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In the

Supreme Court

of the

State of California

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CLERK SUPREME COURT

S179252

CENTURY NATIONAL INSURANCE COMPANY,

Plaintiff-Respondent,

v.

JESUS GARCIA, SR. and THEODORA GARCIA,

Defendants-Appellants.

CALIFORNIA COURT OF APPEAL · SECOND APPELLATE DISTRICT · NO. B209616
SUPERIOR COURT OF LOS ANGELES · MAUREEN DUFFY-LEWIS · NO. BC379522

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED FOR REVIEW

1. May an insurer enforce an exclusion clause in a fire insurance policy that denies coverage to innocent insureds for damages from a fire intentionally caused by a coinsured, or does such a clause impermissably reduce coverage below that, which is statutorily mandated?

I. INTRODUCTION

By this appeal, Defendants/Petitioners Jesus Garcia, Sr. and Theodora Garcia ("Petitioners") respectfully seek reversal of the Trial Court's ruling sustaining a Demurrer to Petitioners Cross-Complaint without leave to amend and the subsequent entry of Judgment of Dismissal of Petitioners' Cross-Complaint, entered in favor of Respondent Century National Insurance Company ("Respondent") and the affirmation of the Trial Court's ruling by the Court of Appeal Second Appellate District, Division Seven, holding that Respondent's fire insurance policy exclusion clause in question can defeat the rights of innocent insureds when the property is arsoned by a co-insured, effectively diminishing Petitioners' fire insurance coverage below the minimum required by *California Insurance Code* §2071.

II. STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

Defendants/Petitioners' home ("the Property') suffered substantial damage as a result of a fire ("the Loss") which occurred on May 2, 2007. CT 05, ¶7. [1] At the time of the Loss, the Property was covered under a homeowner's insurance policy ("Policy") issued by Respondent, to Petitioner Jesus Garcia, Sr. only. Petitioner Theodora Garcia is not named on the Policy, but was an insured on the Policy because she was the wife of

[1] All references are to page numbers with surplus zeros removed in the Clerk's Transcript unless otherwise noted.

the named insured and lived at the Property at the time of the Loss. CT 06, ¶15

Petitioners' son, Jesus Garcia, Jr. was also not named on the Policy, but as he was living at the property at the time of the loss and legally related to Jesus Garcia, Sr., he was an also an insured under the Policy. Jesus Garcia, Jr. was arrested for arson in connection with the Loss and ultimately pled *Nolo Contendre* to the charge. CT 06, ¶¶12, 13, Request for Judicial Notice filed by Respondent and granted by the Court of Appeal.

Petitioners submitted a timely claim to Respondent under the Policy for the Loss. On July 3, 2007, Respondent sent Petitioners a letter informing them that Respondent refused to pay for the Loss, as it was caused by the intentional conduct of an insured, Jesus Garcia, Jr. Respondent's letter referred to paragraphs nine (9) and ten (10) of the "Exclusions" section of the Policy. These paragraphs stated the following acts were excluded from coverage under the Policy:

> "9. Intentional Loss, meaning a loss arising out of any act committed by or at the direction of any insured having the intent to cause the loss.
>
> 10. Dishonest, Fraud or Criminal Conduct of any insured."
>
> CT 05, ¶7, 06, ¶17, 18 and 19.

On October 22, 2007, Respondent filed a complaint seeking declaratory relief and asking for a judicial determination of the rights, obligations and liabilities of the parties under the Policy as they pertained to the Loss. CT 04

Petitioners' filed an Answer and Cross-Complaint on December 3, 2007. CT 040. In the Cross-Complaint, Petitioners alleged that the Policy did not comply with California fire insurance codes, as the Policy language excluded coverage for claims arising from the intentional acts of "any

insured", rather than from the intentional acts of "the insured", thereby affording its insureds less coverage than that mandated by the standard fire insurance policy requirements. Petitioners alleged that the language change from "the insured" to "any insured" in the Policy can exclude coverage under the Policy to innocent co-insureds, and that such exclusion contravenes the pertinent sections of California *Insurance Code* §2071, the California Standard Form Fire Insurance Policy, which refers throughout to "the insured." [2] CT 042, ll.14-21,047, ¶18, 049, ¶29.

Respondent demurred to Petitioners' Cross-Complaint on the basis that: 1) the language of its insurance policy was controlling; 2) that §2071 of the *Insurance Code* expressly authorizes changes to the language of the California Standard Form Fire Policy; 3) that its policy was presumptively correct pursuant to *Insurance Code* §1855.5; 4) that a bad faith cause of action cannot lie when there is a genuine dispute over the scope of an insurer's obligations under the policy; and, 5) that there cannot be a reformation to the policy, when its policy contains no mistake with regard to its compliance with the *Insurance Code*.

The Trial Court sustained Respondent's Demurrer without leave to amend. The Trial court ruled that the Policy excluded coverage for the intentional or criminal acts of any insured, so there was no breach of contract, that the existence of a genuine dispute precluded Petitioners' cause of action for breach of the implied covenant of good faith and fair dealing, and finally, that the Cross-Complaint failed to state a cause of action for reformation.

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[2] All statutory references are to California Insurance Code unless otherwise stated.

B. PROCEDURAL HISTORY

October 22, 2007 Respondent filed its Complaint. CT 04. On December 3, 2007, Petitioners filed their Answer to the Complaint and a Cross-Complaint. CT 040. On January 2, 2008, Respondent filed a Demurrer to Petitioners' Cross-Complaint. CT 058. On March 26, 2008, Petitioners filed an Opposition to Respondent's Demurrer. CT 109. On April 3, 2008, Respondent filed its Reply. CT 120. On April 10, 2008, the Trial Court sustained Respondent's Demurrer without leave to amend and subsequently dismissed the case on May 20, 2008. CT 127, 131. On May 20, 2008, Respondent filed a Request for Dismissal of Petitioners' Cross-Complaint. CT 134. Notice of Entry of Judgment of Dismissal was entered on May 28, 2008 and was served by mail by Respondent's counsel on the same date. CT 136, 137.

On July 24, 2008, Petitioners timely filed a Notice of Appeal. CT 139. On December 2, 2009, the Court of Appeal affirmed the Trial Court's ruling. On December 17, 2009, Petitioners filed a Petition for Rehearing, which was denied on December 22, 2009. Thereafter, this Court granted Petitioners' petition for review.

STANDARD OF REVIEW

The Appellate Court "review[s] the Trial Court's sustaining of a demurrer without leave to amend *de novo*, exercising independent judgment as to whether a cause of action has been stated as a matter of law." (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300 [58 Cal.Rptr.2d 855]; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125 [271 Cal.Rptr. 146].) Since this appeal is from a judgment of dismissal entered after the trial court sustained Respondent's Demurrer, under settled law, the Court "must assume the truth of all properly pleaded material allegations of the Complaint, and give it a reasonable

interpretation by reading it as a whole and its parts in their context." (*Phillips et al. v. Desert Hospital District* (1989) 49 Cal.3d 699, 702 [263 Cal.Rptr. 119].)

SUMMARY OF ARGUMENT

The exclusion clause in the Century National Insurance Company property insurance policy which reads "intentional Loss, meaning a loss arising out of any act committed by or at the direction of any insured having the intent to cause the loss and Dishonest, Fraud or Criminal Conduct of any insured, as applied in this case, is invalid as it diminishes the rights afforded the Petitioners under the provisons of the standard fire insurance policy, for a fire loss, as set forth in *California Insurance Code* §2071 and as controlled by *California Insurance Code* §2070. The underlined language changes the standard fire insurance policy language from the insured to any insured. The Court of Appeal in *Watts v. Farmers Ins. Exchange* (2002) 98 Cal.App.4th 1246, following the modern trend throughout the United States, ruled that the definition of the insured in the standard fire insurance policy allows recovery by innocent insureds, when a co-insured commits an intentional act that violates the policy. This language change in Respondent's policy diminishes the rights of innocent co-insureds below that afforded by the standard fire insurance policy.

ARGUMENT

1. THE POLICY DOES NOT COMPORT TO INSURANCE CODE SECTIONS 2071 AND 2070.

The exclusion clause of Respondent's policy as applied to a loss caused by fire fails to comport to California law. *Insurance Code* §2071 sets forth the requirements for a standard form fire policy in this state.

Petitioners set forth in full the code section for the purpose of demonstrating the degree of inclusiveness of the section:

> (a) The following is adopted as the standard form of fire insurance policy for this state: California Standard Form Fire Insurance Policy
>
> (Space for insertion of name of company or companies issuing the policy and other matter permitted to be stated at the head of the policy.)
>
> (Space for listing amounts of insurance, rates and premiums for the basic coverages insured under the standard form of policy and for additional coverages or perils insured under endorsements attached.)
>
> In consideration of the provisions and stipulations herein or added hereto and of ____ dollars premium this company, for the term of _____
>
> from the _____ day of) At 12:01 _____, 20 _____ a.m.,
>
> to the _____ day of) standard _____, 20 _____ time,
>
> at location of property involved, to an amount not exceeding ____ dollars, does insure ____ and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after the loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from

interruption of business or manufacture, nor in any event for more than the interest of the insured, against all LOSS BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREINAFTER PROVIDED, to the property described hereinafter while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with any other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

IN WITNESS WHEREOF, this company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized agent of this company at

Secretary.

President.

Countersigned this _____ day of _____, 20

_____ _____ Agent

Concealment, fraud

This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Uninsurable and excepted property

This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

Perils not included

This company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that the fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this company be liable for loss by theft.

Other insurance

Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

Conditions suspending or restricting insurance

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; or (b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of 60 consecutive days; or (c) as a result of explosion or riot, unless fire ensues, and in that event for loss by fire only

Other perils or subjects

Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

Added provisions

The extent of the application of insurance under this policy and of the contribution to be made by this company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy or by statute is subject to change.

Waiver provisions

No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or

forfeiture shall be held to be waived by any requirement or proceeding on the part of this company relating to appraisal or to any examination provided for herein.

Cancellation of policy

This policy shall be canceled at any time at the request of the insured, in which case this company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be canceled at any time by this company by giving to the insured a 20 days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand. If the reason for cancellation is nonpayment of premium, this policy may be canceled by this company by giving to the insured a 10 days' written notice of cancellation.

Mortgagee interests and obligations

If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, the interest in this policy may be canceled by giving to the mortgagee a 10 days' written notice of cancellation.

If the insured fails to render proof of loss the mortgagee, upon notice, shall render proof of loss in the form herein specified within 60 days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this company shall claim that no

liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of the mortgagee may be added hereto by agreement in writing.

Pro rata liability

This company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Requirements in case loss occurs

The insured shall give written notice to this company of any loss without unnecessary delay, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within 60 days after the loss, unless the time is extended in writing by this company, the insured shall render to this company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of

insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required and obtainable, verified plans and specifications of any building, fixtures or machinery destroyed or damaged.

The insured, as often as may be reasonably required and subject to the provisions of Section 2071.1, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as may be reasonably required, shall produce for examinations all books of account, bills, invoices, and other vouchers, or certified copies thereof if the originals be lost, at any reasonable time and place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made. The insurer shall inform the insured that tax returns are privileged against disclosure under applicable law but may be necessary to process or determine the claim. The insurer shall notify every claimant that they may obtain, upon request, copies of claim-related documents. For purposes of this section, "claim-related documents" means all documents that relate to the evaluation of damages,

including, but not limited to, repair and replacement estimates and bids, appraisals, scopes of loss, drawings, plans, reports, third-party findings on the amount of loss, covered damages, and cost of repairs, and all other valuation, measurement, and loss adjustment calculations of the amount of loss, covered damage, and cost of repairs. However, attorney work product and attorney-client privileged documents, and documents that indicate fraud by the insured or that contain medically privileged information, are excluded from the documents an insurer is required to provide pursuant to this section to a claimant. Within 15 calendar days after receiving a request from an insured for claim-related documents, the insurer shall provide the insured with copies of all claim-related documents, except those excluded by this section. Nothing in this section shall be construed to affect existing litigation discovery rights.

After a covered loss, the insurer shall provide, free of charge, a complete, current copy of this policy within 30 calendar days of receipt of a request from the insured. The time period for providing this policy may be extended by the Insurance Commissioner.

An insured who does not experience a covered loss shall, upon request, be entitled to one free copy of this policy annually. The policy provided to the insured shall include, where applicable, the policy declarations page.

Appraisal

In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the

written request of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of the request. Where the request is accepted, the appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon the umpire, then, on request of the insured or this company, the umpire shall be selected by a judge of a court of record in the state in which the property covered is located. Appraisal proceedings are informal unless the insured and this company mutually agree otherwise. For purposes of this section, "informal" means that no formal discovery shall be conducted, including depositions, interrogatories, requests for admission, or other forms of formal civil discovery, no formal rules of evidence shall be applied, and no court reporter shall be used for the proceedings. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him or her and the expenses of appraisal and umpire shall be paid by the parties equally. In the event of a government-declared disaster, as defined in the Government Code, appraisal may be requested by either the insured or this company but shall not be compelled.

Adjusters

If, within a six-month period, the company assigns a third or subsequent adjuster to be primarily responsible for a claim, the insurer, in a timely manner, shall provide the insured with a written status report. For purposes of this section, a written status report shall include a summary of any decisions or actions that are substantially related to the disposition of a claim, including, but not limited to, the amount of losses to structures or contents, the retention or consultation of design or construction professionals, the amount of coverage for losses to structures or contents and all items of dispute.

Company's options

It shall be optional with this company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within 30 days after the receipt of the proof of loss herein required.

Abandonment

There can be no abandonment to this company of any property.

When loss payable

The amount of loss for which this company may be liable shall be payable 60 days after proof of loss, as herein provided, is received by this company and ascertainment of the loss is made either by agreement between the insured

and this company expressed in writing or by the filing with this company of an award as herein provided.

Suit

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss.

Subrogation

This company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this company.

(b) Any amendments to this section by the enactment of Senate Bill 658 of the 2001-02 Regular Session shall govern a policy utilizing the form provided in subdivision (a) when that policy is originated or renewed on and after January 1, 2002.

(c) The amendments to this section made by the act adding this subdivision shall govern a policy utilizing the form provided in subdivision (a) when that policy is originated or renewed on and after January 1, 2004.

§2071 requires policy language to refer to "the insured", not "any insured" when the covered peril is fire or lightning. Further, §2071 does not create a statutory right to deny coverage to innocent co-insureds in the event of malfeasance by any one of the individual insureds. Additionally, §2070 provides:

> "All fire policies on subject matter in California shall be on the standard form, and, except as provided by this article shall not contain additions thereto. No part of the standard form shall be omitted therefrom except that any policy providing coverage against the peril of fire only, or in combination with coverage against other perils, need not comply with the provisions of the standard form of fire insurance policy or Section 2080; provided, that coverage with respect to the peril of fire, when viewed in its entirety, is substantially equivalent to or more favorable to the insured than that contained in such standard form fire insurance policy." (Emphasis added.)

Read together, these two sections could not be clearer or more comprehensive. In §2071 the word "the" is used throughout, including the three exclusion clauses, when referring to the insured. §2070, when referring to the peril of fire, could not be clearer that any insurance policy covering a fire loss has to afford the insured coverage equal to or superior to the coverage supplied by §2071. Respondent's policy use of the term "any insured" instead of the required "the insured" in an exclusion clause dealing with a fire loss, fails to comply with the requirements of §2070, as coverage under Respondent's policy is not substantially equivalent to or more favorable to the insured than the standard form fire insurance policy, but is actually less. Respondent's policy exclusion language for "any insured" provides less or diminished coverage against the peril of fire than the standard form policy's term "the insured", as the phrase "any insured" would preclude coverage to an innocent co-insured such as Petitioners under relevant California law.

If the language of §2071 is taken seriously, then only the legislature, not an insurance company, can alter existing mandatory Code sections dealing with fire insurance coverage. By failing to comport to the requirements of these code sections, Respondent's policy impermissibly denies coverage to Petitioners who were innocent co-insureds in the loss at issue. Under the aforementioned Codes, as innocent co-insureds, Petitioners have a right to recover for their individual loss despite the acts of another insured.

2. THE POLICY DOES NOT COMPORT WITH CALIFORNIA COMMON LAW.

In *Watts v. Farmers Ins. Exchange* (2002) 98 Cal. App. 4th 1246, 1260 the Court of Appeal affirmed that the language and provisions of the California statutory fire insurance policy, as set forth in §2071, had to be read into the Farmers Insurance policy at issue. *Watts* held that the language of the policy is determinative of whether an innocent co-insured will be allowed recovery under the reasoning that policy language excluding coverage must be explicit and that the fault of the wrongdoing party cannot be imputed to innocent co-insureds. Id. at 1257. The Court stated that because the language adopted by the California Legislature for the standard form policy does not specifically state that the act of any insured will be attributed to all insureds, the intent of the statute is that coverage is to be severable and that an innocent co-insured is able to recover for his or her share of the damaged property when another insured commits a wrongful act. Id. at 1261. (Emphasis supplied). Consequently, the *Watts* court held that an "innocent co-insured may recover for his or her percentage share of the losses despite the transgressions of the other insured." Id. at 1247. While *Watts* does not stand for the proposition that an innocent co-insured is automatically

entitled to indemnification, it does confirm that the California standard form fire insurance policy language must be read into every California real property insurance policy where the loss in question is caused by fire. If the statutory form fire policy is read into Petitioners' policy, as *Watts* confirms it must be, Petitioners' interests as innocent co-insureds are protected. Cases cited by Respondents in previous memorandums and the decision of the Court of Appeal in affirming the trial court, in support of the restrictive language of its policy, do not refer to first party fire losses, but instead refer to liability portions of the policy. The statutory fire insurance policy set forth in Insurance Code §2071 does not contain liability coverage. Only fire and lightning losses are covered. Liability coverage in a homeowners insurance policy is a permitted addition to a standard fire insurance policy and subject to its own rules on interpretation. The Court of Appeal erred when it relied on *Fire Insurance Exchange v. Alterieri* (1991) 235 Cal.App.3rd 1352, to affirm the trial court as that case did not involve a fire or the standard language of a fire insurance policy, but dealt with the "additional" liability coverage portion added to the standard fire insurance policy in a homeowners policy. The facts of *Alterieri* involved an insured who was the aggressor in a fight. *Western Mutual Insurance Co. v. Yamamoto* (1994) 29 Cal. App.4th 1474 also relied upon by the Court of Appeal, is likewise inapposite, since it involved a shooting by an insured, not a fire loss. The coverage at issue was the "additional" coverage for liability added to a standard fire insurance policy in a homeowners policy.

In W*atts, supra*, Mr. Watts presented evidence that he did not participate in any false swearing committed by Mrs. Watts in their fire insurance claim. *Id.* at 1248. Similarly, in this case, there is no assertion that Petitioners are guilty of any participation in their son's wrongdoing.

The significant issue to be considered is that the legal responsibility or liability for the arson is separate both factually and legally rather than joint among co-insureds. There are no assertions that the Petitioners wished to be homeless and encouraged their son to destroy their home. The intentional action of their son cannot and should not be attributed or imputed to Petitioners. Even if one insured did cause the fire, Petitioners, as innocent co-insureds, should not be precluded from recovery for their interest in the damaged property. With regard to intentional acts, the *Watts* Court stated, "We reaffirm our longstanding public policy preventing an arsonist from benefiting from fraud by denying recovery of his or her own...interest in the claim against the insurer. We conclude, however, that such public policy does not overcome an innocent spouse's contractual right to recover her or his...interest in the policy benefits." *Id.* at 1257. The *Watts* Court reaffirmed that one cannot profit from his or her criminal act, but an innocent co-insured cannot be penalized for the act of another insured. While *Watts*, a fire insurance case, dealt with the issue of fraud and false swearing by Mrs. Watts, the out of State cases favorably relied upon by the *Watts* court in finding potential coverage for the innocent co-insured, are cases involving arson by a co-insured. The Court of Appeal erred by considering arson as a separate form of fire not covered by the standard language of §2071. Arson is merely one form of fire and the Code does not differentiate between different causes of a fire. The original standard fire insurance code is over one hundred years old and arson is not a new concept. If the Legislature wished to differentiate between the different causes of fire, it had plenty of time to have done so. An examination of §2071 reveals that it has been modified and amended many times, usually at the urging of insurance companies to the California Legislature, however an insurance company such as Respondent cannot

modify the standard language by merely changing the language in its policy.

3. THE CURRENT TREND IN OTHER JURISDICTIONS FAVORS RECOVERY BY INNOCENT CO-INSUREDS IN FIRE INSURANCE CASES.

The modern legal trend in other jurisdictions generally followed by California in fire insurance cases of first impression is to resolve any conflict between policy language and statutory form fire insurance policies in favor of innocent co-insureds, based on the requirements and language of the standard form fire insurance policy. *Sager v. Farm Bureau Mutual Ins. Co.* (Iowa 2004) 680 N.W. 2d 8, 11 [finding coverage for innocent co-insured where policy language was not the "substantial equivalent of the minimum provisions of the standard form policy"]; *Trinity Universal Ins. Co. v. Kirsling* (2003) 139 Idaho 89, 91-92 [insurer's policy which excluded coverage for intentional acts of "an" insured provided less coverage for innocent co-insureds than the statutory standard form policy which only excluded acts of "the" insured (n.b. - the Idaho court cited *Watts*, *supra,* as persuasive authority)]; *Rena Inc. v. Brien* (1998) 310 N.. Super. 304, 325-326 and the cases cited therein [accord.]; *Barnstable County Mutual Ins. Co. v. Dezotell* (2006) 21 Mass. L. Rep. 269 [accord.]; *Borman v. State Farm Fire & Casualty Co.* (1994) 446 Mich. 482 [insurer's policy provisions denying coverage to an insured who is innocent of wrongdoing by another insured are contrary to provisions of the statutory standard policy and void]

The Wisconsin Supreme Court, comparing earlier Wisconsin decisions with more modern decisions from other jurisdictions such as Michigan, Illinois, and New York, concluded that, "imputing the incendiary actions of an insured to the innocent insured and creating an absolute bar to

recovery by the innocent insured, produces inequitable results." *Hedtcke v. Sentry Insurance Co.*, (1982) 109 Wis. 2d 461, 740.

California courts in the past have a tendency to *inter alia* follow Michigan cases on fire insurance case issues of first impression. For example, in *Prudential-LMI Commercial Insurance v. Superior Court* (1990) 51 Cal.3d 674, a case involving equitable tolling while an insurance claim is being negotiated, our Supreme Court looked with favor upon two Michigan cases, *Ford Motor Company v. Lumbermens Mutual Casualty Co.* (1982) 413 Mich. 22, 319 N.W.2d 320 and *Tom Thomas Organization v. Reliance Ins. Co.* (1976) 396 Mich. 588, 242 N.W.2d 396. In *Watts, supra,* our Court of Appeal looked with favor upon the Michigan decision in *Morgan v. Cincinnati Insurance Company* (1981) 411 Mich. 267. In *Morgan*, the co-insured husband burned the family home. The Michigan Supreme Court granted relief to the wife as an innocent co-insured. The Respondent will point out that in *Morgan*, both Mr. and Mrs. Morgan were referred to as "the insured".

The Michigan Supreme Court subsequently addressed that issue ["*any* insured"] in *Borman v. State Farm Fire & Casualty Co, supra.* State Farm had changed the language of the policy to foreclose the rights of an innocent co-insured as reflected in *Morgan, supra.* The State Farm language in question is identical in purpose to the language in Respondent's policy. At p. 484 and 485, the Michigan Supreme Court ruled:

> We hold that the provisions of the insurance policy issued by defendant State Farm Fire & Casualty Co., insofar as they deny coverage to an insured who is innocent of wrongdoing by another insured, are inconsistent with the provisions of the standard policy, and, thus, contrary to the provisions of the standard policy, and are therefore void insofar as fire insurance

> coverage is involved. We further hold that State Farm is subject to liability under the policy to the plaintiff's decedent, who was an innocent insured, in the same manner and to the same extent as if the inconsistent provisions were not contained in the policy.

The provisions in question read:

> 14. **Intentional Acts.** If you or *any* person insured under this policy causes or procures a loss to property covered under this policy for the purpose of obtaining insurance benefits, then this policy is void and we will not pay you or *any other insured* for this loss.

From these cases and relevant authority decided in other jurisdictions, a basic rule governing the rights of an innocent co-insured may be deduced as, "mere family relationship of the arsonist which does not bestow a property right or other direct financial benefit in the proceeds of insurance does not bar recovery." *Watts*, *supra,* 98 Cal. App. 4th at 1253. There is no allegation that Jesus Garcia, Jr. would benefit financially in any way by setting his parents home on fire. The rule adopted by courts in other jurisdictions permitting recovery by innocent insureds preserves the essence of the legal principle recognizing protection of innocent co-insureds and produces an equitable result. *Id.* at 1254. The rule benefits the public good by not punishing the innocent victim for the wrongs of another and preventing unjust enrichment by the insurance company and wrongdoer. *Id.* at 1256.

In 2004, two years after W*atts*, the United States District Court for the Southern District of West Virginia in *Icenhour v. Continental Insurance Company* 365 F. Supp.2nd 743, in a West Virginia State Court case removed to Federal Court on Diversity of Citizenship grounds, discussed in

detail the modern trend of courts to honor the rights of innocent co-insureds in situations similar or identical to that of the Petitioners. In that case, the co-insured's husband set fire to the family home. Continental Insurance Company relied on an exclusion clause similar to the one contained in the Policy. The Trial Judge refused to apply the exclusion on the ground that this exclusion impermissibly diminished the rights of the innocent co-insured contained in the standard fire insurance policy. The Court went on to discuss the history of the West Virginia standard fire insurance policy code sections which are similar, if not identical to sections 2071 and 2070. The Court initially looked at West Virginia case law that appeared to grant relief to innocent co-insureds, including one case involving the insured's son burning down their business. The Court then turned to precedent throughout the United States. The Court noted that there was a distinct difference between the standard fire insurance policy use of the phrase "the insured" and the typical fire insurance policy language of "an insured", or "one or more covered persons", as drafted by insurance companies. The Court noted that it is almost unanimous throughout the United States that the innocent co-insured in a fire loss will prevail over contrary exclusion clauses in the insurance policy. In its survey and review, the Court included the decisions in *Borman* and *Watts, supra.* The Court construed the exclusions contained in the standard fire insurance policy, as encompassing arson committed by a co-insured and that the standard fire insurance policy allowed recovery for a loss to innocent co-insureds. The specific exclusion referred to by the cited authorities is the "increase in hazard" exclusion which like the other two exclusions in the code mandated standard fire insurance policy refers to "the insured" and that the financial responsibility or loss for wrongdoing is confined solely to the wrongdoer.

CONCLUSION

The exclusion in the Policy issued by Respondent Century National, insofar as its denies coverage to Petitioners, who are innocent of any wrongdoing committed by a co-insured, are inconsistent with and contrary to the provisions of the California statutory standard fire insurance form policy and public policy, and is void insofar as a loss by fire is involved. Hence, Respondent should be subject to liability under the Policy to Petitioners in the same manner and to the same extent as if the inconsistent provisions were not contained in the policy.

For the reasons set forth above, Petitioners respectfully request that the Trial Court's ruling sustaining Respondent's Demurrer without leave to amend and dismissing Petitioners' Cross Complaint as well as the Court of Appeal Decision be reversed.

Dated: April 8, 2010

RESPECTFULLY SUBMITTED,

BEVERLY HILLS LAW ASSOCIATES

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.504(d)(1) of the California Rules of Court, the enclosed Opening Brief on the Merits is produced using 13-point or greater Roman type, including footnotes, and contains 6,541 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: April 8, 2010

BEVERLY HILLS LAW ASSOCIATES

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State of California)
County of Los Angeles)
)

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I, Elizabeth Hong , declare that I am not a party to the action, am over 18 years of age and my business address is: 354 South Spring St., Suite 610, Los Angeles, California 90013.

On 4/8/2010 declarant served the within: Opening Brief on the Merits

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