**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-0747**

Bryan Reitzner,
as assignee of Gregory L. Stassen and Tara L. Stassen,
Appellant,

vs.

American Family Mutual Insurance Company,
Respondent.

**Filed April 7, 2009**
**Affirmed in part, reversed in part, and remanded**
**Poritsky, Judge**[*]

Hennepin County District Court
File No. 27-CV-07-2344

Mark J. Kallenbach, 2260 Ridge Drive, Suite 13, Minneapolis, MN 55416 (for appellant)

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Considered and decided by Hudson, Presiding Judge; Schellhas, Judge; and Poritsky, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

## U N P U B L I S H E D  O P I N I O N

**PORITSKY**, Judge

A fire damaged the home of assignors Gregory and Tara Stassen. After their insurer denied their claim, they assigned all right, title, and interest in the insurance-policy proceeds to appellant Bryan Reitzner. Reitzner sued to recover on the policy. We conclude that (1) because the anti-assignment clause in the insurance contract did not prohibit assignment of the post-loss proceeds, Reitzner has standing to bring this suit; but (2) because there are material facts in dispute, the district court erred in granting the insurer's motion for summary judgment. Therefore, we affirm in part, reverse in part, and remand.

## FACTS

Gregory and Tara Stassen owned a home in Rockford, Minnesota. On December 23, 2004, respondent American Family Mutual Insurance Company (American Family) issued a homeowners' policy on the Stassens' property. The policy had an effective period of December 17, 2004, to December 17, 2005. The policy contained the following provision regarding assignment: "Assignment of this policy will not be valid unless we give our written consent." The policy also contained exclusions for intentional loss, concealment, or fraud.

A fire occurred at the Stassens' residence on February 12, 2005. Prior to the fire, the Stassens were having financial difficulties. The Stassens' real property went into foreclosure in 2004 and a vehicle was repossessed. In January 2005, the Stassens filed a bankruptcy petition.

On the day fire occurred, Gregory Stassen left his home at approximately 1:00 p.m. to go ice fishing with his son and his son's friend. Tara Stassen left at approximately the same time with the couple's daughter. Gregory Stassen returned to the house briefly to retrieve some gloves and then left for the lake.

The fire was reported at approximately 3:30 p.m. by Gregory Stassen's mother and other extended family members who had stopped by the house. Gregory Stassen was on his way home from Lake Sarah to use the bathroom when his sister called him on his cellular phone to notify him that his house was on fire. The Rockford Fire Department responded and extinguished the fire.[1]

Later that day, Hennepin County Sheriff's Office Detective Steve Sinclair investigated the fire scene. Sinclair contacted Ronald Rahman, the Deputy State Fire Marshal Investigator for the state of Minnesota. Four days later, on February 16, 2005, Sinclair and Rahman investigated the fire scene. The investigation revealed that the fire originated in the lower-level family room, which sustained the most damage. Rahman determined that the point of origin of the fire was the back area of the couch in the family room. A lava lamp was found in close proximity to, but in front of, the couch. Gregory Stassen told investigators that the lava lamp may have started the fire. But when Rahman further investigated the fire, he determined that the lava lamp did not start the fire. Subsequently, at his deposition, Rahman opined that the fire was incendiary in origin and that the Stassens were responsible for the fire.

[1] At the time of the fire, Gregory Stassen was the chief of the Rockford Volunteer Fire Department.

Thomas Haney, a certified fire investigator, investigated the fire on behalf of American Family. Haney retained Anderson Engineering to assist his investigation. Haney inspected the scene and eliminated all potential accidental causes of the fire, including the lava lamp. It was also Anderson Engineering's opinion that the lava lamp did not cause the fire. Haney thereby concluded that the fire was intentionally set by the Stassens.

Robert Van Lith, chief of the Delano Fire Department, and Scott Carriveau, a captain in the Maple Lake Fire Department, performed the on-scene inspection for the Wright County Fire Investigation Team. Van Lith testified that their inspection of the fire scene ruled out all potential accidental causes with the exception of the lava lamp. Carriveau submitted the report of the fire investigation team. In the report, Carriveau concluded, in part, that he "[did] not have the expertise to rule out the lava lamp as the cause of the fire."

Eight days before the fire occurred, the lava lamp had been retrieved from storage and placed in the family room. The Stassens told investigators that one of Gregory Stassen's coworkers was having a 60's-themed party and the coworker was going to borrow the lamp for the party. But Gregory and Tara each identified a different coworker as the person having the party. The two coworkers both denied planning a 60's party. When confronted with this information, Gregory Stassen stated that he must have dreamed about the party. Rahman testified that the conflicting statements about the lava lamp helped him conclude that the Stassens were the culpable parties.

On August 2, 2005, American Family sent a letter to the Stassens denying their claim for coverage for their fire loss. On August 18, 2005, the Stassens conveyed their interest in the real property to appellant Bryan Reitzner by quitclaim deed for $499. Furthermore, for $2500, the Stassens assigned all right, title, and interest in the American Family policy proceeds to Reitzner. Reitzner brought suit on February 1, 2007, to recover the amount due under the policy as the Stassens' purported assignee. Both parties moved for summary judgment: Reitzner claimed that there was no credible evidence of arson and furthermore, Tara Stassen was an innocent insured; American Family claimed that the anti-assignment clause prohibited assignment of the proceeds at issue in this case and that there were no material facts in dispute to demonstrate any conclusion other than that the Stassens started the fire. On March 3, 2008, the district court granted American Family's motion for summary judgment and denied Reitzner's motion for summary judgment. This appeal follows.

**D E C I S I O N**

I. The anti-assignment clause in the homeowners' insurance policy did not prohibit this assignment.

American Family asserts that Reitzner's claims are barred by the policy's anti-assignment clause. The district court disagreed, concluding that the insurance policy prohibited assignment of the policy itself, but did not restrict assignment of the proceeds due under the policy. The issue is one of interpretation of the language of the policy, and "the interpretation of insurance contract language is a question of law as applied to the facts presented." *Meister v. W. Nat'l Mut. Ins. Co.*, 479 N.W.2d 372, 376 (Minn. 1992).

"An appellate court is not bound by, and need not give deference to, the district court's decision on a question of law." *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. App. 2001) (citing *Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984)).

The Stassens' homeowners' policy provides: "Assignment of this policy will not be valid unless we give our written consent." It is undisputed that the Stassens did not seek, nor did American Family provide, written consent to assign their insurance claim to Reitzner.

Absent language to the contrary, proceeds under a contract are generally assignable. The Minnesota Supreme Court has stated:

> The general rule is that the right to receive money due or to become due under an existing contract may be assigned even though the contract itself may not be assignable. A contract to pay money may be assigned by the person to whom the money is payable, unless there is something in the terms of the contract manifesting the intention of the parties that it shall not be assigned.

*Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 272 (Minn. 2004) (emphasis omitted) (quotation omitted). Minnesota law has long distinguished between assignment of an insurance policy itself and assignment of the proceeds of a policy. *In re Estate of Sangren*, 504 N.W.2d 786, 790 (Minn. App. 1993), *review denied* (Minn. Oct. 28, 1993).

In *Reitzner v. State Farm Fire & Cas. Co.*, (*Reitzner I*), the applicable provision in the policy stated: "Assignment of this policy shall not be valid unless [State Farm gives its] written consent." 510 N.W.2d 20, 26 (Minn. App. 1993) (alteration in original) (*superseded by statute on other grounds*, Minn. Stat. § 65A.01, subd. 3 (1994), *as*

*recognized in Border State Bank of Greenbush v. Farmers Home Group*, 620 N.W.2d 721, 723 (Minn. App. 2000)). This court concluded, in dicta, that this contractual language prohibited assignment of the policy but not assignment of the proceeds. *Id.*

American Family cites two cases in which this court determined that assignment of the post-loss proceeds was prohibited by the language in the contract. In *Auto Owners Ins. Co. v. Star Windshield Repair, Inc.*, the anti-assignment provision stated that "[n]o interest in this policy may be assigned without our written consent." 743 N.W.2d 329, 333 (Minn. App. 2008), *review granted* (Minn. Apr. 29, 2008). In *Star Windshield Repair Inc. v. W. Nat'l Ins. Co.*, the first anti-assignment clause stated that "[y]our rights and duties under this policy may not be assigned without our written consent." 744 N.W.2d 237, 238 (Minn. App. 2008), *review granted* (Minn. Apr. 29, 2008). The second anti-assignment clause stated that "[n]o change of interest in this policy is effective unless we consent in writing." *Id.* at 238-39.

The contract language in *Auto Owners* and *Star Windshield* is broader than that in *Reitzner I*. In *Star Windshield*, this court described the distinction. We cited three cases in which the anti-assignment clause prohibited assignment of the "policy" itself. We then said:

> The courts in those cases simply recognized a difference between assigning a policy and assigning loss proceeds. In the cases before us now, however, the anti-assignment clauses refer to rights and interests and duties. This prohibitory language is broad enough to reach loss proceed as well as the policies themselves.

*Id.* at 241. The policy language in *Reitzner I* is nearly identical to the language in this case. *See* 510 N.W.2d at 26. "When the language of an insurance contract is unambiguous, it must be given its plain and ordinary meaning." *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 880 (Minn. 2002). The language in the Stassens' homeowners' policy is unambiguous. It prohibits assignment of the policy itself, but it does not prohibit assignment of the post-loss proceeds. Furthermore, even if it were ambiguous, we construe any ambiguity in the contract against the insurer. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989). Therefore, the district court was correct in concluding that the Stassens were not required to obtain American Family's consent before assigning the post-loss proceeds to Reitzner.

II. The district court erred by granting American Family's motion for summary judgment.

> A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.

*Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted). "On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

> [T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a

> metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.

*DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

The American Family policy issued to the Stassens states that it does not insure for intentional loss, "meaning any loss or damage arising out of any act committed: [a] by or at the direction of any insured; and [b] with the intent to cause a loss." The policy also includes an exclusion for concealment or fraud: "With respect to all insureds, we will not provide coverage if any insured has: [a] before a loss, willfully; or [b] after a loss, willfully and with intent to defraud; concealed or misrepresented any material fact or circumstance relating to this insurance."

Under Minnesota law, an insurer relying on arson as a defense to coverage must establish by a preponderance of the evidence that the insured set the fire. *Quast v. Prudential Prop. & Cas. Co.*, 267 N.W.2d 493, 495 (Minn. 1978). "Because direct proof of arson is seldom available, courts have permitted the insurer to use circumstantial evidence to support the inference that the insured set the fire or arranged to have it set." *Id.* "Evidence of the fire's incendiary nature, combined with evidence of motive, is sufficient to support" a finding of arson. *DeMarais v. N. Star Mut. Ins. Co.*, 405 N.W.2d 507, 509 (Minn. App. 1987). Reitzner, as assignee of the Stassens' claim, is subject to the same arson defense that would defeat the claim of the Stassens for coverage. *See* Minn. Stat. § 336.9-404(a)(1) (2008).

American Family makes a strong showing that the fire was incendiary and that the Stassens were involved in starting it. It does so, we note, by eliminating all accidental causes (that is, the accidental causes of which its experts are aware) and concluding that the fire must have been deliberately set. But Gregory Stassen denies under oath that he set the fire. In a deposition submitted to the district court, the following exchange took place:

> ATTORNEY: Do you remember Mr. Reitzner indicating to you that if you in fact did start the fire you should admit it and your response being you were thinking about it to get your family back on track or something of that nature?
> GREGORY STASSEN: No. I never said that.
> ATTORNEY: All right.
> GREGORY STASSEN: Because I didn't start the fire so I would never say it.

This denial creates a genuine issue of material fact precluding summary judgment. Although the facts in the record and the testimony of several experts may point to the incendiary nature of the fire, it is for the jury to determine whether to believe Gregory Stassen and to weigh the experts' testimony. *See State v. Reese*, 692 N.W.2d 736, 741 (Minn. 2005) (stating that "assessment of witness credibility is a jury function"). Gregory Stassen's denial that he set the fire creates a factual dispute sufficient to defeat American Family's motion for summary judgment. Therefore, this case is remanded to the district court for trial.

III. The district court did not err by denying Reitzner's motion for summary judgment.

Reitzner argues that the district court erred by denying his motion for summary judgment. As discussed above, however, Reitzner was able to demonstrate that there are material facts in dispute such that American Family's motion for summary judgment was improperly granted. These disputed material facts also preclude Reitzner's motion for summary judgment. This case is properly remanded for trial.

IV. The innocent-insured doctrine does not apply to Reitzner.

Reitzner argues that even if Gregory Stassen started the fire, he is entitled to the insurance proceeds because Tara Stassen is an innocent insured. The innocent-insured doctrine operates in cases where there are two or more insureds on a policy, and it allows an insured who is innocent of wrongdoing to recover despite the wrongdoing of other insureds. *See Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 691 (Minn. 1997). Here, the district court concluded that the innocent-insured doctrine does not apply because either or both of the Stassens had knowledge of the fire. We agree that the innocent-insured doctrine does not apply, but our conclusion relies on different reasoning.

First, Reitzner does not fall within the class of individuals whom the doctrine was intended to protect. In the case in which Minnesota adopted the innocent-insured doctrine, the supreme court described the doctrine in this fashion:

> It seems to us, notwithstanding the potential for fraud and profit from wrongdoing, that innocent insureds should not suffer for the aberration of a coinsured, *whether a spouse or business colleague*. We think this is the better public policy. We think it would be unfair and harsh to extend vicarious liability [of the wrongdoer] into this context.

*Hogs Unlimited v. Farm Bureau Mut. Ins. Co*., 401 N.W.2d 381, 386 (Minn. 1987) (emphasis added). In the subsequent case of *Watson*, the supreme court was construing the phrase "the insured" that appears in the Minnesota standard fire insurance policy:

> We held in *Hogs Unlimited* that a policy containing the "standard fraud provision" using the "the insured" language of Minn. Stat. § 65A.01, subd. 3, voids the policy only as to "guilty" insureds and not as to innocent co-insureds. Thus, we conclude that the legislature's use of "the insured" in the Minnesota standard fire insurance policy evinces a general intent to compensate an innocent co-insured spouse despite the intentional acts of the other insured spouse.

566 N.W.2d at 691 (quoting *Hogs Unlimited*, 401 N.W.2d at 384-85).

Reitzner is unable to cite caselaw or statutory authority articulating that an assignee of an innocent insured is entitled to the proceeds. Caselaw has granted protection of the innocent-insured doctrine only to spouses and business partners who were insureds under the policy, but not to assignees. The question presented to us is whether to extend the doctrine to cover assignees such as Reitzner.

From the supreme court's use of the language, "innocent insureds should not suffer for the aberration of a coinsured," in *Hogs Unlimited*, and the court's statement in the same case that it was acting to prevent an "unfair and harsh" result, one can easily discern that the doctrine has its basis in equity. 401 N.W.2d at 386. The doctrine protects insureds, who are named in the policy and have paid dividends in an expectation

of coverage. Reitzner, by contrast, is a stranger to the original policy. He comes to this case as a gambler; he paid the Stassens $2,999 and seeks to recover "a sum of at least $50,000, together with costs, interest, disbursements, [and] attorney[] fees." We conclude that Reitzner is not a candidate for equitable relief, and we decline to extend the innocent-insured doctrine to cover this case.

There is an additional reason for refusing to extend the innocent-insured doctrine to cover Reitzner. When the supreme court adopted the doctrine in *Hogs Unlimited*, it wanted to be certain that the application of the doctrine would not result in an indirect benefit to a coinsured guilty of wrongdoing. The supreme court added this safeguard: The doctrine would be applied to allow innocent insureds to recover, provided, among other things, that "payment of the insurance proceeds to the innocent parties can be accomplished to deny, in a practical manner, any appreciable benefit to the guilty partner." *Id.* Here, Reitzner paid $2,999 to Greg and Tara Stassen jointly. Presumably Gregory Stassen shared in the payment; there is no "practical manner" to ensure that he did not. To apply the innocent-insured doctrine in this case would be for this court to sanction a benefit to Gregory Stassen, even if it were proved that he set the fire, thus short-circuiting the safeguard incorporated by the supreme court when it adopted the doctrine in *Hogs Unlimited*.

We conclude, therefore, that if Gregory Stassen set the fire, Reitzner would not be entitled to recover under the innocent-insured doctrine even if Tara Stassen had no role in setting the fire and had no knowledge of Gregory Stassen's setting it.

**Affirmed in part, reversed in part, and remanded.**

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Judge Bertrand Poritsky