J-S42003-13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

LEBANON MUTUAL INSURANCE COMPANY, AS SUBROGEE OF JAMIE FRY AND CAROL FRY, NOW KNOWN AS CAROL LEE FRY LOPRESTI,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
v.	:	
DAVID LOPRESTI,	:	
v.	:	
ERIE INSURANCE GROUP,	:	
Appellee	:	No. 2254 MDA 2012

Appeal from the Order entered December 14, 2012,
Court of Common Pleas, Lebanon County,
Civil Division at No. 2009-02682

BEFORE: DONOHUE, WECHT and COLVILLE*, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED AUGUST 13, 2013**

Appellant, Lebanon Mutual Insurance Company ("Lebanon"), as subrogee of Jamie Fry and Carol Fry ("Fry"), appeals from the trial court's December 14, 2012 order. We affirm.

The trial court's opinion sets forth the pertinent facts:

> On June 27, 2008, the home of Jamie and Carol Fry ('Fry Home') was damaged by a fire which was caused by the negligence of Defendant David Lopresti ('Lopresti'). The Fry Home was insured under a policy issued by [Lebanon]. After [Lebanon] paid the Frys for repairs and temporary alternative accommodations necessitated by the fire under the terms of the policy, it pursued its subrogation claim and filed suit against Lopresti. Lopresti did not

*Retired Senior Judge assigned to the Superior Court.

defend the suit and default judgment was entered against him in the amount of $158,035.50 on October 30, 2009.

At the time of the fire, Lopresti was the fiancé of [Fry]. Lopresti had transferred title of his mobile home to his sister and her husband in April 2008. Around May 26, 2008, Lopresti began to spend the bulk of his time at the Fry Home. He stored most of his personal property, received all of his mail and telephone calls, did his laundry, and took his meals there. However, he never slept at the Fry Home; instead, each night he slept on a couch at the home of another sister, Mary Banks, and her husband, Victor ('Banks'), for religious and moral reasons. He would routinely carry an overnight bag containing his toiletries and one to three changes of clothing to the Banks home. When he left the Banks home every morning, he would take the bag with him. He did not have a key to the Banks home and did not pay any sums toward rent or utilities. After the fire, Lopresti stayed at the Banks home (both before and after his marriage to [Fry]) and then moved to South Carolina.

Banks' home was covered by a homeowner's insurance policy ('Banks policy') which was issued by Garnishee Erie Insurance Exchange ('Erie'). The Banks policy covered damages caused by the negligence of the policy holder and related 'residents' of their household. The Erie policy defined 'resident' as 'a person who physically lives with you in your household.' Prior to the entry of judgment, Erie was informed of the claim and conducted an investigation of Lopresti's possible coverage under the terms of that policy. Coverage was denied as Erie concluded that Lopresti was not a 'resident' of the Banks household.

[Lebanon] was unable to locate Lopresti for some time when it attempted to collect on the Judgment against him. During its investigation into Lopresti's whereabouts, [Lebanon] learned that he had been spending his nights at the Banks home in

> the month immediately preceding the fire. It also learned of the existence of the Banks policy with Erie, with its coverage for resident relatives. Lebanon Mutual filed a Praecipe for Writ of Execution against Erie on the basis that Lopresti was a resident relative of the Banks household and thereby covered under the Erie policy. A bench trial was held on July 5, 2012 on the issue of whether Lopresti was a 'resident' of the Banks home.

Trial Court Opinion, 12/14/12, at 2-4 (record citations omitted).

The trial court found in favor of Erie, concluding that Lopresti was not a resident of the Banks home. Thus, the trial court refused to permit Lebanon to execute the $158,035.50 judgment against Erie.[1] The trial court denied Lebanon's post-trial motion for judgment notwithstanding the verdict ("JNOV"), and Lebanon filed this timely appeal presenting two questions:

> A. Whether [Lopresti] 'lived with' [Banks] at the time of the fire?
>
> B. Whether, in the alternative, Lopresti was a dual resident 'residing' with both [Banks] and [Fry] at the time of the fire?

Lebanon's Brief at 4.

With both arguments, Lebanon asks us to discern whether Lopresti was a resident relative of Banks pursuant to the Erie Policy ("the Policy"). We will address Lebanon's issues together.[2]

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[1] The trial court's order is final and appealable. ***See Stinner v. Stinner***, 520 Pa. 374, 554 A.2d 45 (1989).

[2] The existence of a dual residency has no bearing on the outcome of this appeal. Lebanon can prevail if and only if Lopresti was a resident of the

Lebanon's arguments require us to interpret the word "resident" as defined in the Policy. We conduct our review as follows:

> [T]he interpretation of an insurance policy is a question of law for this Court to resolve. Our standard of review, therefore, is plenary. In interpreting the language of an insurance policy, the goal is to ascertain the intent of the parties as manifested by the language of the written instrument. Our Supreme Court has instructed that the polestar of our inquiry ... is the language of the insurance policy.

Berg v. Nationwide Mut. Ins. Co., 44 A.3d 1164, 1170 (Pa. Super. 2012) (internal citations and quotation marks omitted), *appeal denied*, ___ Pa. ___, 2013 Pa. LEXIS 775. As the trial court explained, the Policy provides that "**resident** means a person who physically lives with **you** in your household." Policy, at 5.[3]

In ***Krager v. Foremost Ins. Co.***, 450 A.2d 736 (Pa. Super. 1982), this Court explained the meaning of "resident" as used in an insurance policy:

> The Courts of this Commonwealth have historically recognized the classical definitions of the words domocile [*sic*] and residence. Domicile being that place where a man has his true, fixed and permanent home and principal establishment, and to

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Banks home pursuant to the Policy. The status of Lopresti's connection to the Fry home is irrelevant.

[3] The Policy was admitted into evidence as Exhibit 5 during the July 5, 2012 bench trial. N.T., 7/5/12, at 7. Lebanon argues that the Policy covers Lopresti because he was a resident relative of Banks. ***See*** Policy, at 4. The parties do not dispute that Lopresti and Banks are relatives.

> which whenever he is absent he has the intention of returning.
>
> Residence being a factual place of abode. Living in a particular place, requiring only physical presence.
>
> Though the two words may be used in the same context, the word resident as used in the policy, without additional words of refinement, *i.e.*, permanent, legal, *etc*., would carry the more transitory meaning.

Id. at 737-38. Thus, the declaratory judgment plaintiff who stayed with his mother for six months of the year – during which time the accident in question occurred – was a resident under the mother's homeowner's insurance policy. ***Id.***

In ***Amica Mut. Ins. Co. v. Donegal Mut. Ins. Co.***, 545 A.2d 343 (Pa. Super. 1988), daughter was driving a car when an accident occurred and her passengers were injured. Mother's automobile insurance company filed a declaratory judgment action against father's automobile insurance company, seeking to have the latter declared liable for coverage. Daughter split time living with her parents after their divorce. At the time of the accident, daughter stayed primarily with mother, as mother's house was closer to daughter's high school. She slept at father's house three to five times per month. ***Id.*** at 343-45. During that time she stored "a closet or two full of clothes […] approximately forty pairs of shoes, books, cosmetics, stuffed animals, tennis equipment, and a pet rabbit" at father's house. ***Id.*** at 345. She also received some mail at father's house. ***Id.***

The trial court found that daughter was a resident of her mother's house at the time of the accident. ***Id.*** at 345-46. This Court affirmed:

> [father's insurer] argues that the policy language, providing coverage to family members of the insured who are residents of the insured's household, evidences that the objective of the policy was to limit coverage to those family members who actually live in the same household as the insured. We find this persuasive.

Id. at 346. We further reasoned that the policy contained no "words of refinement" such as "legal or permanent which might suggest a less transitory meaning" of resident. ***Id.*** Daughter's "sporadic" visits to her father's house and storage of personal items there were not sufficient to meet even the transitory definition of resident. ***Id***; ***see also***, ***Norman v. Pennsylvania Nat. Ins. Co.***, 684 A.2d 189 (Pa. super. 1996) (tortfeasor was not a resident of the household of his mother and stepfather or his grandfather where he visited those households only sporadically in the months prior to the accident).

We are cognizant that ambiguities in an insurance policy are construed against the insurer. ***Amica***, 545 A.2d at 345. This Court, however, has concluded that a definition of resident very similar to that in the Policy was unambiguous. In ***Erie Ins. Exch. v. Weryha***, 931 A.2d 739 (Pa. Super. 2007), *appeal granted*, 598 Pa. 536, 958 A.2d 493 (2008), this Court wrote:

> The question of whether one physically lives with another is a factually intensive inquiry and it requires the trial court to look at a host of factors in reaching a common-sense judgment. We do not find

> ambiguity in the phrase 'physically lives' simply because the policy does not spell out every single factor a court should look at in making this determination.

Id. at 742. Thus, the term resident is not ambiguous simply because it requires case-by-case assessment of facts.

Instantly, we must determine whether Lopresti's sleeping regularly at the Banks home, by itself, made him a resident of that home under the Policy. This case is unlike ***Amica*** and ***Norman*** in that Lopresti's visits to the alleged residence are more than sporadic. At the time of the accident, he had been sleeping at the Banks home every night. Even the circumstances of his nightly arrangement at the Banks home are not, however, sufficient to establish residence. This Court has held that sleeping on a couch, rather than on one's own bed in one's own bedroom, is more indicative of a temporary arrangement for convenience than residence. ***Wall Rose Mut. Ins. Co. v. Manross***, 939 A.2d 958, 968 (Pa. Super. 2007), *appeal denied*, 596 Pa. 747, 946 A.2d 688 (2008). Lack of a key also is inconsistent with residence. ***Id.***

Lebanon asks this court to conclude that Lopresti is a resident of a home where he spends no waking hours, stores no possessions, receives no calls or mail, takes no meals, pays no bills, has no bedroom or bed of his own, and has no key. Given the applicable case law, we believe the deficiency of this argument is self-evident.

Hoping to avoid this result, Lebanon argues that Lopresti's arrangement with Banks is similar to that of a college student home for the summer. College students are considered residents of their parents' home for insurance purposes even though, according to Lebanon, they spend very little of their summer vacation time at home. Even if this assertion is factually accurate, it avails Lebanon nothing, because many policies expressly provide coverage for unmarried or unemancipated children under a specified age. In any event, we believe this comparison is strained. Lopresti has no connection to the Banks home other than that Banks allows him inside to sleep on the couch. Lebanon's brief offers no reason to believe that the same is true of the typical college student home for the summer.

In summary, the instant record reflects that Lopresti's nightly arrangement at the Banks home was a mere matter of convenience, to accommodate his religious beliefs. We conclude that the trial court did not err in finding that Lopresti was not a resident of the Banks home pursuant to the Policy. We therefore affirm the trial court's order.

Order affirmed.

Judgment Entered.

Mary A. Hoyfield

Deputy Prothonotary

Date: 8/13/2013