the household.

Simpson, 155 S.W.3d at 139-40 (citations omitted); *accord Vanbebber v. Roach*, 252 S.W.3d 279, 286-87 (Tenn. Ct. App. 2007), *perm. app. denied* (Tenn. Mar. 3, 2008).

The evidence in this case supports a finding that Mrs. Tuturea was a resident of Mr. Tuturea's household. The evidence shows that Mr. and Mrs. Tuturea married in 1970 and, despite the filing of more than one divorce petition, remained married through Mr. Tuturea's death in 2004. Although the couple had a history of marital problems which led them to live in separate residences for a period, their relationship remained fairly strong. Like most couples, they shared their finances, residences, and vehicles; entertained guests together; and went about life's daily activities together. In fact, the couple spent most of their time together when they were getting along. As Mrs. Tuturea explained, while some married couples might maintain separate bedrooms in the marital home, the Tutureas maintained separate residences. This was the pattern of the couple's relationship for a number of years.

The situation changed, however, when doctors diagnosed Mr. Tuturea with terminal cancer in 2001. At that time, Mrs. Tuturea moved from the couple's Branch Road residence to live full time with Mr. Tuturea at the White Oak residence. At trial, Mrs. Tuturea conceded that she "half" moved into the White Oak residence and moved most of her belongings there, including her bedroom suite, the vast majority of her clothing, her cooking

utensils, and her pets. Despite the fact that she continued to maintain the Branch Road residence, Mrs. Tuturea testified that it was "closed up" most of the time. In her words, the Branch Road residence served as a "warehouse" that she would check on "once in a while." As the trial court noted, Mrs. Tuturea made a particularly strong statement regarding her decision to move her dogs to the White Oak residence. She stated, "if I moved the dogs over there, that meant that I was going to be there full time, because if the dogs were there, I was there." It is undisputed that Mrs. Tuturea moved the dogs to the White Oak residence prior to the fire. Thus, Mrs. Tuturea's testimony supports a conclusion that she lived full time with Mr. Tuturea prior to the fire, as does the testimony of Mrs. Tuturea's stepdaughter, Marianne Roman, and Mrs. Tuturea's long-time friend, Betty Hunt, who both confirmed that Mrs. Tuturea had primarily stayed at the White Oak residence since her husband's cancer diagnosis.

Additionally, two separate sworn proof of loss statements submitted following the fire corroborated the trial testimony. Mrs. Tuturea testified at trial that she signed, acknowledged, and ratified the proof of loss statements which her secretary prepared. The sworn proof of loss submitted with respect to Mr. Tuturea's homeowner's policy provided that the "only changes in use, occupancy, location, possession, interest, title, or risk exposure that have occurred since this policy was issued are described as follows: *Gladys Tuturea and seven dogs became residents*." (Emphasis added.) A second proof of loss statement filed with respect to the automobile policy stated, "The only changes in use, possession, interest, garage location, or risk that have occurred since this policy was issued are described as follows: *Gladys moved in to live with George full time*." (Emphasis added.)

In light of these facts, we hold that Mrs. Tuturea was a resident of Mr. Tuturea's household under the criteria set forth in *Simpson*. The evidence shows: (1) Mrs. Tuturea's subjective or declared intent was to remain in the household for an indefinite period of time; (2) she was in a formal, married relationship with Mr. Tuturea; (3) she lived in the same residence as Mr. Tuturea at the time of the fire; (4) she made a voluntary choice to reside at that residence in order to care for her husband. Although Mrs. Tuturea maintained another place of lodging that she visited on occasion, we agree with the trial court's conclusion that Mrs. Tuturea was "without question" a resident of Mr. Tuturea's household.[3] Our

[3]Mrs. Tuturea contends that TFMI should be estopped from arguing that she was a member of Mr. Tuturea's household. As TFMI has demonstrated in its brief, this argument was not raised before the trial court and, therefore, will not be considered on appeal. *See Fayne v. Vincent*, 301 S.W.3d 162, 171 (Tenn. 2009) (citations omitted) (acknowledging the "continuing vitality and validity of the principle that parties will not be permitted to raise issues on appeal that they did not first raise in the trial court" and further holding that "the party invoking this principle has the burden of demonstrating that the issue sought to be precluded was, in fact, not raised in the trial court"). Additionally, Mrs. Tuturea has cited no authority in (continued...)

determination that Mrs. Tuturea was a resident of Mr. Tuturea's household leads to the conclusion that Mrs. Tuturea was an insured under Mr. Tuturea's homeowner's policy at the time of the fire and vice versa for the purposes of this opinion. If Mr. Tuturea did not intentionally burn the residence, she may recover fully for the complained of losses. If Mr. Tuturea did intentionally burn the residence, the question of recovery will then turn on the application of the innocent co-insured doctrine.

B. Was the burning intentional?

The next question before this Court is whether the express language of the policies requires TFMI to provide coverage for the losses suffered in this case. Ordinarily, we would begin our analysis with a determination of whether Mrs. Tuturea, as the insured, has carried her initial burden of establishing coverage for the complained of losses. *See Massachusetts Mut. Life Ins. Co. v. Jefferson*, 104 S.W.3d 13, 22 (Tenn. Ct. App. 2002) (citations omitted). In order to establish coverage, Mrs. Tuturea would have to demonstrate that the burning of the residence was an accident because the applicable policies only provide coverage for accidental direct physical loss. Although not specifically addressed by the parties, the question of whether the burning of the residence produced an accidental loss would turn on the perspective from which the event is judged under each policy. As a result, the determination of whether the burning produced an accidental loss could conceivably differ in this case depending on whether we are addressing Mrs. Tuturea's right to recover in a representative capacity or her right to recover individually. It seems fairly clear that we would determine the accidental nature of the fire from Mr. Tuturea's perspective when determining whether Mrs. Tuturea is entitled to recover as the representative of his estate. It is not entirely clear, however, whether this Court would also determine the accidental nature of the fire from Mr. Tuturea's perspective when determining whether Mrs. Tuturea is entitled to recover individually.[4]

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[3](...continued)
support of this argument and has made no attempt in her brief to explain how the elements of estoppel are satisfied. *See Bean v. Bean*, 40 S.W.3d 52, 55-56 (Tenn. Ct. App. 2000) (citations omitted) (explaining that appellate courts will not consider an issue not properly argued in the appellant's brief).

[4]An argument could be made that this Court should determine whether the burning was accidental from Mrs. Tuturea's perspective when determining her individual right to recover. *See Musser v. Tenn. Farmers Mut. Ins. Co.*, 1989 WL 135328, at *1 (Tenn. Ct. App. Nov. 9, 1989) (finding coverage for an innocent co-insured under an automobile policy because the intentional destruction of the vehicle was accidental from the perspective of the innocent spouse); *cf. Ragsdale v. Deering*, No. M2004-00672-COA-R9CV, 2006 WL 2516391, at *5 (Tenn. Ct. App. Aug. 30, 2006) (concluding that the term "accident" in an automobile policy's uninsured motorist coverage should be construed from the perspective of the injured insured). The contrary argument, however, is that this Court should not determine
(continued...)

Resolution of this question is nevertheless unnecessary under the facts. The homeowner's policies and automobile policy respectively exclude coverage for intentional acts that an insured or covered person commits. As we will explain below, the language of these provisions makes clear that an intentional act of either insured excludes coverage for the co-insured, thereby eliminating the need to determine from whose perspective we should determine the accidental or intentional nature of the act. If TFMI, as the insurer, has carried its secondary burden to prove that the policies' exclusionary provisions apply, *see Jefferson*, 104 S.W.3d at 22 (citing *Interstate Life & Accident Ins. Co. v. Gammons*, 408 S.W.2d 397, 399 (Tenn. Ct. App. 1966)), it matters not whether Mrs. Tuturea has carried her initial burden; she may not recover.[5] Additionally, the trial court resolved the question of coverage in favor of TFMI on the basis of the intentional acts exclusions and it is this conclusion that Mrs. Tuturea attacks on appeal.

Mrs. Tuturea argues on appeal that the intentional acts exclusions do not apply in this case because the burning of the residence was an accident. She argues, and we agree, that the word "accident" as used in an insurance policy refers to an unforeseen, unexpected event occurring without intention or design. *See Travelers*, 216 S.W.3d at 308; *see also Am. Cas. Co. v. Timmons*, 352 F.2d 563, 566 (6th Cir. 1965) (citations omitted). We further agree that "intention" is a "willingness to bring about something planned or foreseen," *Black's Law Dictionary* 826 (8th ed. 2004), whereas "design" is a "[a] plan or scheme" or "[p]urpose or intention combined with a plan," *id*. at 478. It follows that an act is "intended" or "intentional" for the purposes of insurance coverage if it is the actor's conscious objective or desire to bring about a planned or foreseen result.[6] *Cf.* Tenn. Code Ann. § 39-11-106(a)(18) (Supp. 2009); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992) (citation omitted). Mrs. Tuturea, in effect, submits that the controlling question for purposes

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[4](...continued)
whether an event is accidental from the perspective of the insured if the person who committed the intentional act was a co-insured of the affected party and not a third party. *See Volquardson v. Hartford Ins. Co. of the Midwest*, 647 N.W.2d 599, 614 (Neb. 2002). Because resolution of this question is not necessary to the disposition of this appeal, we leave it for future consideration.

[5]Mrs. Tuturea has not argued that this case fits within any exceptions to the exclusions. *See Jefferson*, 104 S.W.3d at 22 (citing *Standard Fire*, 972 S.W.2d at 8).

[6]We do not suggest that the resulting loss must mirror the foreseen result. The Tennessee Supreme Court explained in *Tennessee Farmers Mutual Insurance Co. v. Evans*, 814 S.W.2d 49 (Tenn. 1991), that an act is intended for the purposes of an intentional acts exclusion if "the insured intended the act *and* also intended or expected that injury would result." *Evans*, 814 S.W.2d at 55 (emphasis in original). "The intent itself may be actual or inferred from the nature of the act and the accompanying reasonable foreseeability of harm." *Id.* "It is immaterial that the actual harm was of a different character or magnitude or nature than that intended." *Id.*; *accord Buckner*, 302 S.W.3d at 298.

of determining whether Mr. Tuturea intentionally set fire to the White Oak residence is whether he formed a conscious desire or objective to bring about the fire as a foreseen result of his actions.[7]

Mrs. Tuturea argues that Mr. Tuturea did not form a conscious desire or objective to bring about the fire in this case because he was insane, had an acute break with reality, and was not in control of his actions when he set the fire. Mrs. Tuturea offers the deposition testimony of Dr. J. Gerard Monette, who treated her husband in the days and months following the fire, as expert testimony in support of her position. Dr. Monette offered a number of findings that suggest Mr. Tuturea, while in a state of delusion or confusion, may have been unable to form a conscious objective or desire to bring about a planned result. He described Mr. Tuturea as "an irrational, psychotic person, with possible episodes of confusion." He added that "[n]ot only does [Mr. Tuturea] break contact with reality, but he's in another world and possibly in a delirium, [he is a] depressed, raging, paranoid, delusional, and possibly, additionally confused person." When asked whether Mr. Tuturea knew what he was doing when he set fire to the White Oak residence, Dr. Monette responded:

> "[N]o, Mr. Tuturea did not appreciate his act adequately at all. He was probably in a state of confusion, paranoia, massive rage, and agitation; nor might I add at that time he didn't have the capacity to even form an opinion as

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[7]We recognize that courts in other jurisdictions have held, as a matter of law, that an "insane" person is incapable of forming the intent to commit an intentional act in the insurance context, although there is some disagreement between these jurisdictions on what standard to apply when determining whether an insured is "insane." *E.g., Cooperative Fire Ins. Ass'n v. Combs*, 648 A.2d 857, 860 (Vt. 1994); *State Farm Fire & Cas. Co. v. Wicka*, 474 N.W.2d 324, 331 (Minn. 1991); *Ruvolo v. Am. Cas. Co.*, 189 A.2d 204, 209 (N.J. 1963); *Globe Am. Cas. Co. v. Lyons*, 641 P.2d 251, 253-54 (Ariz. Ct. App. 1981); *see generally*, Catherine A. Salton, Comment, *Mental Incapacity and Liability Insurance Exclusionary Clauses: The Effect of Insanity Upon Intent*, 78 Cal. L. Rev. 1027 (1990). Other courts have held that an actor is able to commit an intentional act so long as the actor understands the physical nature and consequences of the act, regardless of whether the actor is able to distinguish right from wrong. *E.g., Prasad v. Allstate Ins. Co.*, 644 So.2d 992, 994-95 (Fl. 1994); *Mun. Mut. Ins. Co. of W. Va. v. Mangus*, 443 S.E.2d 455, 458 (W.Va. 1994); *Auto-Owners Ins. Co. v. Churchman*, 489 N.W.2d 431, 434 (Mich. 1992); *Shelter Mut. Ins. Co. v. Williams*, 804 P.2d 1374, 1382 (Kan. 1991); *Johnson v. Ins. Co. of North Am.*, 350 S.E.2d 616, 620-21 (Va. 1986). Mrs. Tuturea has cited no such authority in support of her position, has not argued that—regardless of the language in an insurance policy—Tennessee courts should hold that an "insane" individual is incapable, as a matter of law, of committing an intentional act, and has not attempted to provide a standard by which courts should determine whether an individual is "insane" when interpreting and applying insurance policies. Rather, she asks this Court to judge Mr. Tuturea's actions under a standard derived from the plain language of the parties' contract, which is somewhat analogous to the latter line of authority cited above and upon which TFMI relies. We find it appropriate under the circumstances to apply the standard derived from Mrs. Tuturea's interpretation of the contract and leave for future consideration any arguments not squarely presented in this appeal.

to whether what he was doing was right or wrong."

According to Dr. Monette, Mr. Tuturea suffered "an acute break with reality" at the time of the fire and his lighting the fire was an irresistible impulse "dictated by psychoses." The fatal deficiency in Mrs. Tuturea's position, however, is that the trial court entered findings of fact that compel a contrary conclusion, and the evidence does not support overturning its findings.

A portion of Mrs. Tuturea's testimony, for example, suggests that Mr. Tuturea, although in an aggressive state, had formed a conscious desire and objective to burn the house down prior to the fire. According to Mrs. Tuturea, she awoke in the early morning hours of September 8, 2004, after hearing a commotion in Mr. Tuturea's bedroom. When she confronted Mr. Tuturea about what he was doing, he responded, "Is it your business what I'm doing?" Mr. Tuturea, who Mrs. Tuturea described as "aggressive" and "belligerent," then pushed his wife out of the bedroom, forced her into a chair, physically restrained her, and eventually chased her as she escaped. After she evaded her husband, Mrs. Tuturea rushed to neighbor Leroy Stratman's home for help and exclaimed that "George [is] threatening to set fire to the house." This statement indicates that burning of the house was not, as Mrs. Tuturea submits, unforeseen.

In addition, the testimony of a first responder who treated Mr. Tuturea at the scene shows that Mr. Tuturea was conscious, alert, and responsive at the time of the fire and immediately thereafter. Kenneth Bawcum, a paramedic, stated that Mr. Tuturea was alert and oriented when he arrived at the scene, i.e., Mr. Tuturea was able to answer correctly questions regarding his name, date, place, et cetera.[8] In his deposition, Mr. Bawcum further explained that Mr. Tuturea told him he was supposed to have started chemotherapy that day, but he had decided not to and he wanted to die. Mr. Tuturea also reported having been in an argument with his wife around the time of the fire. Mr. Bawcum testified in his deposition that the couple again started arguing when police brought Mrs. Tuturea to the ambulance for treatment of chest pains. According to Mr. Bawcum, Mrs. Tuturea asked, "Why did you do it?" and Mr. Tuturea simply responded, "Get her away from here." Police then escorted Mrs. Tuturea from the ambulance at Mr. Bawcum's request.

Additionally, Mrs. Tuturea's expert offered testimony that suggests Mr. Tuturea was mentally alert and oriented at the time of the fire. In his deposition, Dr. Monette stated to a degree of psychiatric certainty that Mr. Tuturea "did have an intent to kill himself" when he set fire to the home and clarified that he never opined that Mr. Tuturea did not understand

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[8]The record contains Mr. Bawcum's deposition testimony in addition to his live testimony. Mr. Bawcum's deposition testimony was entered into the record because he was not present when he was initially called to testify. Shortly thereafter, he appeared and testified live without objection.

that he was burning his house down. The comprehensive psychiatric report Dr. Monette prepared the day after the fire described Mr. Tuturea as "an individual who still has strength, consciousness, alertness, and vigilance with no brain metastatis . . . ." This is important because Dr. Monette testified to a reasonable degree of psychiatric certainty that Mr. Tuturea's mental status on the date of the comprehensive exam was the same as his mental status at the time of the fire.

TFMI also offered evidence suggesting that the burning of the residence was not altogether without warning. Nearly twenty years before his diagnosis, Mr. Tuturea stated that he would kill himself before he went through the process of dying from cancer. The evidence also showed that Mrs. Tuturea asked for a restraining order against Mr. Tuturea when she filed for divorce in 1994, citing her fear that Mr. Tuturea might do physical harm to her person, property, or pets. More importantly, the Tutureas' neighbor, Judith Stratman, testified that Mr. Tuturea specifically threatened to burn down the lake house in the month preceding the fire, which Mrs. Tuturea reported to her during a conversation at Mrs. Tuturea's real estate office.[9]

Considering the evidence in the record, we find no basis upon which to overturn the trial court's judgment. The court's specific finding that "the insanity was not an overwhelming influence" is in implicit rejection of Dr. Monette's testimony that Mr. Tuturea had an acute break from reality and was not in control of his actions at the time of the fire. The court instead looked to the testimony of the lay witness which established: (1) Mr. Tuturea contemplated burning the residence prior to the night of the fire; (2) he decided to burn the residence in an attempt to commit suicide; (3) he specifically threatened to burn the house down on the night of the fire; (4) he was conscious, alert, and aware at the time he set the fire and immediately thereafter. In our opinion, this evidence demonstrates that it was Mr. Tuturea's conscious objective and desire to bring about a planned or foreseen result, which in this case was the burning of the White Oak residence.

The trial court was not required to accept the entirety of Dr. Monette's expert testimony simply because no expert testimony was presented in opposition:

> Expert opinions, at least when dealing with highly complicated and scientific matters, are not ordinarily conclusive in the sense that they must be accepted as true on the subject of their testimony, but are purely advisory in character and the trier of facts may place whatever weight it chooses upon such testimony and may reject it, if it finds that it is inconsistent with the facts in the

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[9] Mrs. Tuturea denied making this statement, but the trial court resolved the disputed testimony in favor of Mrs. Stratman.

> case or otherwise unreasonable. Even in those instances in which no opposing expert evidence is offered, the trier of facts is still bound to decide the issue upon its own fair judgment, assisted by the expert testimony.

Gibson v. Ferguson, 562 S.W.2d 188, 189-90 (Tenn. 1976) (citing *Act-O-Lane Gas Serv. Co. v. Hall*, 248 S.W.2d 398, 404-05 (Tenn. Ct. App. 1951)). In this case, the trial judge diligently considered the evidence presented, including the expert testimony, and concluded that the burning of the residence was a premeditated event that occurred while Mr. Tuturea was mentally alert and aware. In light of the standard set forth by the appellant, we hold that the trial court correctly decided the burning of the residence was an "intended" or "intentional" act for which coverage is specifically excluded.

The unreported cases cited by the appellant are not persuasive on this issue. In *Musser v. Tennessee Farmers Mutual Insurance Co.*, 1989 WL 135328 (Tenn. Ct. App. Nov. 9, 1989), this Court determined that an innocent co-insured spouse was entitled to coverage under the terms of her automobile policy. In *Musser*, a plaintiff's spouse fired thirty rounds from a semi-automatic machine gun into her vehicle during an alleged "insane attack." *Musser*, 1989 WL 135328, at *1. The insurance company argued on appeal that the policy did not provide coverage because the acts of the plaintiff's spouse were intentional. *Id.* We disagreed with the insurance company's position, relying on the "innocent spouse" or "innocent co-insured" doctrine.[10] This Court reasoned that because "the destruction to the car was accidental *to her* denying coverage would produce an inequitable result." *Id.* (emphasis in original). We went on to find the loss accidental because there was no evidence to suggest that the plaintiff could have reasonably expected her husband of six weeks to fire upon her vehicle during an "insane attack." *Id.* This Court, however, did not address whether the destruction of the vehicle was an accident from the perspective of the allegedly insane spouse, which is the only relevant consideration here.

This Court's decision in *Adams v. Aetna Casualty & Surety Co.*, 1985 WL 3642 (Tenn. Ct. App. Nov. 19, 1985), similarly does lead to the conclusion that the intentional burning of the residence in this case was an accident. *Adams* involved the intentional burning of a residence by the plaintiff's husband, who later committed suicide. *Adams*, 1985 WL 3642, at *1. The trial court awarded the plaintiff the full amount of the home under a homeowner's policy after finding that the plaintiff's husband was depressed, had abused alcohol and drugs, and had not intended to defraud the insurance company. *Id.* On appeal,

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[10] Although Mrs. Tuturea only cites *Musser* as it pertains to whether the burning was accidental, we note that its application of the innocent co-insured doctrine is not persuasive on the question of whether we should presently apply the doctrine, because there is no indication in *Musser* that the policy contained an intentional acts exclusion similar to the exclusions present here.

we interpreted the trial court's decision as holding that the plaintiff's husband was insane at the time of the fire and consequently incapable of forming an intent to burn the residence. *Id.* This Court reversed the decision of the trial court, finding that the evidence preponderated against the court's conclusion that the plaintiff's husband was insane. *Id.* at *2. Although the expert testimony suggested that the plaintiff's husband was irrational and suffered from a personality disorder, it further showed that he understood the consequences of his actions. *Id.* This was enough in our opinion to demonstrate that the plaintiff's husband was sane and, therefore, able to commit an intentional act for the purposes of insurance coverage.[11] *Id.* Thus, *Adams* does not support the assertion that Mr. Tuturea's burning of the residence was an accident; rather, this Court's holding suggests to the contrary that Mr. Tuturea, who understood the consequence of his actions, was sane and hence capable of intentionally burning the residence.

Having reviewed the cases and evidence offered in support of the appellant's position, we agree with the trial court's conclusion that Mr. Tuturea intentionally burned the residence. TFMI has met its burden to establish the application of the intentional acts exclusions of each policy in this case. Mrs. Tuturea is not entitled to recover unless she demonstrates a right to recover under the innocent co-insured doctrine.

C. Does the innocent co-insured doctrine permit Mrs. Tuturea to recover?

Mrs. Tuturea argues, as a final matter, that she is entitled to recover for the loss of property destroyed in the fire under the "innocent co-insured" or "innocent spouse" doctrine. This Court adopted the innocent co-insured doctrine in *Ryan v. MFA Mutual Insurance Co.*, 610 S.W.2d 428 (Tenn. Ct. App. 1980), as a "better reasoned" and "more equitable" alternative to the traditional rule of recovery in such cases. *Ryan*, 610 S.W.2d at 437. Under the traditional rule, an insured's intentional destruction of property, *e.g.*, the intentional burning of an insured's residence, operated as a complete bar to recovery by an innocent co-insured—often the spouse of the guilty party. *See id.* at 429-34 (analyzing cases). As the Ohio Supreme Court has explained:

> Traditionally, older cases automatically denied an innocent spouse the right to recover under an insurance policy if the other spouse had committed misconduct, as the rights and obligations of the parties under the contract were presumed to be joint. These older cases were based on the property ideal of the unseverability of estates, the notion that a husband and wife were a single

[11] Because this Court resolved *Adams* on its facts, it did not address the question of whether an insane person is incapable, as a matter of law, of committing an intentional act for the purposes of insurance coverage.

> entity, and concern that the guilty party would indirectly benefit through the innocent spouse because of the complicity of the marital relationship. However, modern cases have properly rejected this reasoning and instead have adopted an approach based on contract principles to determine whether the parties intended joint or several coverage.

Wagner v. Midwestern Indem. Co., 699 N.E.2d 507, 511 (Ohio 1998) (citations omitted); *see also* Lex A. Coleman, *Revisiting Tennessee's Innocent Co-insured Doctrine*, 36 Tenn. B.J. 20, 21-22 (2000) (discussing the development of the modern doctrine in Tennessee).

The innocent co-insured doctrine as it has developed in Tennessee permits recovery for losses caused by the intentional acts of another insured if the applicable policy, as the result of an ambiguity, does not apprise the reasonable person purchasing insurance that an innocent co-insured will be held jointly responsible.[12] *See Spence v. Allstate Ins. Co.*, 883 S.W.2d 586, 591 (Tenn. 1994); *Ryan*, 610 at 437. Although the doctrine finds support in policy considerations, it is primarily a contract-based principle. *See Tex. Farmers Ins. Co.*

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[12] This Court in *Finch v. Tennessee Farmers Mutual Insurance Co.*, No. 01A01-9607-CV-00342, 1997 WL 92073 (Tenn. Ct . App. Mar. 5, 1997), explained that courts have primarily resolved the question of recovery by an innocent co-insured in one of three ways: (1) by determining recovery based on whether the property interests at issue are joint or severable, (2) by determining recovery based on whether the insurance policy creates joint or several obligations in the insured, or (3) by determining recovery based on whether liability for the fraudulent act is joint or severable. *Finch*, 1997 WL 92073, at *7 (citing *McCracken v. Gov't Employees Ins. Co.*, 325 S.E.2d 62, 63-64 (S.C. 1985)). The innocent co-insured doctrine set forth in *Ryan*, as interpreted by our supreme court, permits recovery where: "(1) the policy language governing the rights of an innocent co-insured [is] ambiguous from the standpoint of the reasonable person purchasing insurance; and (2) if the innocent co-insured [can] show that he ha[s] a sole or separate interest in the property claimed in the proof of loss." *Spence*, 883 S.W.2d at 591. Our decision in *Ryan* appears to have adopted a hybrid approach placing initial emphasis on the language of the policy but also requiring an innocent co-insured to demonstrate a sole or separate property interest. This Court in *Ryan*, however, expressly noted that the question of whether an innocent co-insured could recover for jointly held property was not before it, *Ryan*, 610 S.W.2d at 434, 437, and the supreme court in *Spence* was not required to reach the issue, *see Spence*, 883 S.W.2d at 593-94. This Court, when most recently presented the issue, determined that an innocent co-insured is not required in all cases to establish a sole or separate interest in the property claimed in the proof of loss. *See Finch*, 1997 WL 92073, at *8 (extending the doctrine "to permit an innocent coinsured to recover under an insurance policy for the loss to jointly owned property, provided the specific language of the insurance contract does not expressly exclude such coverage so that the reasonable person purchasing insurance would expect to be covered in the event of property loss caused intentionally by a co-insured"). In light of this Court's decision in *Finch*, it would appear that the determination of whether an innocent co-insured is entitled to coverage should depend solely on a contract-based analysis of whether the policy clearly imposes a "joint obligation," "joint liability," or "joint coverage," which we will generally refer to as "joint responsibility" for the acts of a guilty co-insured. This question, however, is not dispositive of the present appeal and need not be decided.

v. Murphy, 996 S.W.2d 873, 878 (Tex. 1999); *Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 688 (Minn. 1997) (citing *Vance v. Pekin Ins. Co.*, 457 N.W.2d 589, 592 (Iowa 1990); *Hildebrand v. Holyoke Mut. Fire Ins. Co.*, 386 A.2d 329, 331 (Me. 1978)). The innocent co-insured doctrine dispenses with the traditional presumption of joint ownership or joint responsibility and restores the generally accepted rule that ambiguous language in an insurance contract is strictly construed against the insurer. *See Ryan v. MFA Mut. Ins. Co.*, 610 S.W.2d 428, 437 (Tenn. Ct. App. 1980); *see also Watson*, 566 N.W.2d at 688 (citing *Sales v. State Farm Fire and Cas. Co.*, 849 F.2d 1383, 1385 (11th Cir. 1988); *Vance*, 457 N.W.2d at 592). Accordingly, this Court has recognized that the question of whether the innocent co-insured doctrine applies in a given case "turns on whether the policy imposes a joint obligation between insureds and the insurer or whether the policy was several, creating a separate contract with each insured." *Allstate Ins. Co. v. Jordan*, 16 S.W.3d 777, 781-82 (Tenn. Ct. App. 1999) (citing *Allstate Ins. Co. v. McCranie*, 716 F. Supp. 1440, 1447 (S.D. Fla. 1989)). This determination naturally depends on the language of the contract. *Id.* (citation omitted); *see also Noland v. Farmers Ins. Co.*, 982 S.W.2d 271, 272-73 (Ark. 1995) (citing cases). The innocent co-insured doctrine has no application where an insurance agreement clearly and unambiguously excludes coverage for property loss resulting from the intentional acts of a co-insured. *Ryan*, 610 S.W.2d at 437; *see also Spezialetti v. Pac. Employers Ins. Co.*, 759 F.2d 1139, 1141 (3d Cir. 1985) (citation omitted); *Dolcy v. R.I. Joint Reinsurance Ass'n*, 589 A.2d 313, 316 (R.I. 1993); *Woodhouse v. Farmers Union Mut. Ins. Co.*, 785 P.2d 192, 194 (Mont. 1990).

In recent cases, the question of whether the innocent co-insured doctrine applies has often depended on whether language in the insurance contract excludes coverage for intentional acts of "the insured," "an insured," or "any insured." *Osbon v. Nat'l Union Fire Ins. Co.*, 632 So.2d 1158, 1160 (La. 1994). Most courts to consider the issue have concluded that policies excluding coverage for the intentional acts of "an insured" or "any insured" clearly impose joint responsibility such that an innocent co-insured may not recover. *Jordan*, 16 S.W.2d at 780; *see also Watson*, 566 N.W.2d at 689 & n.4 (citing cases); *but see McFarland v. Utica Fire Ins. Co.*, 814 F. Supp. 518, 525-26 (S.D. Miss. 1992) (finding exclusion of "an" intentional act committed by "an" insured ambiguous); *Brumley v. Lee*, 963 P.2d 1224, 1226-27 (Kan. 1998) (concluding that the exclusion of intentional acts by "an insured" or "any insured" is ambiguous); *Taryn E.F. v. Joshua M.C.*, 505 N.W.2d 418, 421-22 (Wis. Ct. App. 1991) (distinguishing between the use of "an insured" and "any insured" and finding that only the latter unambiguously excludes coverage for an innocent co-insured under Wisconsin law). Policies that define coverage or exclusions in terms of "the insured," however, are generally found to create a severable contract that allows recovery by an innocent co-insured. *Jordan*, 16 S.W.2d at 782 (citing *Unigard Mut. Ins. Co. v. Argonaut Ins. Co.*, 579 P.2d 1015, 1019 (Wash. Ct. App. 1978)); *see also GRE Ins. Group v. Reed*, No. 01A01-9806-CH-00300, 1999 WL 548498, at *4 n.2 (Tenn. Ct. App. July 12, 1999)

(collecting cases).

Tennessee courts have interpreted insurance policies consistent with these principles. This Court in *Ryan*, for example, held that an insurance policy employing the terms "the insured" in its exclusionary language did not bar recovery by an innocent co-insured for the intentional acts of another co-insured. Our decision in *Ryan*, similar to the decision in this case, involved an attempt by an innocent co-insured to recover for property destroyed in a fire that a spouse intentionally set. *Ryan v. MFA Mut. Ins. Co.*, 610 S.W.2d 428 (Tenn. Ct. App. 1980). The innocent co-insured in *Ryan* alleged that his wife intentionally set fire to their home following an argument; that he was not present, did not encourage, and was not involved in the burning; and that he was a proper party to recover as an insured under the joint insurance policy for the loss of his personal property. *Id.* The insurance company denied the claim, pointing to the following language in the insurance agreement as excluding coverage for the intentional acts of any insured:

> "Insured" means:
>
> (1) the Named Insured stated in the Declarations of this policy; and
>
> (2) if residents of the Named Insured's household, his spouse, the relatives of either, and any other person under the age of twenty-one in the care of the insured.
>
> . . . .
>
> This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by:
>
> . . . .
>
> (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss. . . .
>
> . . . .
>
> . . . Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring
> (a) while the hazard is increased by any means within the control or knowledge of the insured . . . .

Ryan, 610 S.W.2d at 439-40 (emphasis omitted). This Court rejected the position of the insurance company, holding that

> a reasonable person, reading the provisions in the policy at issue here which refer to fraud of "the insured," and neglect of "the insured," etc. would conclude that if an insured was guilty of fraud or neglect or increasing of hazard to property, then *he or she* may not recover under the policy.

Id. at 437 (emphasis added). Because the language of the policy did not unambiguously create joint responsibility for the excluded act, the innocent co-insured was entitled to recover. *Id.* Consequently, we reversed the trial court's grant of the insurance company's motion to dismiss and remanded for a determination of whether the husband was innocent of any participation in the wrongful burning of the house. *Id.*

In *Allstate Insurance Co. v. Jordan*, 16 S.W.3d 777 (Tenn. Ct. App. 1999), on the other hand, we held that policy language excluding coverage for the intentional acts of "any insured" precluded recovery by innocent co-insureds. *Jordan* arose out of the shooting of a pizza delivery person by the son of the co-insured parties. *Jordan*, 16 S.W.3d at 778. After the parents of the victim filed suit, the insurance company sought a declaration that it was not obliged to defend the claim or to provide liability coverage to the co-insureds. *Id.* at 779. The insurance company pointed to following language in the insurance policy as excluding coverage:

> **Definitions Used in This Policy**
>
> 1. "**You**" or "**Your**" means the person named on the Policy Declarations as the insured and that person's resident spouse.
>
> 2. "**Allstate**", "**we**", "**us**", or "**our**" means the company named on the Policy Declarations.
>
> 3. "**Insured person(s)**" means **you** and, if a resident of **your** household:
>
> a) any relative; and
>
> b) and any dependent person in your care.
>
> **Insuring Agreement**
>
> . . . .

> The terms of this policy impose joint obligations on persons defined as an **insured person**. This means that the responsibilities, acts and failures to act of a person defined as an **insured person** will be binding upon another person defined as an **insured person**.
>
> **Losses We Do Not Cover Under Coverage X:**
>
> 1. We do not cover any **bodily injury** or **property damage** intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any **insured person.**

Id. at 779-80 (emphasis in original). The insurance company argued that the intentional act of the co-insureds' son, who was a definitional insured under the policy, precluded coverage for the negligence claims brought against them. *Id.* at 780. We agreed and found the co-insureds' reliance on the innocent co-insured doctrine misplaced. *Id.* Noting that the use of "the insured" in *Ryan* as opposed to "any insureds" or "an insured" created ambiguity, this Court found that policy language excluding coverage for the intentional acts of "any insured" created joint responsibility for the acts of the guilty insured and barred recovery. *Id.* We accordingly affirmed the trial court's grant of summary judgment in favor of the insurance company. *Id.* at 783.

Tennessee courts have similarly interpreted language excluding the intentional acts of "an insured," even where the innocent co-insured doctrine has nevertheless applied due to ambiguity created by additional policy provisions. *See Spence v. Allstate Ins. Co.*, 883 S.W.2d 586, 591-593 (Tenn. 1994) (recognizing that an intentional acts exclusion eliminating coverage for the intentional acts of "an insured person," standing alone, unambiguously precluded recovery by the plaintiff but nonetheless finding ambiguity in the contract based on an amendatory endorsement to the policy); *Tenn. Farmers Mut. Ins. Co. v. Evans*, 1990 WL 64532, at *3-4 (Tenn. Ct. App. May 18, 1990) (opining that use of the phrase "an insured person" in an intentional acts exclusion "unambiguously expresses a contractual intent to create joint obligations and to prohibit recovery by an innocent co-insured" but finding ambiguity due to the inclusion of a severability clause), *reh'g denied,* 1990 WL 93829, *and aff'd on other grounds*, 814 S.W.2d 49 (Tenn. 1991). Accordingly, an insurance company is generally not obligated to provide liability coverage to an innocent co-insured under an insurance policy that excludes coverage for losses resulting from the intentional act of "an insured" or "any insured" absent structural or textual ambiguity created by additional policy provisions.

We agree with the trial court's conclusion that the innocent co-insured doctrine does not apply under the facts because the policies are unambiguous. The relevant provisions of

the homeowner's policies limit coverage to accidents that are neither expected nor intended by "*an insured*," exclude any act other than accidental committed by or at the direction of "*any insured*," exclude coverage "*for anyone*" regardless of the cause of the excluded event, and void coverage as to "*all insureds*" if "*any insured*" commits fraud, conceals material facts, et cetera. The automobile policy similarly limits coverage to accidental loss and excludes "*any*" loss caused by the intentional act or omission of, or at the direction of, a covered person. The policies clearly and unambiguously create joint responsibility between the insureds and exclude recovery by an innocent co-insured for intentional acts committed by another insured. The only potential point of ambiguity—the portion of the intentional acts exclusion in the automobile policy stating that "the interest of the loss payee shown in the declarations shall not be invalidated by such act or omission by a covered person"—does not pertain to an insured's ability to recover. *See U.S. Bank, N.A. v. Tenn. Farmers Mut. Ins. Co.*, 277 S.W.3d 381, 387-88 (Tenn. 2009). Further, Mrs. Tuturea has not argued that she was designated as a loss payee in the declarations. As a result, the language governing Mrs. Tuturea's rights as an innocent co-insured was not ambiguous from the standpoint of the reasonable person purchasing insurance and she is not entitled to recover.

We recognize that insurance companies have written policies in response to the proliferation of the innocent co-insured doctrine that often expressly exclude recovery by an innocent co-insured or, at the very least, more clearly impose joint responsibility on the co-insureds. An argument exists that these carefully written provisions return the relationship between insureds and the insurer to the former status quo previously deemed unacceptable, but it is not the duty of the judiciary to impose liability where none exists. *See Certain Underwriter's at Lloyd's of London v. Transcarriers Inc.*, 107 S.W.3d 496, 499 (Tenn. Ct. App. 2002) (citations omitted) (recognizing that courts are not at liberty to rewrite an unambiguous insurance policy simply to avoid a harsh result). While courts in other jurisdictions have reformed or held unenforceable policies excluding recovery by an innocent co-insured where the policies did not comply with legislative limitations on liability exclusions, *e.g., Sager v. Farm Bureau Mutual Insurance Co.*, 680 N.W.2d 8, 9 (Iowa 2004); *Watson v. United Services Automobile Ass'n*, 566 N.W.2d 683, 692 (Minn. 1997), Mrs. Tuturea has not argued that similar limitations govern the enforcement of insurance agreements in Tennessee. Because the specific language of the policies before us clearly excludes recovery by an innocent co-insured, the trial court's decision is affirmed.

V. Conclusion

For the foregoing reasons, the decision of the trial court is affirmed. Costs of this appeal are taxed to the appellant, Gladys Tuturea, and her surety for which execution may issue if necessary.

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DAVID R. FARMER, JUDGE