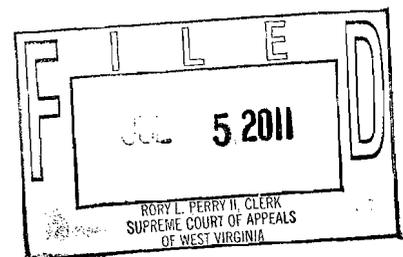


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MUNICIPAL MUTUAL  
INSURANCE COMPANY OF WEST  
VIRGINIA,

Defendant Below, Petitioner.



v.

No. 11-0107

TERRY HUNDLEY, Individually and as  
Administrator of the Estate of AUDREY  
HUNDLEY, deceased,

Plaintiff Below, Respondent,

**BRIEF ON BEHALF OF  
MUNICIPAL MUTUAL INSURANCE COMPANY OF WEST VIRGINIA**

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**BRIEF ON BEHALF OF  
MUNICIPAL MUTUAL INSURANCE COMPANY OF WEST VIRGINIA**

**I. ASSIGNMENTS OF ERROR**

- A. The Circuit Court Erred In Finding That The Municipal Mutual Homeowners Insurance Policy Issued Solely To Audrey Hundley Was Not Void For Lack Of An Insurable Interest By The Named Insured In The Insured Property For The Policy Renewals Which Occurred After Audrey Hundley's Death.
  
- B. Even If The Policy Was Not Void, The Circuit Court Erred In Finding That The Municipal Mutual Homeowners Insurance Policy Provided Coverage To Terry Hundley Under An Exception To An Exclusion In Coverage C Of The Policy Which Governed Losses To Personal Property.

**II. STATEMENT OF THE CASE**

This appeal arises from a lawsuit filed in the Circuit Court of Wayne County, West Virginia, by Terry Hundley, individually and as Administratrix of the Estate of Audrey Hundley, his deceased mother. Mr. Hundley filed this action against Municipal Mutual Insurance Company of West Virginia ("Municipal Mutual"), the defendant below, a Farmers Mutual Insurance Company organized and existing under the provisions of W. Va. Code § 33-22-1 *et seq.* Municipal Mutual had issued a homeowners insurance policy to Audrey J. Hundley, but rescinded the policy in October 2008 after Terry Hundley made a claim under the policy arising from the theft of two Honda all terrain vehicles (ATVs) that were solely owned by Mr. Hundley. Audrey Hundley had died on November 8, 2007, but Municipal Mutual had not been informed of her death when the policy was renewed and reissued for four separate (three month) renewal periods following her death.

Audrey J. Hundley was the sole owner of a home and parcel of property located on Centerville Road in Prichard, Wayne County, West Virginia. Audrey Hundley purchased the home in 1984 and obtained a homeowners insurance policy on the home from Municipal Mutual.

*Municipal Mutual Summary Judgment Motion Exhibit 1, Brian Taylor Deposition at 50-51; Taylor Deposition Exhibit 2.*

Municipal Mutual issued homeowners policy number 3116-801 to Audrey J. Hundley as the sole named insured. Although initially issued for a one-year term, the policy later was reissued on a quarterly basis for three month terms, subject to renewal for a new three month period on March 13, June 13, September 13 and December 13 of each year. *Municipal Mutual Summary Judgment Motion Exhibit 2.* Municipal Mutual reissued policy number 3116-801 to Audrey Hundley as the sole named insured covering Audrey Hundley's home and property on Centerville Road in Prichard for the policy period running from September 13, 2007 to December 13, 2007. The policy provided coverage for the residence in the amount of \$35,000 and coverage for personal property in the amount of \$17,500. *Id.*

Audrey Hundley died intestate on November 8, 2007. *Municipal Mutual Summary Judgment Motion Exhibit 4, Terry Hundley Deposition at 8.* She had eight children, seven of whom were living at the time of her death. A daughter, who had predeceased Mrs. Hundley, had four children who were living at the time of Audrey Hundley's death. *Id. at 9.* Under the laws of intestacy in West Virginia, upon Audrey Hundley's death those eleven individuals became the owners of Audrey Hundley's real and personal property. *See W. Va. Code § 42-1-3a.* At the time of Audrey Hundley's death on November 8, 2007, the only other resident of her household was her son, Jeffrey Shawn Hundley. *Id. at 14.*

As noted above, Municipal Mutual was not informed of Audrey Hundley's death. On November 13, 2007 (five days after her death), Municipal Mutual issued a renewal declarations sheet for policy number 3116-801 for the policy period from December 13, 2007 to March 13, 2008. *Municipal Mutual Summary Judgment Motion Exhibit 2.* The sole named insured was

Audrey J. Hundley. *Id.* Because Audrey Hundley had passed away, the premium for that policy period was paid either by Terry Hundley (Audrey's son and the plaintiff herein) or by his sister, Mary Gail Hundley. At the time policy number 3116-08 was reissued on December 13, 2007, the insured property was not owned by Audrey Hundley. *Municipal Mutual Summary Judgment Motion Exhibit 4 at 29-30.*

Policy number 3116-08 was subsequently reissued again for three month terms on March 13, 2008, June 13, 2008 and September 13, 2008. *Municipal Mutual Summary Judgment Motion Exhibit 2.* At no time during this period was Municipal Mutual informed that Audrey Hundley had died. The sole named insured on each reissued policy was Audrey J. Hundley. On each day of reissuance of policy number 3116-801 in 2008, the insured property was not owned by Audrey Hundley. The premiums for each of these reissued policy periods in 2008 were paid by Terry Hundley. *Municipal Mutual Summary Judgment Motion Exhibit 4 at 34-39.*

On October 27, 2008, Municipal Mutual received a faxed notice of a claim on policy number 3116-801 from Lipscomb Walker Insurance in Huntington, West Virginia. The property loss notice indicated that two "four-wheelers," a 2006 Honda ATV and a 2007 Honda ATV, had been stolen from the Hundley property. The loss notice indicated that "Audrey is deceased and Terry is administrator of estate [and] lives in home." This was the first time that Municipal Mutual became aware that its sole named insured on policy number 3116-801, Audrey J. Hundley, had died. *Municipal Mutual Summary Judgment Motion Exhibit 5, Bradley Shaffer Deposition at 23-25; Municipal Mutual Summary Judgment Motion Exhibit 4 at 61.*

Terry Hundley was the sole owner of the stolen ATVs. *Municipal Mutual Summary Judgment Motion Exhibit 4 at 22.* At the time of his mother's death in November 2007, Terry did not reside with his mother. In November 2007 Terry resided at 4874 Whites Creek Road in

Prichard, West Virginia. *Id. at 6-7.* Terry moved into his mother's old house on Centerville Road, the premises insured by Municipal Mutual, in June or July of 2008. *Id. at 7. See also Plaintiff's Complaint, ¶ 7.*

At the time of his mother's death in November 2007, Terry stored his ATVs at his Whites Creek Road residence. Terry moved his ATVs to the Centerville Road property when he moved there in the summer of 2008. *Id. at 21-22. See also Plaintiff's Complaint ¶ 7.*

Upon learning of the death of Audrey J. Hundley, Municipal Mutual rescinded policy number 3116-801 and issued a premium refund check to Audrey J. Hundley, c/o Terry Hundley. Because the policy was rescinded, Municipal Mutual refused to pay Terry Hundley's claim for the theft of his ATVs. The refund check was not cashed. *Id. at 60-61, 67-68; Hundley Deposition Exhibit 11.*

The insurance policy at issue contained the following pertinent provisions:

#### **DEFINITIONS**

In this policy, "you" and "your" refer to the "named insured" shown in the Declarations and the spouse if a resident of the same household. "We," "us" and "our" refer to the Company providing the insurance. In addition, certain words and phrases are defined as follows:

...

3. "Insured" means you and residents of your household who are:
  - a. Your relatives; or
  - b. Other persons under the age of 21 and in the care of any person named above.

...

8. "Residence Premises" means:
  - a. The one family dwelling, other structures, and grounds; or

- b. That part of any other building;

where you reside and which is shown as the “residence premises” in the Declarations.

“Residence premises” also means a two family dwelling where you reside in at least one of the family units and which is shown as the “residence premises” in the Declarations.

...

## **SECTION I – PROPERTY COVERAGES**

...

### **COVERAGE C – Personal Property**

We cover personal property owned or used by an “insured” while it is anywhere in the world. At your request, we will cover personal property owned by:

1. Others while the property is on the part of the “residence premises” occupied by an “insured”;
2. A guest or a “residence employee,” while the property is in any residence occupied by an “insured.”

...

**Property Not Covered.** We do not cover:

...

3. Motor vehicles or all other motorized land conveyances. ...

We do cover vehicles or conveyances not subject to motor vehicle registration which are:

- a. Used to service an “insured’s residence...”

...

## **SECTION I – PERILS INSURED AGAINST**

We insure for direct physical loss to the property described in Coverages A, B and C caused by a peril listed below unless the loss is excluded in SECTION I – EXCLUSIONS.

...

9. Theft, including attempted theft and loss of property from a known place when it is likely that the property has been stolen.

This peril does not include loss caused by theft:

- a. Committed by an “insured”;
- b. In or to a dwelling under construction, or of materials and supplies for use in the construction until the dwelling is finished and occupied; or
- c. From that part of a “residence premises” rented by an “insured” to other than an “insured.”

This peril does not include loss caused by theft that occurs off the “residence premises” of:

- a. Property while at any other residence owned by, rented to, or occupied by an “insured,” except while an “insured” is temporarily living there. Property of a student who is an “insured” is covered while at a residence away from home if the student has been there at any time during the 45 days immediately before the loss;
- b. Watercraft, and their furnishings, equipment and outboard engines or motors; or
- c. Trailers and campers.

...

## SECTION I AND II – CONDITIONS

...

7. **Assignment.** Assignment of this policy will not be valid unless we give our written consent.

...

9. **Death.** If any person named in the Declarations or the spouses, if a resident of the same household, dies:

- a. We insure the legal representative of the deceased but only with respect to the premises and property of the deceased covered under the policy at the time of death;
- b. “Insured” includes:
  - (1) Any member of your household who is an “insured” at the time of your death, but only while a resident of the “residence premises”; and
  - (2) With respect to your property, the person having proper temporary custody of the property until appointment and qualification of a legal representative.

*Municipal Mutual Summary Judgment Motion Exhibit 3.*

After the rescission of the policy and the denial of Mr. Hundley’s claim, Terry Hundley sued Municipal Mutual in August 2009 in the Circuit Court of Wayne County. Mr. Hundley’s complaint set forth three counts against Municipal Mutual asserting various theories of breach of the insurance contract, one count asserting waiver and four counts asserting various claims of bad faith and entitlement to extra-contractual damages.

After the completion of discovery, the parties filed cross motions for summary judgment on the contract claims and argued those motions before Wayne County Circuit Judge Darrell Pratt on July 8, 2010. Following supplemental briefing as requested by the Court, Judge Pratt issued an “Opinion Order” on July 29, 2010.

In his July 29, 2010 Opinion Order, Judge Pratt stated that, “[h]aving an insurable interest in the property insured is a definitive criteria for obtaining coverage.” *7/29/10 Opinion Order at 2*. Nonetheless, the Circuit Court held that Municipal Mutual’s “contention that the policy is void, as a matter of law, is not supported by the facts of this case.” *Id.* The Circuit Court

concluded that “the Policy coverage extends beyond the homeowner’s death, with or without notice of her death.” *Id. at 3.*

Having found that the policy that had been reissued to Audrey Hundley nearly ten months after her death was not void, the Circuit Court then turned to the specific provisions of the policy to determine whether coverage existed for Terry Hundley’s claim. While rejecting two of Mr. Hundley’s claims for coverage under the policy, the Circuit Court found potential coverage under an exception to an exclusion of coverage for motor vehicles or other motorized land conveyances. The policy provision at issued stated that, although the insurance policy did not cover motor vehicles, the policy would cover “vehicles . . . not subject to motor vehicle registration which are used to service an ‘insureds’ residence.” The Circuit Court’s July 29, 2010 Opinion Order stated:

There are no provisions in the Policy requiring that the non-registered motor vehicle be owned by the insured. There are no Policy provisions requiring that the non-registered vehicle be on the premises prior to the insureds [*sic*] death. There are no Policy provisions requiring the insured to request such coverage during her lifetime.

The clear intent of the Policy language is to cover Terry Hundley’s two (2) ATV’s if, in fact, they were being used to service the premises. The Policy was still in effect after Audrey Hundleys [*sic*] death and at the time of the claim. Terry Hundley was duly appointed the personal representations [*sic*] of Audrey Hundley’s Estate. Terry Hundley was legally obligated to maintain, preserve and protect the premises and property of the decedent. If Terry Hundley used the ATV’s to service the premises they could be covered under this provision of the Policy. This is a factual issue to be determined by a jury.

*Id. at 4.*

After the issuance of the Circuit Court’s July 29, 2010, Opinion Order, Municipal Mutual conceded that it had not presented any evidence in its summary judgment responses to counter

Terry Hundley's deposition testimony that he had used the two stolen ATVs to service his mother's property, and that it would have no such evidence to present at trial. Because the parties had also stipulated to the value of the ATVs, an Agreed Order was entered by the Court on August 17, 2010 which granted judgment to the plaintiff on Count III of his Complaint in accordance with the Court's policy analysis contained in the July 29, 2010 Opinion Order.

*8/17/10 Order at ¶ 2.* The Circuit Court's August 17, 2010 Order also certified that it was a final order pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure on all of plaintiff's breach of contract counts and bifurcated and stayed plaintiff's remaining claims to allow Municipal Mutual to prosecute this appeal on the Circuit Court's coverage rulings. *8/17/10 Order at ¶¶ 3, 4.* This appeal challenges the Circuit Court's August 17, 2010 Order (a final order under Rule 54(b)) which incorporated by reference the Circuit Court's July 29, 2010 Opinion Order.

### **III. SUMMARY OF ARGUMENT**

West Virginia law requires that a named insured have an "insurable interest" in the property to be insured for a property insurance policy to be valid. Specifically, W. Va. Code § 33-6-3(a), states that: "No insurance contract on property or of any interest therein or arising therefrom shall be enforceable as to the insurance except for the benefit of persons having an insurable interest in the things insured." Prior cases decided by this Court have held that, if the person taking out a property insurance policy does not have an insurable interest in the property, the policy is void. The insurable interest requirement is imposed as a matter of public policy.

In this case, the named insured on the homeowners policy at issue died intestate in November 2007. After her death, the named insured had no ownership interest in the property

insured by the policy because, under West Virginia law, the title to her real estate automatically passed to her heirs at the time of her death. Thus, from the point of her death forward, the named insured had no insurable interest in the property that was insured by the policy.

The insurer was not informed of the named insured's death and issued renewals of the policy in the name of the deceased named insured for four separate three month terms after her death. A contract of insurance is a personal contract between the insurer and the insured named in the policy. A homeowners insurance policy follows the person, not the property. Because the named insured had no insurable interest in the property during these policy terms, each of these policy renewals was void as a matter of law, even though premiums were paid by the named insured's children. Additionally, any attempt to keep the policy in force in the name of the named insured's estate, runs contrary to the specific provisions and definitions contained in the policy. Thus, a claim made by the named insured's son, which arose during the September 13, 2008 policy term, was properly rejected by the insurer because the policy was properly rescinded by the insurer.

Moreover, even if the policy is not void as a matter of law for lack of an insurable interest or even if the Court could reform the policy to make the estate the named insured, the plaintiff's claim for coverage under the policy for the loss of his own personal property still fails because of the express provisions of the insurance policy. The Insuring Clause of Coverage C of the policy provides that the personal property covered by the policy must be property that is either: 1) "owned or used by an 'insured;'" or 2) owned by "others" while the property is on the "insured's" residence premises, but only if coverage for that specific property is requested by the named insured prior to the loss. Any personal property must fit into one of these categories to be

covered under Coverage C of the policy. There was no dispute that the plaintiff's personal property that is at issue in this case fits into neither.

In relying on an exception to an exclusion to find coverage for the plaintiff's claim, the Circuit Court erroneously failed to read the policy as a whole and to give effect to the provisions of the Insuring Clause of Coverage C of the policy. When reading the policy as a whole, it is clear that any service vehicle that might be covered under the exception to the exclusion, must be owned or used by an insured or have had coverage specifically requested by the named insured prior to the loss if it is not owned or used by an insured. Plaintiff's vehicles fell into neither of these categories even if they were used to service the deceased named insured's property, and there was no coverage applicable to his claim even if the policy was not void as a matter of law.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This Court has already determined that this matter is appropriate to be scheduled for oral argument and consideration under Revised Rule 20. This case raises the fundamental and recurring issue facing Municipal Mutual and other members of the insurance industry about the application of the insurable interest requirements of W. Va. Code § 33-6-3(a) to the common fact pattern that is present herein and is an issue of first impression in West Virginia.

## V. ARGUMENT

### A. The Circuit Court Erred In Finding That The Municipal Mutual Homeowners Insurance Policy Issued Solely To Audrey Hundley Was Not Void For Lack Of An Insurable Interest By The Named Insured In The Insured Property For The Policy Renewals Which Occurred After Audrey Hundley's Death.

As the Circuit Court recognized, West Virginia law requires that a named insured have an “insurable interest” in the property to be insured for an insurance policy to be valid. W. Va. Code § 33-6-3, titled “Insurable Interest in Property,” mandates in subsection (a) that: “No insurance contract on property or of any interest therein or arising therefrom shall be enforceable as to the insurance except for the benefit of persons having an insurable interest in the things insured.”

In Syllabus Point 1, Filiatreau v. Allstate Ins. Co., 178 W. Va. 268, 358 S.E.2d 829 (1987), this Court held: “The person taking out a fire insurance policy must have an insurable interest in the subject matter and *if such interest is lacking, the policy is void.*” (Emphasis added.) This holding was consistent with earlier cases decided by this Court wherein the concept of insurable interest was discussed.

In Fire Ass'n of Philadelphia v. Ward, 130 W. Va. 200, 42 S.E.2d 713 (1947), this Court stated that, “[i]t is a rule of insurance law generally that *the person taking out the policy* must have an insurable interest in the subject matter of the insurance; and *if such interest is lacking the policy is void.* To hold otherwise would be to go against the spirit and purpose of the contract, as well as against public policy.” Id. at 204, 42 S.E.2d at 715-16, emphasis added. Similarly, in Shaffer v. Calvert Fire Ins. Co., 135 W. Va. 153, 160, 62 S.E.2d 699, 703 (1950), this Court stated: “In the field of insurance law the well established general principle is that to

entitle the insured to the proceeds of an insurance policy he must have an insurable interest in the property insured *when the contract of insurance is made* and when the loss insured against occurs.” (Emphasis added.)

After her death in November 2007, Audrey Hundley, the sole named insured on the homeowners policy at issue, had no ownership interest in the property insured by the policy. As such, after November 8, 2007, Audrey Hundley had no “actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment,” as required by W. Va. Code § 33-6-3(b).

In King v. Riffie, 172 W. Va. 586, 309 S.E.2d 85 (1983), this Court stated that, “title to real property *automatically descends* to heirs by operation of law in the event of intestacy.” Id. at 590, 309 S.E.2d at 89, emphasis in original. Additionally, in Gaylord v. Hope Natural Gas Co., 122 W. Va. 205, 218, 8 S.E.2d 189, 196 (1940), this Court stated: “Our statutes of descent and distribution seem to contemplate the passing of title at the death of an ancestor . . . Undoubtedly, the title to real estate vests in the heir at the death of the ancestor, and, subject to indebtedness, the personal estate as well.”

Under West Virginia law, the title to Audrey Hundley’s real estate “automatically” passed to her seven children and four grandchildren at the time of Audrey Hundley’s death. Thus, from November 8, 2007 forward, Audrey Hundley did not own the insured property – her children and grandchildren did. However, from November 8, 2007 forward, Audrey Hundley – not her children and grandchildren – remained the sole named insured on the insurance policy.

This Court has made clear that, “[i]t is well-established that a contract of insurance is a personal contract between the insurer *and the insured named in the policy.*” Mazon v. Camden Fire Ins. Ass’n., 182 W. Va. 532, 534, 389 S.E.2d 743, 745 (1990), emphasis added. *See also*

Robinson v. Cabell Huntington Hosp., Inc., 201 W.Va. 455, 460, 498 S.E.2d 27, 32 (1997).

More recently, in Keith Estate v. Keith, 220 W.Va. 295, 647 S.E.2d 731 (2007), this Court resolved the issue of a remainderman's entitlement to insurance proceeds paid out in connection with the destruction of property that was subject to a life estate. In doing so, the Court found it appropriate to “apply contractual precepts.” Id. at 299, 647 S.E.2d at 735. In Keith, this Court observed that:

The nature and effect of an insurance contract is to indemnify the insured against loss or damage, and not someone else who is not a party to the contract; nor has such other party any lawful claim upon the amount realized by the assured under the policy.  
...

The insurance policy is a personal contract; ... the proceeds are of the insurance contract, not of the property, and do not stand in the place of the property destroyed.

Id. at 298, 647 S.E.2d at 734, citations and quotations omitted. This analysis was consistent with the Court’s earlier statement in Mazon that, “[a]n insurance policy and all rights arising from the policy are controlled by principles of contract, rather than property law. . . . Provided that the individual applying for insurance has an insurable interest, the insurer is within its rights to issue the policy.” 182 W. Va. at 533-34, 389 S.E.2d at 744-45.

In Keith, this Court also quoted the following significant language from Converse v. Boston Safe Deposit & Trust Co., 315 Mass. 544, 53 N.E.2d 841, 843 (1944):

The underlying principle is that fire insurance policies are personal contracts providing for the payment of indemnity to the insured in case of loss, and the amount received does not stand for nor represent the property damaged or destroyed although the measure of indemnity depends upon the determination of the value of the interest of the insured in the property covered by the policies.

220 W.Va. at 299, 647 S.E.2d at 735. *See also Higdon v. Georgia Farm Bureau Mut. Ins. Co.*, 204 Ga.App. 192, 194, 419 S.E.2d 80, 82 (1992), (“... transfer of title to property ... without the consent of the insurer voids the policy. Insurance policies are of the nature of personal contracts. The insurer is selective of those risks which revolved around the character, integrity and personal characteristics of those whom they will insure.” Citations and internal quotations omitted.); *Paluszek v. Safeco Ins. Co. of America*, 164 Ill.App.3d 511, 516-517, 517 N.E.2d 565, 56, 115 Ill.Dec. 154, 157 (1987) (“Property insurance is not insurance on the property itself, but rather on the interest of the person insured. Insurance coverage does not run with the property when transferred. ... The policy is not an insurance of the specific thing without regard to the ownership but is a specific agreement of indemnity with the person insuring against such loss or damage as he may sustain.”). In short, a homeowners insurance policy follows the person, not the property.

These cases establish that Municipal Mutual policy number 3116-801 was a personal contract between Municipal Mutual and Audrey J. Hundley and could only have been issued to Audrey Hundley if she had an insurable interest in the insured property. When the policy was reissued for the three month term that began on September 13, 2007, Audrey Hundley had an insurable interest in the property. When the policy was reissued for the three month term that began on December 13, 2007 (and for each of the three subsequent three month terms), she did not.

Moreover, the policy that was reissued for the three month term that began on December 13, 2007 (and for each of the three subsequent three month terms), was not issued to a person capable of making a contract. More than a century ago, this Court stated:

It is elementary law that to constitute a valid agreement it is essential that there shall not only be a good and sufficient

consideration and something to be contracted for; there must be a person able to contract and a person able to be contracted with, and without such contracting parties there can be no agreement, for without them there could be no reciprocal or mutual assent.

Stockton v. Copeland, 30 W.Va. 674, 679, 5 S.E. 143, 145 (1888). More recently, the Court has stated:

Concerning the establishment of a contract, this Court has held that the fundamentals of a legal contract are competent parties, legal subject-matter, valuable consideration, and mutual assent. There can be no contract, if there is one of these essential elements upon which the minds of the parties are not in agreement.

Ways v. Imation Enterprises Corp., 214 W.Va. 305, 313, 589 S.E.2d 36, 44 (2003), citation and internal quotation omitted. *See also* W. Va. Code § 33-6-4(a) (“Any person of competent legal capacity may contract for insurance.”). Obviously, a person who is deceased is neither capable of nor competent to assent to and enter into a contract. The insurance contracts issued from and after December 13, 2007 to Audrey Hundley cannot constitute valid, legal contracts under West Virginia law.

Under the clear authority cited above, the four renewed policies that were reissued to Audrey Hundley after her death were void as a matter of law. More specifically, the policy that was supposed to be in effect during the policy period in which Terry Hundley’s ATVs were stolen, was void as a matter of law. Because the policy under which Terry Hundley made his claim was void as a matter of law, the policy was properly rescinded by Municipal Mutual. As the Supreme Court of Oklahoma has stated: “It is well settled that both the validity and enforceability of an insurance contract depend upon the presence of insurable interest in the person who purchased the policy.” Snethen v. Oklahoma State Union of Farmers Educational and Co-op. Union of America, 664 P.2d 377, 379 (Okl. 1983).

As noted above, this Court stated in 1947 that the insurable interest requirement is imposed as a matter of public policy. Ward, 130 W.Va at 204, 42 S.E.2d at 716. Likewise, the Legislature's subsequent codification of the insurable interest requirement in 1957 as set forth in W. Va. Code § 33-6-3(a), requires the insured to have an insurable interest in the property to be insured in order for the insurance contract on the property to "be enforceable." Thus, the mere fact that premiums were paid by Audrey Hundley's children to Municipal Mutual for the policy that was reissued to Audrey Hundley for the three month term that began on December 13, 2007 (and for each of the three subsequent three month terms), does not and cannot alter the Court's analysis. After her death, Audrey Hundley did not own the insured property. "Where the ownership of the property belongs elsewhere, payment of insurance premiums on the property does not give rise to an insurable interest." Gossett v. Farmers Ins. Co. of Washington, 133 Wash.2d 954, 969, 948 P.2d 1264, 1272 (1997), quoting 3 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 41:11, at 41-26 (3d ed.1995).

Indeed, because the insurable interest requirement is a statutory mandate and is imposed as a matter of this state's public policy, parties cannot by agreement create an enforceable insurance contract without an insurable interest. As the Michigan Court of Appeals has observed, "fundamental principles of insurance require the insured to have an insurable interest before he can insure: a policy issued when there is no such interest is void, and it is immaterial that it is taken in good faith and with full knowledge." Morrison v. Secura Ins., 286 Mich.App. 569, 572-573, 781 N.W.2d 151, 153 (2009), citation and internal quotations omitted. The Morrison court further noted that, "parties could not waive the insurable interest requirement, even if both the insured and the insurer mutually agreed to do so." Id. at 573 n.3, 781 N.W.2d at 153 n.3. *See also* Faygal v. Shelter Ins. Co., 689 S.W.2d 724, 727 (Mo.App 1985) ("any actions

or omissions by [the insurer] cannot waive a public policy requirement that an insurable interest exist. ... A valid and enforceable contract may not arise out of a transaction prohibited by state law.”); Brewton v. Alabama Farm Bureau Mut. Cas. Ins. Co., Inc., 474 So.2d 1120 (Ala.1985) (Where insureds had no insurable interest, doctrines of waiver and estoppel do not apply).

In its July 29, 2010 Opinion Order, the Circuit Court recognized that an insurance policy was a personal contract and that an insurable interest in the property “is a definitive criteria for obtaining coverage.” *7/29/10 Opinion Order at 2*. The Circuit Court also recognized that the evidence presented demonstrated that Audrey Hundley did not own the stolen ATVs. *Id.*

The Circuit Court, however, focused on the fact that “the policy language provides coverage for property of ‘others’ while located on the insured premises under certain circumstances.” *Id.* Based on this observation, the Circuit Court concluded that, “the coverage issue cannot be resolved solely on the homeowners’ lack of an insurable interest.” *Id.*

The Circuit Court’s analysis in this regard was flawed. As the cases cited above demonstrate, if the named insured lacks an insurable interest in the property, “the policy is void.” If the policy is void, the application of specific provisions of the policy is simply not relevant. As the Supreme Court of Arizona has stated, “[a] void contract is one which never had any legal existence or effect, and it cannot in any manner have life breathed into it.” National Union Indem. Co. v. Bruce Bros., 44 Ariz. 454, 464, 38 P.2d 648, 652 (1934).

Moreover, the question of whether Audrey Hundley’s estate may have had an insurable interest in the insured property does not alter the conclusion that the policy was properly rescinded. West Virginia has inherited the common law which made important distinctions between realty and personal property, with realty accorded special protection and treatment. Normally, the personal estate of the decedent is the primary fund out of which debts of all classes

are to be paid. Bank of Mill Creek v. Elk Horn Coal Co., 136 W. Va. 36, 65 S.E.2d 892 (1951); *see also* W. Va. Code § 44-2-21. Generally, this means that real estate is free from debts. Statutory law, however, provides that realty may nevertheless be subject to the deceased's debts if the personal estate of the deceased is insufficient to pay the debts of the deceased. *See* W. Va. Code § 44-8-3.

In Sheppard v. Peabody Ins. Co., 21 W. Va. 308 (1883), the Court held that an administrator of an estate may have an insurable interest in the real property of the deceased if the personal estate of the deceased is insufficient to pay the debts of the deceased. *Id.* at 385. However, the Court in Sheppard specifically did not answer the question of whether the estate had an insurable interest in the real estate if the decedent's personal estate was sufficient to pay the debts of the deceased. *Id.* at 386. In this case, the record demonstrated that Audrey Hundley's personal estate was sufficient to pay her debts. *See Exhibit A to Municipal Mutual's July 15, 2010 Supplemental Memorandum on Cross Motions for Summary Judgment.* The Circuit Court's conclusion that "the policy remains in effect to cover the insured's premises and property until the assets are properly administered, debts are paid, and ownership of real estate is legally transferred" is inconsistent with the law as set forth above in King v. Riffie and Gaylord v. Hope Natural Gas.

In fact, and as the Circuit Court observed, the policy does contain a "provision dealing with the death of the insured. . . on page 16 of the policy." *7/29/10 Opinion Order at 4.* Paragraph 9 of the Conditions section of the policy provides for certain limited coverage in the event of the death of the named insured. Pursuant to that provision, if "any person named in the Declarations . . . dies" (and, in this case, Audrey Hundley was the *only* person named in the Declarations of the Municipal Mutual policy), coverage under the policy is limited to "the

premises and property *of the deceased* covered under the policy *at the time of death.*”

*Municipal Mutual Summary Judgment Motion Exhibit 3 at Page 16 of 16, paragraph 9, emphasis added.* Additionally, to the extent the policy provides coverage to resident relatives of the named insured, paragraph 9.b.(1) makes clear that such coverage only exists for those who resided in the insured premises “at the time of [the named insured’s] death.”<sup>1</sup> *Id.*

More importantly, in construing this provision the Connecticut Court of Appeals has observed that “the provision simply defines the successor insured for whom they policy provides coverage *for the remainder of its term.*” *May v. Retarides*, 83 Conn. App. 286, 292, 848 A.2d 1222, 1226 (2004), emphasis added. Thus, this provision simply defined the available coverage under the policy that had been reissued for the three month term that began on September 13, 2007, from November 8, 2007, the date of Audrey Hundley’s death, until December 13, 2007, the end of the term during which she died. But the issue in this case does not involve the policy that was issued for the three month term that began on September 13, 2007. The claim asserted by Terry Hundley that gives rise to this case, involves the renewal of the policy in Audrey Hundley’s name on September 13, 2008, ten months after her death.

When Judge Pratt held that “the Policy coverage extends beyond the homeowner’s death, with or without notice of her death,” (7/29/10 *Opinion Order at 3*), he was correct with regard to the application of paragraph 9 to the policy that had been reissued to Audrey Hundley on September 13, 2007. However, to the extent that the Circuit Court’s ruling attempted to extend coverage under Audrey Hundley’s homeowners policy beyond the parameters of paragraph 9 and beyond the policy period that ended on December 13, 2007, it was clearly wrong.

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<sup>1</sup> The Circuit Court concluded there was no coverage under this provision for property owned by Terry Hundley. 7/29/10 *Opinion Order at 4.*

Yet, even if the Court assumes *arguendo* that Audrey Hundley's estate (or the Administrator of Audrey Hundley's estate) had an insurable interest in her property, the rescission of the renewed homeowners policies issued after Audrey Hundley's death was still proper. The sole named insured on the policy is Audrey Hundley, not the Estate of Audrey Hundley. The policy at issue is a "Homeowners 2 Broad Form" policy. The policy provides a variety of coverage related to the "residence premises" as defined in the policy. As noted above, the policy defines "residence premises" as "[t]he one family dwelling, other structures, and grounds; or ... [t]hat part of any other building where [the named insured] reside[s] and which is shown as the 'residence premises' in the Declarations."

In reviewing a similar definition of the term "residence premises" in a homeowners insurance policy, the court in Shepard v. Keystone Ins. Co., 743 F.Supp. 429 (D.Md. 1990), noted that, "the contract specifically requires that this property be a dwelling in which the insured is living." Id. at 431. The court further stated that "[t]he terms of Shepard's insurance policy with Keystone are clear in their requirement that the insured reside on the premises. There is no ambiguity as to the meaning of the terms 'reside' or 'residence' as used in the policy. They indicate a place currently lived in by the insured as a home." Id. at 433-34. *See also Heniser v. Frankenmuth Mut. Ins. Co.*, 449 Mich. 155, 163-64, 534 N.W.2d 502, 506 (1995) ("The policy is also clear that if [the named insured] did not 'reside' at the insured property at the time of the loss, the property is not a 'residence premises,' as defined by the policy."). From and after her death on November 8, 2007, Audrey Hundley, the sole named insured, did not reside in the premises located at Route 1, Centerville Road, Lot 4, Prichard, West Virginia that was listed in the Declarations. Thus, under the express terms of the policy there was no "residence premises" and, as such, the policy provided *no coverage at all*. This

was yet another reason why the premium was required to be refunded and the policy was required to be rescinded.

In Payne v. Weston, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995), this Court stated: “[w]e will not rewrite the terms of the policy; instead, we enforce it as written.” More recently, this Court has stated:

Where an insurance policy is clear and unambiguous, “[t]he court is bound to adhere to the insurance contract as the authentic expression of the intention of the parties, and it must be enforced as made where its language is plain and certain.” Keffer v. Prudential Insurance Company of America 153 W.Va. 813, 816, 172 S.E.2d 714, 716 (1970). “[T]he court cannot make a new contract for the parties where they themselves have employed express and unambiguous words.” Id.

Blankenship v. City of Charleston, 223 W.Va. 822, 827, 679 S.E.2d 654, 659 (2009).

Nonetheless, it is possible under certain circumstances for a court to “reform” an insurance contract. “[A]n insurance policy is subject to reformation just as is any other contract.” Ohio Farmers Ins. Co. v. Video Bank, Inc., 200 W. Va. 39, 43, 488 S.E.2d 39, 43 (1997).<sup>2</sup> In discussing this concept, this Court in Ohio Farmers further observed that “reformation is appropriate only where there is a mutual mistake, rather than in a unilateral mistake situation such as the one involved in the case presently under consideration. Also, reformation is appropriate only if the written agreement or insurance policy does not confirm to the clear unwritten agreement between the parties.” Id. at 44, 488 S.E.2d at 44.

By ruling that “the Policy remains in effect to cover the insured’s premises and property until the assets are properly administered, debts are paid, and ownership of the property is legally transferred,” the Circuit Court effectively attempted to rewrite the policy by changing

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<sup>2</sup> Reformation is an equitable remedy. In this case, plaintiff did not plead any counts seeking reformation of the policy.

the “named insured” from Audrey Hundley to the Estate of Audrey Hundley. Such a reformation would not conform the policy to a “clear unwritten agreement between the parties.” In Davis v. Combined Ins. Co. of America, 137 W.Va. 196, 212, 70 S.E.2d 814, 824 (1952), this Court stated: “The parties having specified and limited the extent of the protection afforded by the contract of insurance, courts may not, by construing, changing or remaking such contract, extend its coverage beyond the limits fixed by the parties themselves.”

As noted above, the policy specifically contemplates that the named insured reside in the insured home. The estate of the named insured cannot reside in the home. By effectively reforming the policy to make the Estate the named insured under the policy, the Circuit Court actually created a policy that provided *no coverage at all* under the terms and conditions of the policy.

**B. Even If The Policy Was Not Void, The Circuit Court Erred In Finding That The Municipal Mutual Homeowners Insurance Policy Issued To Audrey Hundley Provided Coverage To Terry Hundley Under An Exception To An Exclusion In Coverage C Of The Policy Which Governed Losses To Personal Property.**

Even if the policy is not void as a matter of law for lack of an insurable interest or even if the Court could reform the policy to make the Estate of Audrey Hundley the named insured, Terry Hundley’s claim for coverage under the policy for the loss of his stolen ATVs must still fail because of the express provisions of the insurance policy. The Circuit Court misinterpreted the policy and erred in failing to conclude that there was no coverage for the claim as a matter of law.

In Syllabus, Keffer v. Prudential Ins. Co. of America, 153 W.Va. 813, 172 S.E.2d 714 (1970), this Court held that: “Where the provisions of an insurance policy contract are clear and

unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.” Further, in Payne v. Weston, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995), this Court stated: “In West Virginia, insurance policies are controlled by the rules of construction that are applicable to contracts generally. We recognize the well-settled principle of law that this Court will apply, and not interpret, the plain and ordinary meaning of an insurance contract in the absence of ambiguity or some other compelling reason. Our primary concern is to give effect to the plain meaning of the policy and, in doing so, ***we construe all parts of the document together.***” Emphasis added. See also Syllabus, Tynes v. Supreme Life Insurance Company of America, 158 W.Va. 188, 209 S.E.2d 567 (1974) (“Where provisions in an insurance policy are plain and unambiguous and where such provisions are not contrary to a statute, regulation, or public policy, the provisions will be applied and not construed.”). Thus, to the extent this Court must review the specific provisions of the homeowners policy issued to Audrey Hundley, it must give full effect to the policy’s provisions and enforce the policy as it is written.

The Circuit Court wrongly concluded that the policy provided coverage for Terry Hundley’s loss under the “service” vehicle section of the policy that had been issued to his deceased mother. The language cited by the plaintiff in support of his claim for coverage under this section of the policy comes from the second part of “Coverage C – Personal Property” and is a subpart of the portion of Coverage C that delineates “Property Not Covered.” Under paragraph 3 of that subpart, the policy states that the insurer “do[es] not cover . . . [m]otor vehicles or all other motorized land conveyances.” *Municipal Mutual Summary Judgment Motion Exhibit 3 at Page 3 of 16*. However, as an exception to this exclusion the policy does cover “vehicles or

conveyances not subject to motor vehicle registration which are . . . used to service an ‘insured’s’ residence.” *Id.*

Significantly however, this section of the policy cannot be read in isolation as the Circuit Court did in its July 29, 2010 Opinion Order. As it is a part of Coverage C, this section of the policy is subject to the language of the Insuring Clause of Coverage C. That clause provides that the personal property covered by the policy must be property that is either: 1) “owned or used by an ‘insured;’” or 2) owned by “others” while the property is on the “insured’s” residence premises, but only if coverage for that specific property is requested by the named insured prior to the loss. *Id. at Page 3 of 16.*<sup>3</sup> Any personal property must fit into one of these requirements to be covered under Coverage C of the policy. Significantly, there was no dispute that the ATVs were not owned or used by Audrey Hundley, the insured, and the Circuit Court specifically found that “[t]here is no evidence that Audrey Hundley ever requested coverage for Terry Hundley’s two ATVs while stored on her premises.” *7/29/10 Opinion Order at 3.*

West Virginia caselaw mandates that the policy provision relied upon by the Circuit Court not be viewed in a vacuum. In Payne, for example, this Court stated that, “[o]ur primary concern is to give effect to the plain meaning of the policy and, in doing so, we construe all parts of the policy together.” 195 W. Va. at 507, 466 S.E.2d at 166. Moreover, in discussing the rules of construction of interpreting an insurance contract, this Court has observed that:

The contract should be read as a whole with all policy provisions given effect. See generally 2 Couch on Insurance 2d § 15:29 (rev. ed. 1984). If the policy as a whole is unambiguous then the insured will not be allowed to create an ambiguity out of sections taken out of context.

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<sup>3</sup> Coverage C would also provide certain coverage to personal property owned by a guest or “resident employee” under certain conditions. Obviously, Terry Hundley was neither a guest nor resident employee of Audrey Hundley.

Soliva v. Shand, Morahan & Co., Inc., 176 W. Va. 430, 432, 345 S.E.2d 33, 35 (1986), overruled in part on other grounds by National Mutual Ins. Co. v. McMahon & Sons, Inc., 177 W. Va. 734, 356 S.E.2d 488 (1987).

When reading the policy as a whole, it is clear that any “service” vehicle that might be covered, must be owned or used by an insured or have had coverage specifically requested by the named insured prior to the loss if it is not owned or used by an insured. Terry Hundley’s ATVs fell into neither of these categories even if they were used to service the Centerville Road property. The Circuit Court erred in concluding that this section of the policy could potentially provide coverage for Terry Hundley’s claim. In holding that, “[t]here are no provisions in the Policy requiring that the non-registered motor vehicle be owned by the insured,” and “[t]here are no Policy provisions requiring the insured to request such coverage during her lifetime,” (7/29/10 *Opinion Order at 4*), the Circuit Court simply ignored the language of the insuring clause of Coverage C. The Circuit Court’s analysis of Coverage C of the policy was clearly erroneous.

**VI. CONCLUSION**

For the reasons set forth herein, the Petitioner, Municipal Mutual Insurance Company of West Virginia, prays that the Court reverse and vacate the Orders of the Circuit Court of Wayne County, West Virginia, direct the Circuit Court to grant judgment to Municipal Mutual Insurance Company of West Virginia as a matter of law on the Respondent's claims of breach of contract and grant Petitioner such other and further relief as the Court deems appropriate.

MUNICIPAL MUTUAL INSURANCE COMPANY OF  
WEST VIRGINIA,  
By Counsel

*John J. Polak*

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**CERTIFICATE OF SERVICE**

I, John J. Polak, counsel for Defendant/Petitioner, do hereby certify that service of the  
**“BRIEF ON BEHALF OF MUNICIPAL MUTUAL INSURANCE COMPANY OF WEST  
VIRGINIA”** was made upon the parties listed below by mailing a true and exact copy thereof to:

Ronald H. Hatfield, Jr., Esq.  
ORNDORFF & HATFIELD  
Village Professionals Building  
99 Cracker Barrel Drive, Suite 100  
Barboursville, WV 25504  
*Counsel for Plaintiff/Respondent*

in a properly addressed envelope this 5<sup>th</sup> day of July, 2011.

  
\_\_\_\_\_  
John J. Polak  
(WV State Bar No. 2929)