SJC-12705

WENDA AQUINO vs. UNITED PROPERTY & CASUALTY COMPANY.

Suffolk. October 4, 2019. - January 21, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, Kafker, JJ.

Insurance, Homeowner's insurance, Joint insured, Coverage, Burning of insured property.

Civil action commenced in the Superior Court Department on February 1, 2018.

The case was heard by Paul D. Wilson, J., on motions for summary judgment.

The Supreme Judicial Court granted an application for direct appellate review.

Seth H. Hochbaum for the plaintiff.

David F. Hassett (Michael S. Melville also present) for the defendant.

The following submitted briefs for amici curiae:

Michael L. Snyder for Metropolitan Property and Casualty Insurance Company.

Kathy Jo Cook, Thomas R. Murphy, Kevin J. Powers, Patrick M. Groulx, & John G. Mateus for Massachusetts Academy of Trial Attorneys.

KAFKER, J. The plaintiff, Wenda Aquino, owned a home as a tenant in common with her fiancé, Kelly Pastrana. Both were named coinsureds on a homeowners' insurance policy issued by defendant United Property & Casualty Insurance Company (insurer). Pastrana set fire to the home intentionally without any involvement on the part of the plaintiff. Despite the plaintiff's lack of involvement, the insurer denied the plaintiff's claim for coverage, relying on an intentional loss exclusion in the policy that barred recovery when any coinsured intentionally caused a loss. A Superior Court judge granted in part the plaintiff's motion for partial summary judgment against the insurer, finding the intentional loss exclusion as written in the policy violated the standard policy language mandated under G. L. c. 175, § 99, Twelfth, but allowing the plaintiff to recover only one-half of the coverage limit due to her and Pastrana's equal interests under their insurance policy and Pastrana's forfeiture of his interest.

The two dispositive questions at issue in this appeal are related: first, whether an innocent coinsured may collect on a standard fire insurance policy when another coinsured intentionally sets fire to the insured premises, and second, if the coinsured may recover, how to determine the extent of that recovery. We conclude that the standard fire insurance policy set by statute imposes several, rather than joint, rights and

obligations on the insureds, and the insurer's redrafting of the statutorily defined policy language to make either insured responsible for the actions of the other in setting the fire was in violation of the statute. We reach this conclusion notwithstanding a 1938 decision of this court, Kosior v. Continental Ins. Co., 299 Mass. 601 (1938), which denied equitable relief for an innocent coinsured spouse whose husband deliberately set fire to the house to recover insurance proceeds. We conclude that the Kosior case, which contains little analysis and appears to be based on outdated assumptions about the marital relationship and the legal rules associated therewith, is distinguishable, even if it remains good law. The holding in that case, however, provides a good faith basis for the insurer's decision to deny coverage in the instant case, precluding recovery by the plaintiff under G. L. c. 93A.

We hold that the policy proceeds in this case are severable, and that the plaintiff is entitled to only one-half of the insurance proceeds. Finally, we conclude that the walkway, the stairway, the railings, and the retaining wall fall under the policy's coverage for the plaintiff's dwelling. Accordingly, we affirm the decision of the Superior Court judge, granting in part and denying in part the parties' cross-motions for summary judgment.

1. Background. In 2014, the plaintiff and her fiancé, Kelly Pastrana, purchased a two-family residential dwelling in Chelsea (property) as tenants in common.[1] Both the plaintiff and Pastrana are listed on the deed and mortgage for the property. On July 5, 2016, the insurer issued a homeowners' insurance policy to the plaintiff and Pastrana effective September 3, 2016 (policy). Both the plaintiff and Pastrana were named insureds on the policy. In the policy, "you" and "your" refer to the "named insured in the Declarations," but there is not otherwise an express definition of "the named insured."

The policy provided for fire insurance. Fire insurance in Massachusetts is governed by the standard policy statute, which provides that "[n]o company shall issue policies or contracts which . . . insure against loss or damage by fire or by fire and lightning to property or interests in the commonwealth, other

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[1] The certificate of title to the property states that the plaintiff and her fiancé owned the property as tenants in common. Moreover, "in this Commonwealth a conveyance or devise to several always creates a tenancy in common unless the deed or the will expressly provides for a joint tenancy," as "[j]oint tenancy and its doctrine of survivorship are not in harmony with the genius of our institutions, nor are they much favored in law" (citation omitted). Cross v. Cross, 324 Mass. 186, 188 (1949). See G. L. c. 184, § 7 ("A conveyance or devise of land to two or more persons . . . shall create an estate in common and not in joint tenancy, unless it is expressed in such conveyance or devise that the grantees or devisees shall take jointly, or as joint tenants, or in joint tenancy, or to them and the survivor of them, or unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy").

than those of the standard forms herein set forth . . . ." G. L. c. 175, § 99. That standard form provides for an exclusion of coverage when there is loss by fire "caused, directly or indirectly, by . . . neglect of the insured to use all reasonable means to save and preserve the property at and after a loss." G. L. c. 175, § 99, Twelfth. Further, a company "shall not be liable for loss occurring . . . while the hazard is increased by any means within the control or knowledge of the insured." Id. Finally, the standard form provides, in relevant part: "In consideration of the provisions and stipulations herein or added hereto and of dollars premium this company . . . does insure . . . to the extent of the actual cash value of the property at the time of loss, [but not in] any event for more than the interest of the insured, against all loss by fire . . . ." (emphasis added). Id.

The policy issued did not, however, track the standard form language, particularly the intentional loss exclusion language. The policy provision here states, in part:

> "Section I - EXCLUSIONS
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> "A. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.
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> ". . .

> "8. Intentional Loss
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> "Intentional Loss means any loss arising out of any act an 'insured' commits or conspires to commit with the intent to cause a loss. In the event of such loss, no 'insured' is entitled to coverage, even 'insureds' who did not commit or conspire to commit the act causing the loss."

The policy further provides: "[e]ven if more than one person has an insurable interest in the property covered, [the insurer] will not be liable in any one loss . . . [t]o an 'insured' for more than the amount of such 'insured's' interest at the time of loss . . . ."

Other relevant aspects of the policy did not raise issues of conflict with the statute. Coverage A of the policy insures "[t]he dwelling on the 'residence premises' . . . including structures attached to the dwelling," providing a coverage limit of $622,000. Coverage B of the policy insures "other structures on the 'residence premises' set apart from the dwelling by clear space. This includes structures connected to the dwelling by only a fence, utility line, or similar connection." The policy limit for Coverage B is $62,200.

On May 22, 2017, a fire totally destroyed the home, and damaged the walkway, the patio, the stairway, the retaining wall, and the wrought iron railing. Pastrana intentionally set the fire. Emergency responders were incapable of fighting or suppressing the fire due to an exchange of gunfire between

Pastrana, who remained in the home, and emergency responders. Pastrana died at some point during the blaze. The plaintiff was innocent of any involvement in the fire.

After the fire, the plaintiff asserted claims under the policy for destruction of the dwelling; destruction of the driveway, the walkway, the patio, the retaining wall, the stairs, and the railing on the property; loss of personal property in the dwelling; loss of rental income and additional living expenses; costs associated with the enforcement of "ordinance law" against the plaintiff as the owner of property containing a fire-damaged and unsafe structure; destruction to landscaping, trees and shrubs; and debris removal. In a letter to plaintiff dated August 18, 2017, the insurer denied its liability for the plaintiff's claims, citing Pastrana's intentional setting of the fire and the policy's intentional loss exclusion.

After the insurer denied liability, counsel for the plaintiff wrote the insurer a demand letter pursuant to G. L. c. 93A on December 15, 2017, claiming that the insurer violated G. L. c. 93A, §§ 2 and 9, and G. L. c. 176D, § 3 (9), by issuing a policy with less coverage than what is required under the language of the standard fire policy, G. L. c. 175, § 99, Twelfth, and thereby denying the plaintiff the coverage she is guaranteed under Massachusetts law. Counsel for the insurer

responded on January 5, 2018, disputing that its policy was inconsistent with the Massachusetts standard fire policy.

Plaintiff commenced an action against the insurer on February 1, 2018, bringing claims for declaratory judgment, breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, equitable estoppel, waiver, reformation of the policy to comply with G. L. c. 175, § 99, Twelfth, and unfair and deceptive trade acts and practices under G. L. c. 176D and G. L. c. 93A. On her claim for declaratory judgment, plaintiff requested that the court find that the intentional loss exclusion of the policy was void for its failure to conform with and for impermissibly restricting coverage mandated by the Massachusetts standard fire policy; that Pastrana's alleged intentional act of arson suspended insurance coverage under the policy only as to him, and not as to the plaintiff; and that the driveway, the stairs, the walkway, the foundation, and the retaining wall situated on the property fell within Coverage B of the policy, and not within Coverage A.

The insurer filed its answer on March 21, 2018, which it amended on May 22, 2018. On May 9, 2018, the plaintiff moved for partial summary judgment on her counts for declaratory judgment, breach of contract, and reformation of the policy. On the same day, the insurer simultaneously opposed the plaintiff's

motion and filed a cross motion for summary judgment on all counts of the plaintiff's complaint. Subject to their respective coverage positions, the parties agreed that the loss in value for the dwelling was $622,000, and that the total damages, including the lost value of the dwelling, were $890,600.[2]

In allowing in part and denying in part the parties' motions, the judge agreed with plaintiff that the intentional loss exclusion provision of the policy was unenforceable as written, and had to be reformed in accordance with G. L. c. 175, § 99, Twelfth. The judge also found that the insurer committed a breach of the terms of the policy, as reformed, by failing to provide coverage to the plaintiff. The judge then granted a declaratory judgment that the driveway fell under Coverage B, but he rejected the plaintiff's argument that the walkway, the retaining wall, the stairs, and the wrought iron railing also were protected by Coverage B. The judge dismissed the claim for violations of G. L. c. 93A but otherwise denied the insurer's motion for summary judgment. In ruling on the cross motions for

[2] This was the total property damage if certain structures besides the driveway were included in Coverage B rather than Coverage A of the policy. It also included damages covered by other provisions of the policy that were not in dispute. The parties agreed upon a total amount of damages of $845,770.41 if the structures besides the driveway were deemed to be covered by Coverage A and not Coverage B.

summary judgment, the judge found that the plaintiff should recover for one-half of the losses caused by the fire, concluding that "Pastrana's act of purposefully burning the property [forfeited] his share of recovery under the [p]olicy." The plaintiff appealed, and the insurer cross-appealed. We granted direct appellate review.

2. Discussion. a. Standards of review. "Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law" (quotation and citation omitted). Surabian Realty Co. v. NGM Ins. Co., 462 Mass. 715, 718 (2012). The interpretation of an insurance policy is a question of law subject to de novo review. Id. We must "ascertain the fair meaning of the language used, as applied to the subject matter" (quotation and citation omitted). McNeill v. Metropolitan Prop. & Liability Ins. Co., 420 Mass. 587, 589 (1995). In this context, where the policy provisions are dictated by statute, "the rule of construction resolving ambiguities in a policy against the insurer is inapplicable" (quotation and citation omitted). Id. See Santos v. Lumbermens Mut. Cas. Co., 408 Mass. 70, 83 (1990) ("We refrain from construing [the policy] language against [the insurer], considering that the words find their source in . . . statutory provisions"); 16 R.A. Lord,

Williston on Contracts § 49:16 at 151-152 (4th ed. 2014) ("the rule of liberal construction in favor of the insured is inappropriate when the wording of a particular clause in an insurance policy is mandated by statute [because] a clause required by statute is not included in the policy as a result of the insurer's superior bargaining power").

No material facts are in dispute in the instant case: the parties have stipulated that the plaintiff is innocent of any wrongdoing, and it is undisputed that Pastrana was responsible for intentionally setting fire to the home. Further, the question whether the plaintiff's insurance policy comports with G. L. c. 175, § 99, Twelfth, as a matter of law does not require the resolution of any disputed facts, but turns on the language of the statute and the policy. Finally, determining whether the policy's coverage for the dwelling (Coverage A) or for "Other Structures" (Coverage B) governs the walkway, the patio, the retaining wall, the stairs, and the wrought iron railing does not require resolving any disputed issues of material fact, but involves the interpretation of the language of the policy and applying that language to the undisputed facts of this case.

b. Mandatory minimum coverage under G. L. c. 175, § 99, Twelfth. Where language in a statutorily defined insurance policy is in conflict with the statute, that language is unenforceable. See Surrey v. Lumbermens Mut. Cas. Co., 384

Mass. 171, 177 (1981). The insurer cannot limit coverage to a scope narrower than what the Legislature envisioned. Id. For the reasons that follow, we hold that the policy language here conflicts with the mandatory insurance coverage provided for in G. L. c. 175, § 99, Twelfth, and must be reformed.

The Massachusetts standard fire insurance policy is defined by G. L. c. 175, § 99, Twelfth. See Ideal Fin. Servs., Inc. v. Zichelle, 52 Mass. App. Ct. 50, 53 (2001). The initial legislation governing the standard form of fire insurance policies came in the wake of the great Boston fire in 1872: the legislation was first enacted in 1873 and became mandatory in 1881, when "it became evident that uniformity in policy provisions was lacking but desirable." Id.

As explained supra, the standard fire policy statute requires the use of standard forms. Those forms provide for an exclusion of coverage when there is loss by fire "caused, directly or indirectly, by . . . neglect of the insured to use all reasonable means to save and preserve the property at and after a loss." G. L. c. 175, § 99, Twelfth. Further, the standard forms provide that a company "shall not be liable for loss occurring . . . while the hazard is increased by any means within the control or knowledge of the insured." Id. These provisions of § 99, Twelfth, govern a scenario in which the insured intentionally sets fire to insured property, and allow

the insurer to exclude coverage for this intentional conduct. See, e.g., Lane v. Security Mut. Ins. Co., 96 N.Y.2d 1, 5 (2001) (analyzing and applying identical statutory language to case where insured's son intentionally set fire to insured's home). The statute does not include further definition of the meaning of "the insured." See G. L. c. 175, § 1.

At issue is the significance of the difference in the use of an indefinite article in the policy exclusion and a definite article in the statute: the policy provides an exclusion for "loss arising out of any act an 'insured' commits or conspires to commit with the intent to cause a loss," whereas the statute provides an exclusion for "loss occurring . . . while the hazard is increased by any means within the control or knowledge of the insured" (emphasis added). G. L. c. 175, § 99, Twelfth. The policy provides further clarification of this distinction by adding an additional sentence: "In the event of such loss, no 'insured' is entitled to coverage, even 'insureds' who did not commit or conspire to commit the act causing the loss."

The distinction in the use of the words "an insured" and "the insured," although subtle on its face, is not without difference, and has been extensively analyzed by numerous courts and scholars, who have concluded that an intentional loss exclusion referencing "the insured" offers more protection than

an exclusion referencing "an insured" or "any insured." As explained by one of the foremost commentators:

> "[W]here a policy precludes recovery as a result of fraud on the part of 'the' insured, the recovery is precluded only as to the insured who committed the fraud and the innocent coinsured is allowed to recover. On the other hand, where a policy precludes recovery as a result of fraud on the part of 'any' insured, the effect of the fraudulent acts of one insured preclude recovery as to all insureds and an innocent coinsured is thereby precluded from recovery."

13A Couch on Insurance § 197:38 at 197-82 -- 197-83 (3d ed. rev. 2019). See Vance v. Pekin Ins. Co., 457 N.W.2d 589, 593 (Iowa 1990) ("The words 'an insured' in the above exclusion means an unspecified insured who commits arson. In short, if any insured commits arson, all insureds are barred from recovering"); 3 A.D. Windt, Insurance Claims & Disputes: Representation of Insurance Companies & Insureds, § 11:8 at 11-181 & n.5 (6th ed. 2013), collecting cases ("Most exclusions are written to apply to actions taken by 'the' insured [and are thus] inapplicable as to any insured that did not engage in the proscribed actions"). See also Shepperson v. Metropolitan Prop. & Cas. Ins. Co., 312 F. Supp. 3d 183, 196 (D. Mass. 2018), and cases cited.

With the significant exception of Kosior, 299 Mass. 601, which we discuss in detail infra, courts in the Commonwealth have correctly focused on this distinction. See, e.g., Norfolk & Dedham Mut. Fire Ins. Co. v. Cleary Consultants, Inc., 81

Mass. App. Ct. 40, 52 (2011) ("Because of its reference to 'the insured,' the exclusion must be applied individually to each insured for whom coverage is sought, looking at both the causation and knowledge components of the exclusion in relation to that insured").[3]

Uniformity in the drafting and interpretation of fire insurance provisions is also an important consideration. It was a driving force behind the original passage of the statutory mandate. See Ideal Fin. Servs., Inc., 52 Mass. App. Ct. at 53. Similarly, this court has stated that it has an "interest in giving [G. L. c. 175, § 99,] the same treatment that is given to identical language in policies issued in other States." Pappas Enters., Inc. v. Commerce & Indus. Ins. Co., 422 Mass. 80, 83 (1996). Such uniformity is promoted by interpreting the

[3] As the judge below noted, there are also Superior Court decisions that have addressed this issue. See Liberty Mut. Ins. Co. vs. Gonzalez, Mass. Sup. Ct., No. ESCV20151794B (June 8, 2017) ("when 'the insured' is given its plain and ordinary meaning, it unambiguously refers only to the named insured who has violated the terms of the policy[, whereas] a policy exclusion that uses the language 'an insured' or 'any insured' unambiguously creates a joint obligation as to all named insureds" [citations omitted]); Hall vs. Preferred Mut. Ins. Co., Mass. Sup. Ct., No. HDCV201400781 (May 1, 2015) ("the Legislature chose to use the term 'the insured' in lieu of a more inclusive term, such as 'any insured,' or a more restrictive term, such as 'named insured'"); Barnstable County Mut. Ins. Co. vs. Dezotell, Mass. Sup. Ct., No. 200500361 (July 20, 2006) ("The Intentional Act exclusion terms may very well be construed to exceed the scope of exclusion permitted under the term 'the insured' in the statute").

standard language "the insured" in our statutory exclusion in a manner consistent with its common understanding and the great weight of authority in the case law. See, e.g., Streit v. Metropolitan Cas. Ins. Co., 863 F.3d 770, 773-774 (7th Cir. 2017); Watson v. United Servs. Auto. Ass'n, 566 N.W.2d 683, 688-689 (Minn. 1997); Lane, 96 N.Y.2d at 5; 13A Couch on Insurance, supra at § 197:38.

For these reasons, we conclude that by using the article "the" and not "an" before the word "insured" in the statutory exclusion, the Legislature provided for several rather than joint rights and obligations. Had the Legislature intended to preclude recovery for innocent coinsureds, it would have drafted the statutory exclusion to apply to "an insured" rather than "the insured." See, e.g., Postell v. American Family Mut. Ins. Co., 823 N.W.2d 35, 48 (Iowa 2012) (acknowledging that Iowa Legislature amended its standard policy language to replace "the insured" with "an insured" in five places and to "revise[] language about intentional acts in standard fire policy language which are noncompensable").

c. The Kosior case. We now address the 1938 decision of this court in Kosior, 299 Mass. 601.[4] In that case, the

[4] The continuing viability of the Kosior decision was questioned but not decided by this court in Baker v. Commercial Union Ins. Co., 382 Mass. 347 (1981), another case where an innocent coinsured sought to recover under his policy when his

plaintiff and her husband owned land and buildings as tenants in common. Id. at 602. The husband set fire to the buildings with the intent to defraud the insurance companies, but the plaintiff was not involved at all. Id. The policy insuring the property, under which the plaintiff was a coinsured, contained the following provision: "[I]f the insured shall make any attempt to defraud the Company, either before or after the loss, the policy shall be void." Id. The plaintiff brought her suit in equity, attempting to avoid the technical pleading requirement at the time that her husband be required to join in the action. Id. See Butler, Jr. & Freemon, Jr., "The Innocent Coinsured: He Burns It, She Claims -- Windfall or Technical Injustice?", 17 Forum 187, 191 (1981-1982). The plaintiff did so after conceding that she had no case at law. Kosior, supra. In a brief and somewhat cryptic decision, the court concluded that the plaintiff was not entitled to equitable relief. Id. at 603.

The plaintiff in Kosior did not present an argument concerning the meaning of the words "the insured." The court also glossed over the issue, focusing instead on the fact that

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wife committed arson. The plaintiff in that case argued his wife was insane at the time she set the fire, id. at 348, and the court declined to "reach the issue whether the rule that an innocent insured is barred from recovery by the intentional burning of the property by another insured is still sound policy." Id. at 353 n.9, citing Kosior v. Continental Ins. Co., 299 Mass. 601 (1938).

the husband and wife were jointly insured under the policy. In its holding, the court stated:

> "We think the policy in question was joint and that the plaintiff cannot recover. The act of her husband in burning the insured buildings was an act of the 'insured,' and as such it was a fraud upon the defendants which rendered the policies void in accordance with their terms."

Id. at 604. This holding, however, directly followed the court's statement that "[c]ases dealing with policies which by their express terms permit of a severance of interest of the insured are not in point." Id. It appears to us that neither party, nor the court, focused on the question before us, which is whether the Legislature's use of the term "the insured" in the standard policy exclusion provided for joint as opposed to several rights and obligations.

We stress that in Kosior, the court engaged in very little analysis of the actual terms of the policy when concluding that the contract imposes a joint obligation. Instead, the court appears to have relied on the fact that the policy was written in the name of both the husband and the wife when holding that the plaintiff had a joint obligation under the contract. In the absence of contractual analysis, we are concerned that this approach may have been based, at least in part, on outdated conceptions of the marital relationship and the legal rules associated with those conceptions. See Note, The Problem of the

Innocent Co-insured Spouse: Three Theories on Recovery, 17 Val. U. L. Rev. 849, 858 (1983) (under theory of recovery embraced in Kosior, often referred to as "the old rule," "courts deny recovery concluding that the contract is joint, yet are often unclear as to how they arrive at this decision" [footnote omitted]). See also Klemens v. Badger Mut. Ins. Co., 8 Wis. 2d 565, 567 (1959) ("What is material is the fact that the insurance was written in the joint names of Mr. and Mrs. Klemens and they have a joint obligation to comply with the terms of the policy"), overruled by Hedtcke v. Sentry Ins. Co., 109 Wis. 2d 461 (1982). "Because the policies were usually written in the names of both spouses, these courts [applying the old rule] had little difficulty concluding that the rights and obligations under the policy were joint." Vance, 457 N.W.2d at 590-591. This "'oneness' fiction" is "repugnant to the general rule of law that, a wife is not vicariously liable for the criminal acts of her husband merely because of the existence of the marital relationship." Steigler v. Insurance Co. of N. Am., 384 A.2d 398, 401-402 (Del. 1978). It also reflects a dated conception that their property interests are generally not separable. See Vance, supra at 591, quoting Note, supra at 861-862 (under "old rule," because "the property interests of a husband and wife are regarded as inextricably intertwined, the [insurance policy] interests also are considered inseparable"). See also duPont v.

duPont, 33 Del. Ch. 571, 574 (1953) ("The quaint old legal unity concept of marriage gave the husband an absolute interest in his wife's personal property including choses reduced to possession. . . . The result may be inelegantly and imprecisely expressed thus: 'What was his was his but what was hers was his also'" [citations omitted]).

The old rule and the results of applying it were therefore criticized as "harsh and poorly reasoned," Hosey v. Seibels Bruce Group, S.C. Ins. Co., 363 So. 2d 751, 754 (Ala. 1978), as well as inequitable and "in need of reexamination" (citation omitted), Vance, 457 N.W.2d at 591. Courts critical of the old rule emphasized that "the reasonable person does not expect arson to be imputed as a result of the intentional acts of the spouse," id. at 592, quoting Note, 17 Val. U. L. Rev. at 868, and "[v]icarious liability is not an attribute of marriage," Hedtcke v. Sentry Ins. Co., 109 Wis. 2d 461, 483 (1982), quoting Shearer v. Dunn County Mut. Ins. Co., 39 Wis. 2d 240, 249 (1968). Further, "[w]hether the rights of obligees are joint or several is a question of construction," and jointly naming the insureds on the policy is not enough to establish a joint obligation under the entirety of the contract. Hoyt v. New Hampshire Fire Ins. Co., 92 N.H. 242, 243 (1942). Given the lack of contractual analysis in the Kosior decision and our concerns that the court's assumptions in that decision about

joint obligations may have reflected outdated conceptions of the marital relationship, we decline to conclude that the Kosior decision controls the present case.

Rather, we conclude that the fact that an insurance contract has more than one named insured is the beginning, and not the end, of the analysis in determining whether insurance rights and obligations are joint or several. This is true for all insureds, including those married or otherwise involved in a domestic relationship. See Hedtcke, 109 Wis. 2d at 485-486 ("In Klemens [a case involving a husband and wife] this court concluded without analysis that if there are several insureds, the joint nature of the insurance contract gives rise to joint interests and obligations on the part of each policyholder. The courts following the modern rule discard this conclusory maxim and turn instead to the language of the policy to determine whether the rights of the insureds are joint or several"). See also Hoyt, 92 N.H. at 243. Recovery depends on the policy language itself and the contract law applicable to that language, and cannot be based on dated conceptions of the marital relationship.[5] See Steigler, 384 A.2d at 401-402; Note,

[5] The approach we adopt here has been considered by commentators to reflect the "best reasoned rule," Vance, 457 N.W.2d at 592, and has been followed by a majority of jurisdictions. See, e.g., Hosey, 363 So. 2d at 754; Watts v. Farmers Ins. Exch., 98 Cal. App. 4th 1246, 1258 (2002); Steigler, 384 A.2d at 402; American Economy Ins. Co. v. Liggett,

17 Val. U. L. Rev. at 868. Because the reformed language of the policy in this case must conform with the statutorily mandated language, we focus on that statutory language and the insurance policy considerations important to the Legislature.

Under the language of G. L. c. 175, § 99, Twelfth, as discussed supra, the rights and obligations of the insureds are several. In the statutory exclusion, the words "the insured" are used, not "an insured." There also is good reason why the Legislature would not want to hold the innocent insured responsible for the intentional acts of the other insured. See American Economy Ins. Co. v. Liggett, 426 N.E.2d 136, 143 (Ind. Ct. App. 1981), quoting Howell v. Ohio Cas. Ins. Co., 130 N.J. Super. 350, 354 (1974) ("the responsibility or liability for the fraud -- here, the arson -- is several and separate rather than joint, and the husband's fraud cannot be attributed or imputed to the wife, who is not implicated therein").[6] Had the

426 N.E.2d 136, 144-145 (Ind. Ct. App. 1981); Hildebrand v. Holyoke Mut. Fire Ins. Co., 386 A.2d 329, 331 (Me. 1978); Watson, 566 N.W.2d at 688; Hedtcke, 109 Wis. 2d at 488-489.

[6] Our interpretation of G. L. c. 175, § 99, comports with the principle that insurance is intended to cover fortuitous losses, and "losses are not fortuitous if the damage is intentionally caused by the insured." Hedtcke, 109 Wis. 2d at 483-484. Under our interpretation of that principle, the question of fortuitousness should "be examined from the point of view of the person making the claim," particularly because "[t]he law does not require us to foresee the criminal act of another." American Economy Ins. Co., 426 N.E.2d at 142.

Legislature intended to narrow the obligation of the insurer, we conclude it would have used the alternative "an insured" formulation. This reading of the statutory language also is consistent with our emphasis on the importance of uniformity of interpretation, which is promoted by adopting, as explained supra, the clear majority rule across the country. See Pappas, 422 Mass. at 83. See also Streit, 863 F.3d at 774 and cases cited; Shepperson, 312 F. Supp. 3d at 196. Uniformity of provisions, at least within the State, was also a driving force of the original legislation.

For all of these reasons, we conclude that the insureds' rights and obligations are several under the reformed policy, and we affirm the decision of the judge below to allow the plaintiff to recover notwithstanding her coinsured's intentional acts.

d. The extent of recovery for an innocent coinsured. Having concluded that the rights and obligations of the insured under the exclusion clause are several, not joint, and that the innocent insured is not responsible for the intentional fraud of the insured who intentionally set the fire, we consider next whether the insurable interest protected by the insurance contract is severable. We conclude that it is. We also conclude that the plaintiff is entitled to recover fifty percent of the proceeds for the loss here. Our interpretation is

informed by the insurable property rights at issue and confirmed by the statutorily prescribed insurance contract language.

To insure real property, there must be an "insurable interest" in that property. See Womble v. Dubuque Fire & Marine Ins. Co., 310 Mass. 142, 144 (1941). That interest must be tangible, but it need not be a title interest in the property. Queen v. Vermont Mut. Ins. Co., 32 Mass. App. Ct. 343, 345 (1992). "By the law of insurance, any person has an insurable interest in property, by the existence of which he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself" (citation omitted). Womble, supra. See 3 Couch on Insurance § 41:11 (rev. 2011) ("Any right that may be enforced against the property and that is so connected with it that its injury or destruction will cause loss is an insurable interest").

In the instant case, there is no question that the plaintiff and her fiancé had a tangible, insurable interest in the property they insured. They held title to the insured property as tenants in common. A tenancy in common is clearly an insurable interest. What we must decide is whether the insurable interest here was severable so as to warrant division of the proceeds, and if so, how much the plaintiff was entitled to recover. In the instant case, the property right is readily

divisible and the statutorily prescribed language in the contract allows such division.

As a tenant in common, the plaintiff had an "undivided fractional interest and the right to possession and use of the entire property" up until her cotenant's death. Brady v. City Council of Gloucester, 59 Mass. App. Ct. 691, 695 (2003). A tenancy in common does not, however, have the incidence of survivorship: when one tenant in common dies, his fractional interest in the right to possession and use of the entire property passes to his or her heirs at law -- not the other tenant in common. West v. First Agric. Bank, 382 Mass. 534, 536 n.4 (1981). A tenant in common only "has an insurable interest to the extent of his or her interest in the property," whereas "[a] spouse who holds a tenancy by the entirety has an insurable interest in the whole premises." 3 Couch on Insurance §§ 42:44-42:45.

In the instant case, the plaintiff's insurable interest was limited to her rights as a tenant in common at the time of the loss. At the time of the loss, her cotenant was dead. As a tenant in common, she had no right to inherit his share. Even if the fiancé had innocently died in the fire, the plaintiff would not have been entitled to the entire proceeds. Rather, the plaintiff and the fiancé's heirs would have split the

proceeds: the heirs would have been entitled to the fiancé's share upon his death. See West, 382 Mass. at 536 n.4.

In these circumstances "it is generally recognized [that] an innocent tenant in common can recover a pro rata share of fire insurance proceeds." Steigler, 384 A.2d at 401. Thus, an action brought by tenants in common to recover under an insurance policy "may, for all practical purposes, be treated as . . . separate actions for the recovery of each [tenant in common's] share." Hoyt, 92 N.H. at 244. See Finch vs. Owners Ins. Co., U.S. Dist. Ct., No. CV 616-169 (S.D. Ga. Dec. 6, 2017) ("Tenants in common . . . do have fractional shares. . . . Thus, Plaintiff's recovery may be limited to the forty-percent interest she holds in the house" [citation omitted])

We recognize that the insurable property interest informs but does not define the contractual right to recovery. The contract as prescribed by statute defines that interest. In the instant case, the statutory language confirms that the interest is severable and that the plaintiff's interest is fifty percent. Under the standard form contract prescribed by statute, the coinsured fiancé had no right to recover his insured interest in the property, as he was responsible for the fire and the damage it caused. When he intentionally set fire to the dwelling, he completely lost his right to recover his insured interest. The standard form contract prescribed by statute, as well as the

public policy it represents, is designed to prevent the guilty coinsured from recovering the insured interest he has lost due to his wrongdoing. See Hedtcke, 109 Wis. 2d at 488 ("courts adopting the modern rule have fashioned it to effectuate the public policy that guilty persons must not profit from their own wrongdoing"). Conversely, the insurer has no obligation under the statute to compensate the guilty coinsured for the loss. See G. L. c. 175, § 99, Twelfth.

Where the tenant in common set fire to the property, we do not discern any intention in the policy prescribed by statute to allow the innocent cotenant to enhance her own insured interest in the property. As a tenant in common, she does not inherit his share. The standard form prescribed by statute also provides: "In consideration of the provisions and stipulations herein or added hereto and of dollars premium this company . . . does insure to the extent of the actual cash value of the property at the time of loss, . . . [but not] in any event for more than the interest of the insured, against all loss by fire . . ." (emphasis added). G. L. c. 175, § 99, Twelfth. The standard form contract as prescribed by statute thus recognizes that the insured is limited to recovering his or her own interest. Here, the plaintiff's interest in the insured property as a tenant in common means the plaintiff is only entitled to recover fifty percent.

The effect of the guilty coinsured's loss of his rights on the innocent coinsured's right to recover is thus clear. The guilty cotenant has forfeited his right to recover, but he has not enhanced the plaintiff's insured interest. The standard form policy prescribed by the statute sought neither to blame nor benefit the innocent coinsured, as her rights and obligations were severable from the guilty coinsured: she was not responsible for the other insured's intentional acts and thus would not lose the right to recovery altogether; nor would she be allowed to benefit from them, and receive a one hundred percent recovery.

We therefore conclude, as did the judge below, that the standard form contract prescribed by statute insures only to the extent of the insurable interest, which here is a tenancy in common. Although the insurance contract did not expressly reference the tenancy in common, it did not in any way suggest that the insured's respective rights in the insurable interest were anything but equal. It also provided that the guilty coinsured forfeited his rights when he set the fire. Therefore, the plaintiff is entitled to recover a fifty percent interest in the lost property. Our holding, as explained supra, is informed by the insurable property interest they had as tenants in common

and confirmed by the standard form insurance policy language prescribed by statute.[7]

e. Claims under G. L. c. 93A. General Laws c. 176D, § 3, identifies unfair or deceptive acts or practices in the business of insurance, including unfair claim settlement practices. Engaging in any unfair or deceptive act enumerated in G. L. c. 176D, § 3, amounts to a violation of G. L. c. 93A. See G. L. c. 176D, § 2; Rhodes v. AIG Domestic Claims, Inc., 461 Mass. 486, 494-495 (2012). However, "[a]n [insurer] which in good faith denies a claim of coverage on the basis of a plausible interpretation of its insurance policy cannot ordinarily be said

[7] We recognize that a different set of considerations are implicated when the innocent insured has survivorship rights in the property. See West v. First Agric. Bank, 382 Mass. 534, 536 n.4 (1981) (describing survivorship rights for joint tenants and tenants by entirety). Upon the death of the guilty insured, the innocent insured has inherited the guilty insured's insurable interest in the property and she is the only insured still entitled to recover the insurance proceeds under the insurance contract. Where the innocent insured has survivorship rights, her interests in the property covered by the insurance policy are thus different, and this has convinced some, but not all, courts in other states to allow for a full recovery. Compare American Economy Ins. Co., 426 N.E.2d at 140 ("There is no difficulty in ascertaining [the plaintiff's] interest in the entireties real estate. As the surviving spouse she owns it all"), with Steigler, 384 A.2d at 402 (awarding one-half of damages within limits of contract to plaintiff, who owned property as tenant by entirety, as insureds' insurable interests were nonetheless still separable under contract). Regardless, we need not and do not decide today the more difficult question presented when the innocent coinsured with survivorship rights seeks to recover one hundred percent of the proceeds when the guilty coinsured dies in the fire he or she sets.

to have committed a violation of G. L. c. 93A." Lumbermens Mut. Cas. Co. v. Offices Unlimited, Inc., 419 Mass. 462, 468 (1995). Additionally, "[a] plausible, reasoned legal position that may ultimately turn out to be mistaken -- or simply . . . unsuccessful -- is outside the scope of the punitive aspects of the combined application of c. 93A and c. 176D." Guity v. Commerce Ins. Co., 36 Mass. App. Ct. 339, 343 (1994).

The plaintiff contends that, by misrepresenting facts of the insurance policy, refusing to pay her claims, failing to effectuate a prompt and fair settlement of the claims, and compelling the plaintiff to institute litigation to recover amounts due under the policy, the insurer engaged in unfair claim practices and therefore violated G. L. c. 93A. The plaintiff also argues that, by issuing a policy that contradicts the prescribed provisions of G. L. c. 175, § 99, Twelfth, the insurer committed a per se violation of G. L. c. 93A.

We hold that when the insurer denied coverage, it did so on the basis of a plausible, reasoned legal position that Massachusetts law denies an innocent coinsured recovery when her coinsured intentionally set fire to the premises, even though that position turned out to be mistaken. At the time the insurer was asked to honor the plaintiff's claims under the policy, Kosior was the primary guidance available from this

court. Although the standard language referencing "the insured" that appears in the statutorily mandated intentional loss exclusion had been interpreted by most jurisdictions and the foremost commentators to impose several rather than joint obligations to allow innocent coinsureds to collect under their policies, Kosior, as explained supra, was at best cryptic and confusing on this point and could be interpreted in good faith to support the insurer's contrary construction.[8] Therefore, in denying the plaintiff coverage and drawing the plaintiff into litigation, the insurer was not acting unfairly or deceptively for purposes of G. L. c. 93A or c. 176D.

A more difficult question is presented by the issuance of the policy that contained language that departed from the statutory language. The statute required that the statutory language be used. See G. L. c. 175, § 99 ("No company shall issue policies or contracts which . . . insure against loss or damage by fire . . . other than those of the standard forms herein set forth . . ."). Although the insurer could in good faith believe that it was simply clarifying the language to conform to its understanding of Kosior, it did so to its

[8] The insurer's good faith interpretation of Massachusetts law is reinforced by the fact that the court in Kosior, when imposing joint obligations, analyzed the language "the insured" in the insurer's policy, which is the language used in the standard fire insurance form statute. See Kosior, 299 Mass. at 604; G. L. c. 175, § 99, Twelfth.

advantage and, as we concluded supra, incorrectly. See Kosior, 299 Mass. at 603-604. See also Shepperson, 312 F. Supp. 3d at 200 ("[t]he very existence of the legal debate" surrounding G. L. c. 175, § 99, and various theories of recovery for innocent coinsureds "militates in favor of dismiss[ing] [plaintiff's] c. 93A, § 9[,] claim").

That being said, the policy language could not have caused any damages here, as the insurer had the right to contest the claim based on Kosior regardless of that language. The plaintiff here would have had to hire counsel in any event to recover under the policy, as this was not a situation where the insurer raised a meritless defense. The plaintiff also successfully sued and recovered all that she was entitled to under the policy. In sum, even if there was a conceivable violation of G. L. c. 93A by issuing the policy language in contravention of G. L. c. 175, § 99, Twelfth, this violation caused no harm, and the c. 93A claim was properly dismissed. See Hartford Cas. Ins. Co. v. New Hampshire Ins. Co., 417 Mass. 115, 125 (1994) ("The absence of proof of causation is fatal to . . . G. L. c. 93A and G. L. c. 176D claims"); Van Dyke v. St. Paul Fire & Marine Ins. Co., 388 Mass. 671, 678 (1983) ("any omission by [the insurer] to comply with G. L. c. 176D, § 3 (9), did not cause any injury to or adversely affect the plaintiffs").

We therefore affirm the dismissal of plaintiff's G. L. c. 93A claims.

f. Applicable coverage under the terms of the policy. The plaintiff seeks to obtain additional coverage for her losses by invoking Coverage B of the policy, which governs "Other Structures." The plaintiff seeks coverage under Coverage B for the walkway, the patio, the retaining wall, the stairs, and the wrought iron railings on the premises. The question is thus whether these named areas constitute "Other Structures" within Coverage B, or whether they are instead considered part of the dwelling governed by Coverage A.

This inquiry turns on whether the structures are "attached to the dwelling," in which case they fall under Coverage A, or whether they are "set apart from the dwelling by clear space," in which case they fall under Coverage B. Addressing this question does not involve the resolution of any disputed material facts. Instead, we must interpret the policy's terms and apply that interpretation to the undisputed facts of this case.

Absent an ambiguity, the terms of an insurance policy will be construed "in their usual and ordinary sense." Surabian Realty Co., 462 Mass. at 718. Policies are construed "as a whole, without according special emphasis to any particular part over another." Id. Here, the coverage language is not mandated by statute, such that, "[w]hen the policy language is ambiguous, doubts as to the intended meaning of the words must be resolved against the [insurer] that

employed them and in favor of the insured. . . . This rule of construction applies with particular force to exclusionary provisions" (quotations and citations omitted). Boazova v. Safety Ins. Co., 462 Mass. 346, 350-351 (2012). "However, an ambiguity is not created simply because a controversy exists between the parties, each favoring an interpretation contrary to the other." Lumbermens Mut. Cas. Co., 419 Mass. at 466.

That the policy does not define what "attached" means in Coverage A, or the "clear space" needed for a structure to be included under Coverage B, does not mean that these terms are ambiguous. See Adamo v. Fire Ins. Exch., 219 Cal. App. 4th 1286, 1294 (2013). If their usual and ordinary meaning can be determined, the provisions are not ambiguous. We also construe policies as a whole. Surabian Realty Co., 462 Mass. at 718. In so doing, the provisions of the policy concerning different coverage types should be read together in a way that does not render either coverage meaningless. Id.

In Porco v. Lexington Ins. Co., 679 F. Supp. 2d 432, 438 (S.D.N.Y. 2009), the court analyzed the same language concerning coverage that we have before us in the present case. The court found that the Coverage B section of the policy for "Other Structures" covered a swimming pool on plaintiffs' property. Id. at 439. The court found that the pool deck constituted a "clear space" between the swimming pool and the home. Id. Additionally, the pool could

not fall under Coverage A, which required that a structure be "attached" to the home; under the definition of "attached," "more is required than that the two objects be adjacent to or even touch each other . . . . Some form of connection is required beyond mere spatial proximity." Id. at 438. Accepting "the broader definition of 'attached'" as "'joined or fastened to something,'" id. at 437, the court held that the pool did not fall under Coverage A since "the pool is indisputably not joined or fastened to the dwelling." Id. at 438. Further, "the fact that the pool deck is between the stairs and the pool, even if they touch each other, does not change the analysis." Id.

In coming to this conclusion, the court rejected the plaintiffs' argument that all connected manmade structures are perforce "attached":

> "If the patio is joined or fastened to the dwelling, as it would seem to be, then that might distinguish the patio from a lawn or other obviously clear space separating the house from other structures. However, a dwelling might well be connected to a patio, and the patio to a walkway, and a walkway to a dog house or a mail box, but it would be absurd to conclude that the dog house and mail box are 'attached' to the dwelling. Plaintiff's implicit argument that manmade structures that are all connected to each other have a property of being 'attached' must, therefore, be limited in some way."

Id. The court also made clear that a concrete space could still constitute "clear space" for purposes of Coverage B: "While the clear space is a concrete [pool deck], rather than grass, it

still provides separation from the house" (citation omitted). Id. at 440.

In Arch vs. Nationwide Mut. Fire Ins. Co., U.S. Dist. Ct., No. 88-5421 (E.D. Pa. Nov. 10, 1988), the court came to the same conclusion about a pool that was approximately twelve feet from the house. The court held that, "under the plain and ordinary meaning of the language in the policy describing an 'other structure,'" the dwelling and the pool were "separated by the twelve feet of clear space provided by the patio." That finding was "bolstered by the fact that the pool and the dwelling do not share a common foundation or roof."

In this case, the driveway on the right side of the dwelling -- referred to as the tenants' driveway -- does not abut or touch the dwelling. As such, there is a clear space between it and the house. Nor does anything attach it to the dwelling. Nothing fastens it to the house; instead, it sits on its own concrete slab independent of the home. Therefore, the driveway is a separate structure that falls under the purview of Coverage B.

The walkway, however, touches and abuts the dwelling. Based on the photographs in the record, the walkway also appears to be attached to the dwelling, in that it shares the same concrete slab. Similarly, the stairway is attached, as it touches and abuts the dwelling in such a way that it appears to

have a seamless connection with the outer wall and foundation of the dwelling. The railings are an integral part of the stairway and walkway. Moreover, the retaining wall seems to be one unit with the stairway and walkway: based on the photographs in the record, the retaining wall has a clear connection with the stairway, which in turn is continuously connected to the attached wall of the dwelling and the walkway. The photographs thus show the walkway, the stairway with its railings, and the retaining wall as one structure with a unified connection to the home. For these reasons, the walkway, the stairway, the railings, and the retaining wall are not separated by "clear space" to qualify for coverage under Coverage B, but are attached to the dwelling so as to fall under Coverage A.

We also agree with the judge below that there remains a material question of disputed fact regarding the coverage for the patio. While part of the patio appears to be separated from the dwelling by the walkway, the debris in the photographs in the record obscures the back portion of the home, such that it is unclear whether the patio is attached to the dwelling. We therefore agree with the judge that the issue of coverage for the patio is not ripe for summary judgment at this stage.

Conclusion. The statutory standard policy under G. L. c. 175, § 99, Twelfth, requires insurers to impose only several obligations on their insureds. The policy language at issue

here imposes joint obligations on all coinsureds by denying recovery to any coinsured for the intentional loss caused by any other coinsured. As such, the policy does not comply with G. L. c. 175, § 99, Twelfth, and must be reformed accordingly to allow the plaintiff to recover under the policy. The plaintiff's insurable interest under the policy is severable from her coinsured's, but the plaintiff is entitled only to one-half of the insurance proceeds. To the extent the insurer denied the plaintiff recovery, it did so based on a reasonable interpretation of Massachusetts law governing whether an innocent coinsured may recover if her coinsured intentionally set fire to the insured property, and thus did not violate G. L. c. 93A. The walkway, the stairway, the railings, and the retaining wall are attached to the dwelling as to fall under Coverage A. The judgment of the Superior Court is therefore affirmed.

So ordered.