

**IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS**

**LIBERTY MUTUAL FIRE
INSURANCE COMPANY,**

Plaintiff,

vs.

No. CH-09-1755-3

KAREN BARNES,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is an action for declaratory judgment brought in connection with an insurance policy dispute involving a fire which destroyed the residential rental property of Karen Barnes ("Ms. Barnes"), which was insured by Liberty Mutual Fire Insurance Company (Liberty Mutual). The policy of insurance in place at the time of the loss between Ms. Barnes and Liberty Mutual expressly provided coverage for losses caused by fire. Liberty Mutual denied Ms. Barnes' insurance claim based on an exclusion in the policy for losses caused by "vandalism and malicious mischief...if the dwelling has been vacant for more than 30 consecutive days immediately before the loss."

For the purposes of this motion, the parties stipulated that the fire was intentionally set. The parties did not argue and the Court does not address the issue of whether the subject dwelling was vacant for more than 30 days preceding the loss. The only question for the Court's determination is whether the clause "vandalism and/or malicious mischief" as stated in the policy includes the act of arson.

In Tennessee, insurance policies are generally subject to the same rules of construction as contracts and should be interpreted as written. Absent fraud or mistake, the terms of a contract should be given their plain and ordinary meaning, for the primary rule of contract is to ascertain

and give effect to the intent of the parties.¹ All provisions in the contract should be construed in harmony with each other to promote consistency and to avoid repugnancy between the various provisions. The policy must be read as a whole.²

It has long been the rule in this state that in construing an insurance policy, uncertainties or ambiguities must be construed against the insurer and in favor of the insured. Exceptions, exclusions, and limitations in insurance policies must be construed against the insurance company and in favor of the insured.³

In the present case, the policy at issue provides in pertinent part as follows:

"PERILS WE INSURE AGAINST."

We insure for direct physical loss to the property described in Coverage C caused by a peril listed below unless the loss is excluded in the General Exclusions.

1. Fire or Lightning

8. Vandalism or malicious mischief.

This peril does not include loss by pilferage, theft, burglary or larceny.

We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property; however, we do not insure loss:

2. caused by

f. **vandalism and malicious mischief**, theft or attempted theft if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant.

"OTHER COVERAGES."

We cover trees, shrubs, plants or lawns, on the Described Location for loss caused by the following Perils Insured Against: **Fire or lightning**, Explosion, Riot or civil commotion, Aircraft, vehicles not owned or operated by you or a resident of the Described Location or **Vandalism or malicious mischief**, including damage during burglary or attempted burglary, but not theft of property.

¹ See *U.S. Bank, N.A. v. Tennessee Farmers Mut. Ins. Co.*, 277 S.W. 3d 381, 387 (Tenn. 2009)

² See *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999)

³ See *Travelers Ins. Co. v. Aetna Cas. & Surety Co.*, 491 S.W.2d 363, 366 (Tenn. 1973).

The terms “vandalism” and “malicious mischief” are not defined in Ms. Barnes’ policy and arson is not a stated exclusion under the General Exclusions. Liberty Mutual cites the case of *Lorentz v. Phillips*⁴ in support of their position in this case. In *Lorentz*, the Court of Appeals addressed a similar policy where the issue before the Court was whether the insurer carried its burden of proving that the fire was intentionally set. The Court of Appeals never specifically addressed or considered the issue presented in this case of whether arson is included in the vandalism exclusion. Accordingly, this Court does not consider the Court of Appeals decision in *Lorentz* to be dispositive of the issue presented in this case and this Court must interpret the insurance policy before it.

Other jurisdictions considering this issue have differed concerning whether the phrase “vandalism and malicious mischief” include arson. Ms. Barnes cites several cases in which courts concluded that a vandalism exclusion does not preclude coverage for a fire caused by arson to vacant property.⁵ Conversely, Liberty Mutual cites several cases in which courts found a vandalism exclusion to encompass a claim arising from an arson fire.⁶

Under Coverage A-Dwelling and C-Personal Property, Liberty Mutual lists “Fire” and “Vandalism or malicious mischief” as two separate causes of loss, and arson is not mentioned. It is not disputed by either party that arson is a covered peril under the insurance policy in question. Liberty Mutual interprets arson to be included under vandalism and malicious mischief. This, however, is inconsistent with its own treatment of these terms. If it was Liberty Mutual’s intention to include arson as a peril not covered under the 30 day exclusion, it could have expressly stated that in the policy or simply defined the terms “vandalism” and “malicious mischief” to include arson. This Court is inclined to believe that it was neither parties’ intention for arson to be a peril excluded under the peril of “vandalism and malicious mischief.” If it was Liberty Mutual’s intention to have the terms “vandalism and malicious mischief” include arson, the Court finds the contract language ambiguous in this regard as to those terms. As such, the

⁴ 1996 WL 140527 (Tenn. Ct. App. 1996)

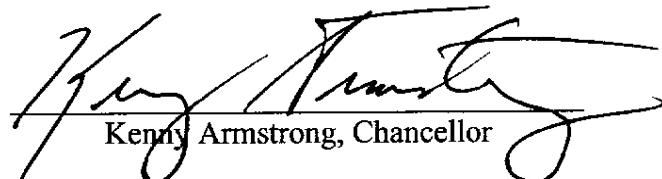
⁵ See e.g., *Johnson v. State Farm & Cas. Co.*, 2008 WL 4724322 (Mich. Ct. App. 2008), *United Capital Corp. v. Travelers Indemnity Co.*, 237 F Supp 2d 270, 271-278 (E.D.N.Y., 2002), *Nationwide Mut. Fire Ins. Co. v. Nationwide Furniture, Inc.*, 932 F Supp. 655, 656-657 (E.D.Pa., 1996).

⁶ See e.g., *American Mut. Fire Ins. Co. v. Durrence*, 872 F.2d 378, 378-379 (11th Cir., 1989), *Estes v. St. Paul Fire & Marine Ins. Co.*, 45 F Supp 2d 1227, 1229 (D. Kan. 1999), *Battishill v. Farmers Alliance Ins. Co.*, 127 P.3d 1111 (N.M. 2006).

policy must be construed against Liberty Mutual and in favor of Ms. Barnes. Where a homeowner's insurance policy treats "fire" and "vandalism and malicious mischief" as two distinct causes of loss and the terms are undefined in the policy, a reasonable person would conclude that arson falls under the category of fire rather than under vandalism and malicious mischief.

Based on the Court's review of relevant Tennessee case law and persuasive law from other jurisdictions on this issue, it is the Court's opinion that fire is a separate peril from vandalism and malicious mischief, and that arson under the terms of the insurance policy here is not included within the exclusion applying to losses caused by "vandalism and malicious mischief." Ms. Barnes' claim should not have been denied under that exclusion.

For the reasons stated herein, the Court grants Ms. Barnes' Motion for Summary Judgment by finding that "arson" is not included in the "vandalism and malicious mischief" exclusion in the policy provided by Liberty Mutual.



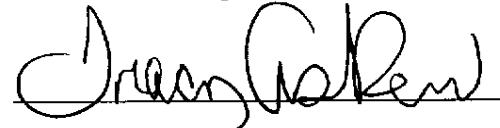
Kenny Armstrong, Chancellor

8-4-10

Date

Certificate of Service

I hereby certify that a copy of this Order is being mailed to counsel for all parties.



Tracy Askew, Courtroom Clerk

8-4-10

Date