IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 3, 2023 Session

TENNESSEE FARMERS MUTUAL INSURANCE COMPANY, INC.
v. LINDA LINKOUS ET AL.

Appeal from the Chancery Court for Fentress County
No. 20-07 Elizabeth C. Asbury, Chancellor

No. M2022-01035-COA-R3-CV

The trial court held that an insurance company properly denied an insured's claim for property loss arising out of a fire. The trial court found that the denial was supported by two grounds: (1) that the property was not "occupied" as defined by the policy at the time of the fire and, therefore, the policy did not cover the loss, and (2) that the policy was voided by the insured's misrepresentations relating to the loss. We affirm the trial court's decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and CARMA DENNIS MCGEE, J., joined.

Matthew Janson McClanahan, Crossville, Tennessee, for the appellant, Linda Linkous.

Daniel H. Rader, III, and Walter S. Fitzpatrick, III, Cookeville, Tennessee, for the appellee, Tennessee Farmers Mutual Insurance.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Linda Linkous and her brother, F.H. McCluskey, owned property located on Rhum Road in Clarkrange, Tennessee. The home was insured by Tennessee Farmers Mutual Insurance Company. On April 12, 2019, the house was destroyed by a fire. Ms. Linkous and Mr. McCluskey were living in Florida at that time. On April l8, 2019, Ms. Linkous and Mr. McCluskey filed a claim against Tennessee Farmers under the insurance policy.

Under the insurance policy between Ms. Linkous and Mr. McCluskey ("the insureds") and Tennessee Farmers, the insureds warranted that the dwelling was their residence. The policy defined the term "residence" to mean "the one-family or two-family dwelling owned by you, described in the Declarations, and occupied by you." The terms "occupy, occupied, or occupancy" were defined to mean "the regular use of the premises as a dwelling place by the person or persons to whom reference is made." The term "vacant" was defined to mean "lacking sufficient contents or utilities to function as a regular dwelling place." The policy further provided as follows:

> This 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 or loss;
> 2. Makes false statements relating to this policy or loss; or
> 3. Commits fraud relating to this policy or loss.

Tennessee Farmers investigated the claim and determined that the house had been vacant for seven years at the time of the fire. Tennessee Farmers filed a declaratory judgment action on January 23, 2020, requesting a declaration that the company was not liable for coverage for the house or any personal property. In its complaint, Tennessee Farmers alleged that Ms. Linkous and Mr. McCluskey "submitted a materially false and fraudulent property list of personal property located in the property and have presented a false and fraudulent claim." Tennessee Farmers further alleged that, at the time of the loss, the property did not constitute a dwelling or residence as required under the terms of the policy.

During the pendency of the lawsuit, Mr. McCluskey died, and his estate was not substituted as a party. The court entered an order dismissing with prejudice Mr. McCluskey's claim for one-half of the insurance proceeds.

The case went to trial on the liability of Tennessee Farmers to Ms. Linkous. The court heard testimony from three witnesses: Mike West, a fire investigator employed by Tennessee Farmers; John Paul Ray, a fire analysis consultant; and Ms. Linkous. Mr. West testified that he went to the site and interviewed Ms. Linkous on April 25, 2019. Ms. Linkous claimed that she lived at the property six to eight months out of the year. In a subsequent sworn statement, Ms. Linkous claimed that she lived at the house eight to ten months out of the year.

Ms. Linkous's daughter, Katina Linkous, informed Mr. West that she had moved out of the property in 2011. The gas and water had been shut off since 2014. Mr. West obtained records of the electricity use in the house since 2007. He testified that the usage records were not consistent with Ms. Linkous's statement that she lived in the house six to

eight months out of the year. Based upon the evidence, Mr. West opined that no one lived in the house after 2011, when Katina Linkous moved out.

Mr. West did an initial investigation of the debris field. After receiving Ms. Linkous's personal property inventory of items she claimed to have been lost in the fire, Mr. West and Mr. Ray returned to the site. Mr. West noted a number of listed items that would not have been destroyed in the fire and that did not appear in the debris field. For example, Ms. Linkous included a stove on her inventory, but there was no evidence of a stove at the site. The inventory included the following items as having been in the garage: a lawn mower, a weed eater, ten shovels, an air conditioner, nine ladders, a garden hoe, and two or three rakes. According to Mr. West, all of these items were "things that I know that we would be able to find in the debris field." Mr. West and Mr. Ray "turned over a rake through every square inch of the garage" and found no evidence of the claimed items.

Based upon the investigation of the garage, Mr. West decided to contract with Mr. Ray to do a comprehensive sift analysis of the entire site. Ms. Linkous's inventory included four or five large screen televisions and a computer, and there was no evidence of any of these items at the house. Mr. West testified that, overall, there were 836 items on Ms. Linkous's list that were not found at the property; these items had a total value of $34,992. Ms. Linkous also claimed $10,500 for debris removal but did not provide any documentation to justify the claim. Based upon his analysis, Mr. West opined that the inventory submitted by Ms. Linkous was not truthful. He recommended that the claim be denied. Tennessee Farmers refunded to Ms. Linkous all of the premiums paid under the policy.

Mr. Ray, a senior fire investigator at Integrity Fire Analysis, testified about his forensic investigation of the fire that destroyed the property at issue. He, too, interviewed Ms. Linkous, who stated that she was last at the home in October 2018, and that her brother had last been there in February 2019. Ms. Linkous stated that she and her brother took cold showers and used kerosene heat. Because the water had been turned off in 2014, however, there was no running water in the house. Mr. Ray corroborated Mr. West's testimony regarding the results of the initial garage debris sift. Mr. Ray and several others performed a comprehensive debris sift of the entire scene, which lasted for two days.

Mr. Ray explained and showed photographs to illustrate the noncombustible remains that one would expect to find after a house fire. He then testified and presented photographs of the fire site at issue in this case. Based upon the inventory submitted by Ms. Linkous, Mr. Ray opined that there was "significantly less [evidence of claimed items] than what we would normally find." His investigation found no remains of many inventory items that would not have been consumed in a fire, including televisions, fire extinguishers, fireplace tools, a sound system, a stove, cast iron skillets, small appliances, as well as tools and other items in the garage.

Counsel for Tennessee Farmers questioned Mr. Ray as to why he thought so many items claimed on the inventory list were not found. Mr. Ray responded: "Because they weren't there." He opined that the inclusion of all of the missing items could not be the result of a mistake or inadvertence. When asked to explain his opinion, Mr. Ray stated:

> Everybody makes mistakes, and can inadvertently list a few wrong items. . . . I don't know how many spoons I have. But I know how many televisions are in my house. I know how many fire extinguishers are in my house. Those types of items, it just—it gives me, based on my training, education, and experience, the opinion that they just—they're not there.

Moreover, based upon what he was able to recover, Mr. Ray testified that the home did not appear to be fully furnished. He stated that, "in looking at the totality of the information that I obtained from start to finish, even the fire department's report indicates that this structure was idle at the time of the fire, meaning it didn't appear that anybody that [sic] was living there." Asked whether the contents appeared to be consistent with someone living in the home or staying there on a regular basis, Mr. Ray responded: "No, sir. For lack of [a] better way of describing it, it almost appeared as though these were the items that somebody didn't want to take with them."

Ms. Linkous was the final witness. During her testimony, Ms. Linkous frequently failed to answer the question posed to her and interjected extraneous information. The court admonished Ms. Linkous repeatedly, instructing her to respond to the questions asked. Ms. Linkous testified that, after her daughter moved out in 2011, family members were in the house "off and on." She acknowledged that, after 2011, no one regularly lived in the home as a permanent residence. She further acknowledged that, after mid-August 2018, she never spent a night in the house. Ms. Linkous gave a circuitous explanation of why she had not responded to Tennessee Farmers's request for cell phone records to show when she had visited Tennessee.

Counsel for Tennessee Farmers questioned Ms. Linkous concerning her financial means. She confirmed that she had been unemployed since 2011 and that she did not earn enough money to require her to file income tax returns. She agreed that, for the years from 2015 through 2017, she had approximately $25,000 to $30,000 to live on each year. In her claim to Tennessee Farmers, Ms. Linkous stated that the following amounts were invested in improvements to the home and property: in 2015, $35,622; in 2016, $48,787; and in 2017, $25,077. When asked how she could have spent these amounts on the property, Ms. Linkous blamed FirstCall, the company that assisted her with preparing the insurance forms. Ms. Linkous stated that she did not agree with the figures on the form, but she acknowledged that the information on the form came from her and her brother. She further averred that the inventory included duplicate items. Upon further questioning, Ms. Linkous testified that she believed that they remodeled the house in 2015. When asked the source

of the funds, Ms. Linkous stated that she had rich friends, but she declined to identify any of the rich friends.

Although the water service was disconnected in 2014. Ms. Linkous asserted at trial that "we had water in that house." She testified that they drove 30 miles round trip to a well and kept "over a hundred gallons of water in the garage in plastic containers." Ms. Linkous stated that they were able to flush the toilet and had access to the collected water. If they needed to take a shower, they would go to a friend's house.

Ms. Linkous acknowledged that she and her brother signed every page of the inventory list submitted to Tennessee Farmers. She testified that she did not read the entire document and that she later discovered some of the items claimed were incorrect. She estimated that 35% to 40% of the inventory list contained "discrepancies." Ms. Linkous admitted that there was no stove in the house at the time of the fire, but a stove allegedly purchased in 2014 was included in the inventory. She asked at trial that the stove be removed from the list. The inventory also included twenty live plants. Ms. Linkous testified that, "I don't know if they were alive at the time of the fire, but there was a thing that watered them automatically," which she claimed to have been filled with the gallons of water kept in the garage. Ms. Linkous said she "had a neighbor that cut my grass that might have went back and" watered the plants.[1] She acknowledged her brother's sworn testimony that all of the plants in the house were dead.

When asked why she never produced receipts for all of the items she claimed to have purchased for the house when it was remodeled, Ms. Linkous stated that the did not know where she purchased the items and could only tell counsel the stores at which she normally shopped. She could not identify with certainty in what cities the stores were located. According to Ms. Linkous, she used cash for all of the purchases.

In an opinion entered on June 15, 2022, the trial court made findings of fact and conclusions of law. The court found that the "testimony of [Mr. Ray] provided the Court with very credible information." The court's findings of fact included the following:

> 7. . . . F. H. McCluskey testified in his deposition that a total of $15,000.00 had been spent for the house from 2015 until 2019 fire (see Exhibit 27).
> . . . .
>
> 11. Both in her sworn statement provided to counsel for the insurance company and in her depositions, [Ms. Linkous] was given an opportunity to change and make corrections to anything in the inventory list. She chose not to do so. However, at trial, she testified that 35% to 40% of the information in her inventory sheet was incorrect.

[1] Ms. Linkous had previously suggested that all of the plants could have been cactuses.

. . . .

> 17. When asked to state his opinion within a reasonable degree of certainty and within his area of expertise why the items were not found, [Mr. Ray] testified that they were not found because they were not present. Based on the debris sift, he testified that this was not a normally furnished home. He described it as [an] "idle" structure. Based on debris sifts he said that the items left in the home appeared to be items that no one wanted to keep.
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> 18. On cross-examination, [Mr. Ray] did confirm that he found evidence of bedroom furnishings and acknowledged that overnight stays at the residence were feasible.
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> 19. At the beginning of the investigative process, [Mr. West], a fire investigator with Plaintiff's company, talked with [Ms. Linkous]. She told him that someone lived at the residence for 6 to 8 months of the year. She made a similar statement in a subsequent sworn statement. However, those statements are completely contrary to her testimony at trial.

The trial court concluded that Ms. Linkous's use of the house "was not regular use so as to be considered an occupied premises" and that "[u]sage was infrequent and occasional." On the issue of whether the policy was voided by Ms. Linkous's acts, the court stated, "There can be no question that Ms. Linkous misrepresented material facts relating to this policy." The court again found Mr. Ray's testimony "very credible" and summarized key parts of that testimony. The court determined that Tennessee Farmers "properly denied the claim of Linda Linkous." Based upon its findings, the court entered an order on June 29, 2022, dismissing Ms. Linkous's claim and declaring that there was no insurance coverage. Ms. Linkous filed a timely appeal.

The issues presented on appeal are (1) whether the trial court erred in determining that the house was not "occupied" under the terms of the insurance policy and that, therefore, there was no coverage under the policy; and (2) whether the trial court erred in determining that Ms. Linkous's claim was barred because she submitted materially false statements to Tennessee Farmers relating to the loss.

STANDARD OF REVIEW

This case was heard by the trial court without a jury. We, therefore, review the trial court's findings of fact de novo upon the record, with a presumption that the trial court's findings are correct, unless the preponderance of the evidence is otherwise. TENN. R. APP. P. 13 (d); *Williams v. City of Burns*, 465 S.W.3d 96, 108 (Tenn. 2015). We review questions of law de novo, with no presumption of correctness "and reach [our] own independent

conclusions regarding these issues." *Nashville Ford Tractor, Inc. v. Great Am. Ins. Co.*, 194 S.W.3d 415, 425 (Tenn. Ct. App. 2005).

ANALYSIS

1. Coverage

Ms. Linkous's first argument is that the trial court erred in determining that the insureds' use of the home did not constitute regular use and that, therefore, the property was not an occupied premises as required under the insurance policy.

An insurance policy is a contract, subject to the rules of construction applicable to all contracts. *Am. Just. Ins. Reciprocal v. Hutchison*, 15 S.W.3d 811, 814 (Tenn. 2000). The extent of coverage of an insurance policy is a question of law involving the interpretation of the contractual language of the policy. *See Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tenn., Inc.*, 566 S.W.3d 671, 694 (Tenn. 2019); *Clark v. Sputniks, LLC*, 368 S.W.3d 431, 441 (Tenn. 2012). The terms of an insurance contract "'should be given their plain and ordinary meaning.'" *Sputniks*, 368 S.W.3d at 441 (quoting *U.S. Bank, N.A. v. Tenn. Farmers Mut. Ins. Co.*, 277 S.W.3d 381, 386-87 (Tenn. 2009)).

At issue here are the policy provisions requiring the insured's dwelling to be his or her residence. Under the policy definitions, a residence must be occupied by the insured, and "occupied" is defined to mean "the regular use of a premises as a dwelling place." The insurance policy does not define the word "regular use." Black's Law Dictionary provides the following definition of "regular use" as used in the insurance context: "A use that is usual, normal, or customary, as opposed to an occasional, special, or incidental use." *Use*, BLACK'S LAW DICTIONARY (11th ed. 2019). This Court has adopted the Black's Law Dictionary definition of regular use in the context of an automobile insurance policy. *See Gillard v. Taylor*, 342 S.W.3d 492, 499 (Tenn. Ct. App. 2009). We consider the Black's Law Dictionary definition instructive in the present case.

In reviewing the trial court's application of the term "regular use" to the facts in the present case, we consider the following findings of fact made by the trial court to be significant:

> 7. . . . [Ms. Linkous] testified that no one lived in the home as a permanent residence. She and her brother were in and out on occasion. [Ms. Linkous's] last overnight stay at the residence was in mid August, 2018. She testified that her now deceased brother did stay at the residence for a few days in February, 2019.
> . . . .

> 8. [Ms. Linkous] testified that there are no water utilities provided to the residence prior to the fire loss. However she stated in sworn discovery responses that the house had water service on the date of the fire loss (see Exhibit 29). Minimal electricity was used to keep the refrigerator running. There was no natural gas service to the residence at the time of the fire. Thus, there was no source for heat. . . .
> . . . .
>
> 17. . . . [Mr. Ray] described [the house] as a "idle" structure.

Because the trial court observed the witnesses and heard their testimony, "we must extend considerable deference to the trial court's findings regarding that testimony." *Layman v. Vanguard Contractors, Inc.*, 183 S.W.3d 310, 314 (Tenn. 2006). The trial court specifically found that Ms. Linkous's "testimony was not credible."

Ms. Linkous argues that the term "regular use" in the contract was ambiguous and that, therefore, "the Appellants are entitled to a definition of 'regular' or 'regular use' that is most favorable to the Appellants." We do not find any ambiguity in the term "regular use" as used in the insurance contract. Moreover, even under the definition proposed by Ms. Linkous, the result would be the same. Ms. Linkous relies upon the following definition of the term "regular": "'steady or uniform in course, practice, or occurrence, not subject to unexplained or irrational variations.'" *Gen. Care Corp. v. Olsen*, 705 S.W.2d 642, 648 (Tenn. 1986) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY).[2] The trial court quoted this definition in its opinion. Ms. Linkous reasons as follows:

> In theory, regular use could be the family spending only one day a year at the Home, for example every Fourth of July. This would conform to the use being steady or uniform in course, practice, or occurrence not subject to unexplained or irrational variations. Therefore, Linda Linkous's testimony that she and her brother made regular use of the property over the summers and at various times throughout the year should be given the greatest deference due to the ambiguity of the insurance contract.

This argument must fail. As stated above, the trial court found that Ms. Linkous was not a credible witness, and we give great deference to that assessment. The trial court considered the definition cited by Ms. Linkous and all of the facts before the court and concluded that her use and her brother's use of the property did not qualify as regular use under the policy.

[2] It should be noted that the definition quoted by the Supreme Court in *Olsen* included an additional phrase: "'steadily pursued, . . . returning, recurring, or received at stated, fixed or uniform intervals.'" *Olsen*, 705 S.W.2d at 648 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY).

The evidence does not preponderate against the trial court's conclusion that the usage of the property at issue was "infrequent and occasional" and that, therefore, the house was not in "regular use so as to be considered an occupied premises."

Ms. Linkous also argues that the policy's vacancy clause was waived. Based upon the fact that Tennessee Farmers sent all policy renewals to Ms. Linkous at her mailing address in Florida, she asserts that Tennessee Farmers "had knowledge and information that there was a strong probability that the home would not be occupied for potentially long durations of time." We find no merit in this theory. The case cited by Ms. Linkous, *McCaleb v. American Insurance Co. of Newark, N.J.*, 325 S.W.2d 274, 276 (Tenn. 1959), involved a waiver argument based upon a conversation between an insured and an insurance agent. The fact that Ms. Linkous received her mail in Florida did not put Tennessee Farmers on notice that the property in Tennessee was vacant. There are many reasons why an insured might receive mail in one state but still regularly use a dwelling in another state.

We conclude that the trial court did not err in finding that Ms. Linkous was not covered by the insurance policy. This finding alone is sufficient to support the trial court's dismissal of Ms. Linkous's claim. We will, nevertheless, proceed to examine the other basis for the trial court's decision.

2. Automatic voiding of policy

Ms. Linkous argues that the trial court erred in concluding that the policy was voided because the court failed to make a finding that "the purported misrepresentations were willfully and knowingly made with the intent to deceive or defraud the insurer."

Under Tennessee law, "material misrepresentations made in a proof of loss statement do not void an insurance policy, unless evidence establishes, on the plainest grounds, that the misrepresentations were willfully and knowingly made with the intent to deceive or defraud the insurer." *Sexton v. State Farm Fire & Cas. Co.*, No. 3:09-CV-535, 2011 WL 1748606, at *3 (E.D. Tenn. May 5, 2011); *see also Trice v. Com. Union Assurance Co.*, 334 F.2d 673, 676 (6th Cir. 1964); *Nix v. Sentry Ins.*, 666 S.W.2d 462, 464 (Tenn. Ct. App. 1983). The burden is on the insurer to prove that the insured "intended to deceive or defraud the insurer." *Wassom v. State Farm Mut. Auto Ins. Co.*, 173 S.W.3d 775, 783 (Tenn. Ct. App. 2005). The requisite knowledge and intent may be inferred from all of the circumstances before the court. *McConkey v. Cont'l Ins. Co.*, 713 S.W.2d 901, 906 (Tenn. Ct. App. 1984); *Trice*, 334 F.2d at 676. The question of the insured's intent is an issue of fact. *Trice*, 334 F.2d at 677.

In *McConkey v. Continental Insurance Co.*, this Court quoted with approval the following principles:

> "Policies of fire and property indemnity insurance usually provide that any fraud or false swearing on the part of the insured, whether before or after loss, shall relieve the insurer from liability. Under such a provision, false statements as to material matters wilfully made by the insured in proofs of loss with the intention of thereby deceiving the insurer will preclude any recovery on the policy by the insured; . . . . This rule is applicable, for example, to the following: an overvaluation of the property insured; . . . the inclusion in the proofs of property not destroyed; . . . .
>
> If a false statement is knowingly made by the insured with regard to a material matter, the intent to defraud will be inferred. . . . Furthermore, the insured's knowledge of the falsity of the statements made by him need not be absolute in order to work a forfeiture of his rights under the policy. It is sufficient if he swears with disregard to the truth or swears to matters as true within his knowledge when in fact he knows little or nothing about them."

McConkey, 713 S.W.2d at 906 (quoting 44 AM. JUR. 2D *Insurance* § 1371).

Ms. Linkous argues that the trial court "failed to conduct any analysis regarding Ms. Linkous's conduct for fraud." We respectfully disagree. The trial court made the following pertinent findings:

> 9. There can be no question that Ms. Linkous misrepresented material facts relating to this policy. She acknowledged in her testimony before this Court that 35% to 40% of the inventory was incorrect. She testified that the stove listed on the inventory list had, in fact, been taken to a dump prior to the fire. Her testimony was not credible. She made inconsistent statements in her court testimony, her sworn statement, and her deposition.
>
> 10. The testimony of [Mr. Ray] who performed a debris analysis was very credible. He had no duty other than to ascertain facts and prepare a report. In looking at his testimony as compared to Ms. Linkous'[s], there can be no doubt that the insurance company has proven misrepresentation sufficient to void the policy by a preponderance of the evidence. . . . It is clear that Ms. Linkous made misrepresentations of material facts and made false statements concerning the fire loss. Thus, [there] is no need to analyze her conduct for fraud.

Based upon all of the facts and circumstances before the court, the court determined that Ms. Linkous acted with the intent to deceive Tennessee Farmers.

Ms. Linkous cites *Matthews v. Auto Owners Mutual Insurance Co.*, 680 F. Supp. 287 (M.D. Tenn. 1988), in support of her argument that her "admitted errors" in the sworn

inventory list "can reasonably [be] attributed to faulty memory, reliance on other parties, and a confused state of mind." In *Matthews*, the insured brought suit in federal district court to recover on a homeowners insurance policy, and the insurer moved for summary judgment. *Matthews*, 680 F. Supp. at 288. In a deposition, the insured admitted to listing items on his proof of loss that were not in the home at the time of the fire; he explained that, based on a conversation with his insurance agent, he believed "he was required to do so." *Id.* The deposition also showed that the insured "was in a confused mental state at the time he completed the proof of loss statement." *Id.* The federal district court concluded that there was a genuine issue of material fact as to whether the insured "misrepresented the extent of his personal property loss *with the intent to deceive or defraud*" the insurer *Id.* at 289. Therefore, the court denied the motion for summary judgment. *Id.*

In the present case, unlike in *Matthews*, the trial court heard the witnesses, made credibility determinations, and concluded that "there can be no doubt that the insurance company has proven misrepresentation sufficient to void the policy by a preponderance of the evidence." The evidence does not preponderate against the trial court's determination.

CONCLUSION

The judgment of the trial court is affirmed. Costs of this appeal are assessed against the appellant, Linda Linkous, and execution may issue if necessary.

_/s/ Andy D. Bennett_____
ANDY D. BENNETT, JUDGE