Case No. 24-1824

In The
United States Court of Appeals
For The Eighth Circuit

Roland Pour, Sr., *et al*.

Appellants,

v.

Liberty Mutual Personal Insurance Company,

Appellee.

Appeal from the United States District Court for the
District of Minnesota
Case No. 22-cv-01502-PJS-DJF

APPELLEE'S BRIEF

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SUMMARY OF THE CASE

This dispute involves a partial insurance-coverage denial of a 2019 fire loss occurring at a house owned by Appellant Roland Pour, Sr. The subject insurance policy—a homeowner's policy issued by Appellee—provides coverage for the named insured's "residence premises," and defines that term as a structure in which the named insured resides. At the time of the loss, Mr. Pour, Sr. did *not* reside in the house, as he had remarried and moved to a different state two years earlier.

Appellee, after investigating the loss, denied Mr. Pour Sr.'s claim for damages to the structure because the house was not a "residence premises" as defined under the policy. It also denied the remaining Appellants' personal-property claims because, although they lived in the house, they were not considered "insureds" since they did not live with Mr. Pour, Sr. at any time during the policy period.

The district court granted summary judgment to Appellee, concluding that the policy's residency requirement was unambiguous and enforceable. The court then concluded, after reviewing the record, that no reasonable factfinder could conclude that Mr. Pour, Sr. resided in the house at the time of the loss (or at any time during the policy period). It also concluded that the remaining named plaintiffs were not "insureds" because they did not dwell together as a family under the same roof, and were not, therefore, residents of the same "household."

Appellee concurs with Appellants' 15-minute per side oral argument request.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 8th Cir. R. 26.1A., Appellee Liberty Mutual Personal Insurance Company ("Liberty") states the following:

Liberty Mutual Personal Insurance Company is a company organized under the laws of the State of New Hampshire and for federal court jurisdiction/diversity of citizenship disclosure purposes, the principal place of business is 175 Berkeley Street, Boston, Massachusetts.

1. Liberty Mutual Holding Company Inc. owns 100% of the stock of LMHC Massachusetts Holdings Inc.

2. LMHC Massachusetts Holdings Inc. owns 100% of the stock of Liberty Mutual Group Inc.

3. Liberty Mutual Group Inc. owns 100% of the stock of Liberty Mutual Personal Insurance Company.

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STATEMENT OF THE ISSUES

1) **Does the homeowners insurance policy issued by Liberty Mutual Personal Insurance Company, which defines "residence premises" as a structure in which a named insured resides, require the named insured to actually reside in that structure for coverage to apply?**

The district court determined that the express language (and formatting) of the policy at issue in this case makes clear that, for coverage to apply to a damaged dwelling, the named insured must reside there. The court rejected Appellants' argument that the definition of "residence premises" was merely a representation of the property's usage at the time the policy incepted, but also noted that because Mr. Pour, Sr. had moved to a different state several years earlier its analysis would be the same either way.

MOST APPOSITE AUTHORITIES

Centre Ins. Co. v. Blake, 370 F. Supp. 2d 951 (D.N.D. 2005).

Gerow v. State Auto Prop. & Cas. Co., 346 F. Supp. 3d 769 (W.D. Pa. 2018)

McGrath v. Allstate Ins. Co., 802 N.W.2d 619 (Mich. App. 2010)

Moutry v. Travelers Home & Marine Ins. Co., No. 22-CV-0070-BHL, 2023 WL 2019342 (E.D. Wis. Feb. 15, 2023)

2) **Did Roland Pour, Sr. reside in the home insured by Liberty Mutual Personal Insurance Company at any point during the policy period?**

The district court concluded that the evidence as a whole established that Roland Pour, Sr. had not resided at the subject property since he remarried and moved to Georgia in 2019, more than two years before the subject loss, and that no reasonable jury could find that Pour resided at the subject property either at the time of the fire or at the start of the Policy period.

MOST APPOSITE AUTHORITIES

Progressive Direct Ins. Co. v. Rithmiller, 505 F. Supp. 3d 899 (D. Minn. 2020)

Centre Ins. Co. v. Blake, 370 F. Supp. 2d 951 (D.N.D. 2005).

Gerow v. State Auto Prop. & Cas. Co., 346 F. Supp. 3d 769 (W.D. Pa. 2018)

3) **Did the policy's requirement that the named insured reside in the insured location during the period the homeowners policy was in effect violate the requirements of the Minnesota Standard Fire Insurance Policy**?

The district court concluded that the Minnesota insurance code specifically contemplates that insurers will offer homeowner's policies under which coverage will depend on the uses to which the insured home is put, and that, therefore, a residency requirement for coverage does not violate the Minnesota Standard Fire Insurance Policy.

MOST APPOSITE AUTHORITIES

Minn. Stat. § 65A.01 (2021)

Keelen v. Metro. Prop. & Cas. Ins. Co., No. CIV.A. 11-1596, 2012 WL 1933747 (E.D. La. May 29, 2012)

Slater v. State Farm Fire & Cas. Co., No. 1:09-CV-01437-JOF, 2011 WL 13176733 (N.D. Ga. Jan. 28, 2011), *aff'd*, 450 F. App'x 809 (11th Cir. 2011)

4) **Was coverage illusory because the Declarations page lists an "insured location" rather than a "residence premises"?**

The issue was not specifically raised by Appellants in their district-court briefing, and the district court did not rule on the issue.

MOST APPOSITE AUTHORITIES

Wright v. Newman, 735 F.2d 1073 (8th Cir.1984)

Singleton v. Wulff, 428 U.S. 106, (1976)

5) **Were Roland Pour, Jr. and Kmontee Pour "insureds" as defined under the policy when they did not live in the same household as Roland Pour, Sr.?**

The district court determined that Roland Pour, Sr. and his sons did not "dwell together as a family under the same roof," and were therefore not residents of the same "household." As such, the district court concluded that Kmontee and Roland Pour, Jr. were not "insureds" under the Policy, and were not entitled to coverage for their personal property.

MOST APPOSITE AUTHORITIES

Firemen's Ins. Co. of Newark, N. J. v. Viktora, 318 N.W.2d 704 (Minn. 1982)

Van Overbeke v. State Farm Mut. Auto. Ins. Co., 227 N.W.2d 807 (Minn. 1975)

Tomlyanovich v. Tomlyanovich, 58 N.W.2d 855 (Minn. 1953))

6) **Should the district court's granting of full summary judgment be reversed in part to allow Roland Pour, Sr. to litigate his claim for personal property when (1) Liberty Mutual does not dispute coverage for that portion of the claim, and (2) Mr. Pour, Sr. has not perfected his claim?**

The district court granted full summary judgment because Liberty Mutual does not dispute that Mr. Pour, Sr. is entitled to coverage for his personal property.

MOST APPOSITE AUTHORITIES

Ali v. Cangemi, 419 F.3d 722 (8th Cir. 2005)

Haden v. Pelofsky, 212 F.3d 466 (8th Cir. 2000)

STATEMENT OF THE CASE

I. Relevant Facts

A. Roland Pour, Sr. once lived in Minnesota and purchased homeowners insurance.

At all relevant times, Appellant Roland Pour, Sr. owned a three-bedroom house located at 11637 Nevada Lane in Champlin, MN. (App. 7; R. Doc. 5, ¶4). [1] Prior to February 2019, the subject property was Mr. Pour, Sr.'s primary residence (Aple App. 075; R. Doc. 33-01, p. 9:3-16; Aple App. 104; R. Doc. 33-02 at LMPIC002250), and he lived there with his sons Kmontee and Roland Pour, Jr., and at least one of Kmontee's children. (Aple App. 059; R. Doc. 28-2 at p.25:4-7).

In 2015, at a time that he lived at the subject property, Mr. Pour, Sr. submitted an online application for, and purchased, a Homeowner's Policy from Liberty Mutual. (Aple App. 181; R. Doc. 33-12). That policy, Policy No. H3V24842265040, was renewed annually thereafter and listed the Nevada Lane address as the "insured location" (Aple App. 003; R. Doc. 28-1 at LMPIC000002). The policy in effect on the date of the loss, which incepted on May 15, 2021, had specific definitions for the following terms:

DEFINITIONS

***

[1] Cites "App. 01 to App. 47" are to Appellants' appendix. Cites "Aple App.001 to Aple App-186" are to Appellee's appendix.

4. "Insured location" means:

a. The "residence premises";

b. The part of other premises, other structures and grounds used by you as a residence and:

1) Which is shown in the Declarations; or

2) Which is acquired by you during the policy period for your use as a residence;

***

8. "Residence premises" means:

a. The one family dwelling, other structures, and grounds; or

b. That part of any other building;

where you reside and which is shown as the “residence premises” in the Declarations.

"Residence premises" also means a two family dwelling where you reside in at least one of the family units and which is shown as the "residence premises" in the Declarations.

(Aple App. 009; R. Doc. 28-1 at LMPIC000008).

Because Mr. Pour, Sr. purchased a *homeowner’s* insurance policy, the policy’s coverage is expressly related to, and dependent on, the home being maintained as a “residence premises” as defined under the Policy:

SECTION I - PROPERTY COVERAGES

COVERAGE A - Dwelling

> We cover:
>
> > 1. The dwelling on the "residence premises" shown in the Declarations, including structures attached to the dwelling; and
> >
> > 2. Materials and supplies located on or next to the "residence premises" used to construct, alter or repair the dwelling or other structures on the "residence premises."
>
> This coverage does not apply to land, including land on which the dwelling is located.

(*Id.*). The policy further defines "insured" as follows:

> 3. "Insured" means you and residents of your household who are:
>
> a. Your relatives; or
>
> b. Other persons under the age of 21 and in the care of any person named above.

(*Id.*).

B. Roland Pour, Sr. no longer resides in Minnesota.

At some point after Mr. Pour, Sr. purchased and insured the house in Champlin, he married Orthea Sherman. (Aple App. 076; R. Doc. 33-1 at p.13:10-23). Ms. Sherman has never lived in Minnesota, and Mr. Pour, Sr. testified that he moved from Minnesota to his current residence located at 462 Rebecca Drive in Bethlehem, Georgia in February 2019. (Aple App. 073; R. Doc. 33-1 at p.7:9-11; *see also* App. 9; R. Doc. 5, ¶ 18). After that time, he lived in Georgia full time and

only visited Minnesota occasionally. (Aple App. 078-079; R. Doc. 33-01 at pp.24:13-19, 25:2-15; Aple App. 137; R. Doc. 33-06 at 19:9-21, *see also* Aple App. 111-134; R. Doc. 33-05).

Specifically in 2021 (the year of the fire giving rise to this lawsuit), Mr. Pour, Sr. testified that he only traveled to Minnesota on one occasion prior to the fire, for a family reunion, and during that visit did not stay in the house. (Aple App. 080-081, 083; R. Doc. 33-01 at pp.30:13-31:12; 34:1-10). He also testified that he received no mail at the Champlin address and changed his billing address to Georgia once he moved. (Aple App. 086; R. Doc. 33-01 at p.49:16-24). The primary utilities were changed to Kmontee's name, and Kmontee paid them. (Aple App. 087; R. Doc. 33-01 at p.50:10-12; Aple App. 109; R. Doc. 33-04 at p.76:2-22). Mr. Pour, Sr.'s personal property, including his bed, clothing and other personal belongings, was moved out of the master bedroom and stored in the garage or underneath the stairwell in the interior of the home.[2] (Aple App. 090-092; R. Doc. 33-01 at p.54:18-56:17).

Once more, after Mr. Pour, Sr. moved to Georgia in February 2019, Kmontee invited his mother (one of Mr. Pour, Sr.'s ex-wives) Doris Bartee to move in. (Aple App. 108; R. Doc. 33-04 at p.9:6-18). She did so shortly thereafter and purchased a

[2] And when Mr. Pour, Sr. *did* stay at the home, the most recent time being no later than 2020, he slept in someone else's bedroom and had no bed of his own (other than the one that was stored). (Aple App. 079; R. Doc. 33-01 at p.25:10-15).

separate renter's policy for her own personal property. (Aple App. 093-094; R. Doc. 33- 01 at pp.67:17-68:2, Aple App. 144-154; R. Doc. 33-08). Another of Ms. Bartee's sons, Joseph Wreh, also lived in the home after Mr. Pour, Sr. moved out, and others, including a man named Garmonyou (one of Kmontee's friends), were reported to have lived there at the time of, or at some point shortly before, the subject fire. (Aple App. 100, 104; R. Doc. 33-02 at LMPIC002246, 2250).

C. The subject fire

On or about September 5, 2021, during the early morning hours, a fire started in the backyard of the Champlin home.[3] (Aple App. 141-142; R. Doc. 33-07 at pp.1-2; App. 9; R. Doc. 5, ¶ 25.) The fire spread and destroyed a shed and, eventually, the home's garage. (Aple App. 102; R. Doc. 33-02 at LMPIC002248; Aple App. 141-142; R. Doc. 33-07 at pp.1-2; Aple App. 067-070; R. Doc. 28-7). The fire did not spread further into the house, but it is undisputed that the fire caused smoke damage to the building's contents. (Aple App. 090; R. Doc. 33-01 at p.54:10-14; Aple App. 103; R. Doc. 33-02 at LMPIC002249).

The loss was reported to Liberty Mutual that same day, when Mr. Pour, Sr. called in the loss to Liberty Mutual's toll free number. (Aple App. 105; R. Doc. 33-

[3] After investigating the loss, Liberty Mutual's retained fire investigator concluded the fire was accidentally started from Kmontee Pour's improperly discarded cigarette butts the evening before. (Aple App. 141-143; R. Doc. 33-07; Aple App. 104; R. Doc. 33-02 at LMPIC002250; Aple App. 067-070; R. Doc. 28-7).

02 at LMPIC002251). Mr. Pour advised that he was not at the home and provided the contact information for his son Kmontee. (*Id.*). Liberty Mutual then made all further arrangements with Kmontee to investigate the fire and to inspect the home. (Aple App. 103; R. Doc. 33-02 at LMPIC002249).

At that time, Kmontee indicated that his father no longer lived at the home, but that six other individuals resided there: Bartee (who slept in the master bedroom), Wreh and Pour, Jr. (in the upstairs bedroom), Garmonyou and Kmontee (in the lower-level bedroom), and one of Kmontee's three minor children (in a converted walk-in closet area in the basement). Kmontee provided this information on at least three separate occasions: once to Liberty Mutual desk adjuster Tara Goldman on September 7, 2021 (Aple App. 104; R. Doc. 33-02 at LMPIC002250); again to Liberty Mutual's fire investigator Jeff Washinger at some time prior to September 9, 2021 (Aple App. 141; R. Doc. 33-07 at p.1), and again to Liberty Mutual Personal Property Specialist Matt Alessi on September 13, 2021. (Aple App. 100-101; R. Doc. 33-02 at LMPIC002246-2247).

D. Liberty Mutual's policy position

Based upon the information provided through its discussions with Kmontee and Roland Pour, Sr., Liberty Mutual issued a partial denial of the claim on September 15, 2021. (Aple App. 067-070; R. Doc. 28-7). In it, Liberty Mutual noted the policy definitions articulated above, and stated that since Mr. Pour, Sr. did not

reside in the house, the house could not be considered a covered "residence premises" under the policy. (*Id.* at Aple App. 068-069). It also noted that because Mr. Pour, Sr. did not reside in the same "household" as his two sons during the policy period, Kmontee and Roland Pour, Jr. were not "insureds" as defined under the policy and could not make any insurance claim for personal property.[4] (*Id.* at Aple App. 069).

II. Procedural History

Appellants filed this lawsuit against Liberty Mutual on June 6, 2022. (*See generally* Complaint (R. Doc. 1-1)).[5] The complaint alleges a single cause of action for breach of contract but asserts individual claims by each Appellant within that count: for Roland Pour, Sr., the alleged breach involves a failure to cover the structure (*Id.* at ¶ 47). For each of the other Appellants, the asserted breach is the

[4] Liberty Mutual did, however, acknowledge that Roland Pour, Sr.'s personal property would still be covered, but Mr. Pour ceased all communications with Liberty Mutual and failed to respond to specific queries about the personal property made by the adjuster handling that portion of the claim. (*See* Aple App. 095-096; R. Doc. 33-01 at pp.69:4-70:4). Because of that failure, Liberty Mutual has not yet paid any amounts for his personal property.

[5] The lawsuit was originally brought against Liberty Mutual Insurance Company, a related company to Appellee. (R. Doc. 1-1). Appellants amended their complaint on June 21, 2022 to name the correct defendant, but the allegations in the amended complaint were identical to those brought in the complaint. (*See generally* Amended Complaint (App. 7-15; R. Doc. 5)).

failure to cover personal property and alternative living expenses. (*Id*. at ¶¶ 56-59; 72).

At the close of discovery, the parties filed cross motions for summary judgment. After full briefing and oral argument, the district court, Chief Judge Patrick Schiltz presiding, denied Appellants' motion and granted Liberty Mutual's motion in full. (App. 28-45; R. Doc. 41). First, the court addressed Appellants' contention that the use of "residence premises" in the policy was merely a description of the property at the time the policy was issued, finding the unambiguous language of the policy required actual residency at the time of the loss. (App. 34-36; R. Doc. 41 at 7-9). It then concluded that, when applying Minnesota law to the facts, "no reasonable jury could find that Pour resided at the Champlin house either at the time of the fire or at the start of the Policy period). (App. 41; R. Doc. 41 at 14). The court also rejected the same arguments Appellants make here with respect to the Minnesota Standard Fire Insurance Policy (Minn. Stat. § 65A.01(2021)), finding that the policy's residency requirement "(which is different from requiring that he occupy the home continuously) does not conflict with the Standard Policy." (App. 44: R. Doc. 41 at 17). And once it determined Mr. Pour, Sr. did not reside in the home, the court denied the personal property claims of the other Pour appellants, finding they were not "insureds" as defined under the policy. (*Id.*)

This appeal follows.

SUMMARY OF ARGUMENT

In asserting that coverage should apply, Appellants argue that (1) Mr. Pour's residency was an application-time representation rather than a condition of coverage; and (2) that Liberty Mutual improperly requires an insured's "continuous occupancy" to grant coverage. (App. Brief at 12-20, 27-28). To make these arguments, Appellants largely ignore the express language of the Policy and the facts, and instead base their arguments on archaic case law that interprets inapposite policy language.

Appellants are correct with respect to one thing, however: under Minnesota law, policies must be read as a whole, applying the plain and ordinary meaning of the terms therein to effectuate the intention of the parties. (App. Brief at 11 (*quoting Canadian Universal Co., Ltd. v. Fire Watch, Inc.*, 258 N.W.2d 570, 573 (Minn. 1977)). And under *this* unambiguous homeowner's policy, residency is required to make a property an insurable "residence premises." Moreover, contrary to Appellants' repeated assertions, Liberty Mutual has *never* taken the position that "continuous occupancy" is required for coverage. In fact, Liberty Mutual testified in this case that an insured *can* own, insure, and reside in multiple homes. (Aple App. 157-158; R. Doc. 33-09 at pp.13:7-14:15).

To be clear, this case does not involve a question of "continuous occupancy." Mr. Pour, Sr. failed to actually reside in his Champlin home *at all* after February

2019. The district court, therefore, correctly concluded that "no reasonable jury could find that Pour resided at the Champlin house either at the time of the fire or at the start of the Policy period." (App. 41; R. Doc. 41 at 14). And if Mr. Pour, Sr. did not reside in the home, then the remaining Appellants are not "insureds" as defined under the policy because they do not share a household with him. The district court's judgment, therefore, should be affirmed.

ARGUMENT

I. Standard of Review

An appellate court reviews a grant of summary judgement *de novo*, applying the same standard as the district court. *See Richardson v. Omaha Sch. Dist.,* 957 F.3d 869, 876 (8th Cir. 2020), *cert. denied*, No. 20-402, 2021 WL 2637849 (U.S. June 28, 2021). That is, the Court must grant summary judgment if, "after viewing the evidence and drawing all reasonable inferences in the light most favorable to the nonmovant, no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law." *Johnson v. Carroll*, 658 F.3d 819, 825 (8th Cir. 2011) (*quotation omitted*). A disputed fact is material when its resolution "might affect the outcome of the suit under the governing law," and a factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Once the party moving for summary judgment has informed the court of the basis for its motion and identified "those portions of the record which it believes demonstrate the absence of a genuine issue of material fact," *Jackson v. United Parcel Serv.*, 643 F.3d 1081, 1085 (8th Cir. 2001) (*quotations omitted*), the non-moving party may not rest on mere allegations or denials, but must point to evidence of "specific facts showing that there is a genuine issue for trial." *Anderson,* 477 U.S. at 256; *see also* Fed. R. Civ. P. 56(c)(1). Conclusory assertions, standing alone, are

not enough to create a genuine issue of material fact. *See Bennett v. Nucor Corp.*, 656 F.3d 802, 820 (8th Cir. 2011). Further, "[a]n appellate court can properly consider only the record and facts before the district court and thus only those papers and exhibits filed in the district court can constitute the record on appeal." *Bath Junkie Branson, L.L.C. v. Bath Junkie, Inc.*, 528 F.3d 556, 559–60 (8th Cir. 2008) (*citing Huelsman v. Civic Ctr. Corp*., 873 F.2d 1171, 1175 (8th Cir. 1989); Fed. R. App. P. 10(a)). Summary judgment in favor of a party is appropriate where all credible evidence, taken together, "could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (*quotation omitted*).

II. The policy requires Roland Pour, Sr. to reside in the house to effectuate Dwelling coverage.

Under the express terms of the policy, for coverage to apply for the Champlin house, Roland Pour, Sr. *must actually live* there. Indeed, coverage for a "dwelling" is contingent on the dwelling being the "residence premises." "Residence premises," in turn, is defined as the "one family dwelling, other structures, and grounds," or "[t]hat part of any other building," "*where you reside* and which is shown as the 'residence premises' in the Declarations." (Aple App. 009; R. Doc. 28-1 at LMPIC000008 (*emphasis added*)). Although the house is certainly listed in the Declarations, Mr. Pour, Sr. *did not* reside there. Instead, he testified as follows:

- He moved to Georgia in 2019 after getting married (Aple App. 075-076; R. Doc. 33-01 at pp.9:3-5; 13:13-23; App. 9; R. Doc. 5 at ¶ 18);

- He only visited Minnesota on one occasion in 2021 prior to the fire, and did not stay at the house when he was in the state[6] (Aple App. 080-082; R. Doc. 33-01 at pp.30:17–32:16);

- After moving, one of his ex-wives moved into the master bedroom so he slept in the room across the hall when visiting, and his personal effects were stored. (Aple App 079, 090-092; R. Doc. 33-01 at p.21:18-20; pp.54:18-56:17);

- He did not know all of the individuals who lived in the home at the time of the fire (Aple App. 139; R. Doc. 33-06 at p.26:10-19);

- His driver's license and all his personal bills were transferred to Georgia (Aple App. 073-074, 089; R. Doc. 33-01 at pp.7:18-8:3; 52:6-10);

- All utility bills were transferred to his son's name (Aple App. 109; R. Doc. 33-04 at p.76:2-22; Aple App. 088-089; R. Doc. 33-01 at pp.51:18-52:5);

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[6] Mr, Pour testified that he only visited Minnesota by flying to and from Georgia after his move in 2019, and that his plane tickets produced in discovery were his only visits to the state since leaving. (Aple App. 111-134; R. Doc. 33-05). Mr. Pour produced evidence of six round-trip tickets to Minnesota over nearly three years prior to the fire. (*Id.*). Mr. Pour, Sr. testified that the last time he spent a night in the house was 2020, more than a year before the fire, and he stayed in his son's room. (Aple App. 079, 084-085; R. Doc. 33-01 at pp.25:10-15; 36:17-37:12).

Thus, although Mr. Pour continued to pay the mortgage[7] and property taxes, there is no reasonable dispute that Mr. Pour moved out of the home in 2019 and ceased to "reside" there at any point thereafter. At best, he was an occasional visitor to a house he still owned in which *others* resided. *See, e.g., Gerow v. State Auto Prop. & Cas. Co*., 346 F. Supp. 3d 769, 780 (W.D. Pa. 2018) ("Sporadic visits, only some of which involve spending time at the Subject Property, are simply not enough to create a genuine issue of material fact regarding residency."); *Neary v. Tower Ins*., 94 A.D.3d 725, 725–26, 941 N.Y.S.2d 279, 280 (2012) ("The standard for determining residency for purposes of insurance coverage requires something more than temporary or physical presence and requires at least some degree of permanence and intention to remain.")

Although Appellants are correct that no Minnesota case has directly addressed a similar fact pattern to this, it is well established under Minnesota law that, in determining whether an insurance policy provides coverage, a court must look to the language of the insurance policy itself. *Depositors Ins. Co. v. Dollansky*, 919 N.W.2d 684, 691 (Minn. 2018); *Bobich v. Oja*, 104 N.W.2d 19, 24 (Minn. 1960). The court's "objective when interpreting insurance contracts is to 'ascertain and give effect to the intentions of the parties as reflected in the terms of the insuring contract.'" *Eng'g*

[7] Kmontee conveyed during the inspection that he would sometimes contribute to the mortgage payment as well. (Aple App. 141; R. Doc. 33-07 at p.1, para.2).

& Const. Innovations, Inc. v. L.H. Bolduc Co., 825 N.W.2d 695, 704 (Minn. 2013) (*citing Jenoff, Inc. v. N.H. Ins. Co.*, 558 N.W.2d 260, 262 (Minn.1997)). Where the language of an insurance policy "is clear and unambiguous," a court effectuates the intent of the parties by "interpret[ing] the policy 'according to plain, ordinary sense.'" *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008) (*quoting Canadian Universal,* 258 N.W.2d at 572). And although a court is to resolve ambiguous terms against the insurer, *see Jenoff, Inc*., 558 N.W.2d at 262, a court may not "read an ambiguity into the plain language of a policy in order to provide coverage." *Farkas v. Hartford Accident & Indem. Co.*, 173 N.W.2d 21, 24 (Minn. 1969). When the material facts are undisputed, the question of residence can be resolved as a matter of law by reference to the insurance policy and the facts in the record. *Am. Family Mut. Ins. Co. v. Thiem*, 503 N.W.2d 789, 790 (Minn.1993).

Under the Policy, coverage for the structure itself is only available if the structure is the insured's "residence premises." (Aple App. 009; R. Doc. 28-1 at LMPIC000008). To be a "residence premises," the named insured—that is, the individual named in the declarations page—must reside in the structure. (*Id.*). When Mr. Pour, Sr. ceased to reside in the house, the structure no longer fit the policy's definition of "residence premises."

Courts throughout the country addressing similar facts to this case have consistently found that no coverage applies when an insured does not reside in the

home. *E.g., McGrath v. Allstate Ins. Co.*, 802 N.W.2d 619, 622-23 (Mich. App. 2010) (finding insured's "extended absence" from the property critical "because the phrase 'where you reside' was not used to describe the dwelling but is an independent part of the definition of 'residence premises.'); *Varsalona v. Auto-Owners Ins. Co.*, 637 S.E.2d 64, 67 (Ga. App. 2006) ("the plain language of the Auto–Owners policy … unambiguously required as a condition of coverage that the insureds use the residence premises principally as their private residence"); *Gerow,* 346 F. Supp. 3d at 778 ("The Policy thus clearly makes coverage conditional on at least one of the insureds residing at the Subject Property, and numerous federal courts in the Pennsylvania have interpreted similar policy language in the same way."); *Shepard v. Keystone Ins. Co*., 743 F. Supp. 429, 430–31 (D. Md. 1990) ("The terms 'residence' and 'reside,' as employed throughout the policy, clearly refer to a place that is occupied by the insured as a dwelling place or home, at least on a temporary basis…. Accordingly, it is clear on the face of the policy that the property covered must be a place currently occupied by the insured as his home."); *GeoVera Specialty Ins. Co. v. Joachin*, 964 F.3d 390, 393 (5th Cir. 2020) (residence requirement is "clear and explicit.")

In *Centre Insurance Co. v. Blake*, an insured moved out of the insured premises and began renting it out. 370 F. Supp. 2d 951, 953 (D.N.D. 2005). Although the insured stored some personal items on the premises and made repairs on the

property as a landlord, he did nothing to show that he intended to maintain the property as his residence once he moved out. *Id*. The court rejected the insured's argument that coverage was available under the policy:

> The homeowners policy limited coverage to the residence premises. The applicable provision regarding residence premises in this case includes a two, three, or four family dwelling where the insured "resides" in at least one of the family units.
>
> When an insurance policy fails to define a term, the court will often turn to the dictionary to determine the plain, ordinary meaning of that term. *Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191, 194 (N.D.1998). The plain and ordinary meaning of reside is "to dwell permanently or for a considerable time." Webster's Unabridged Dictionary (2d ed. 1997); *see Heniser* [*v. Frankenmuth Mut. Ins. Co.,* 534 N.W.2d 502, 510 (Mich. 1995)] (stating the term "reside" is clear to most laypersons and the general definition requires actual occupancy). By his own statements, Blake was no longer "residing" at the insured location when the injury occurred. Blake's answers to questions posed to him during his deposition demonstrate that he understood "reside" to have the plain and ordinary meaning of the place where he lived or dwelled permanently.

Blake, 370 F. Supp. 2d at 957. The court then held that "[t]o require the insurance company to provide coverage for property not used as the insured's residence premises would constitute an extension of liability where none previously existed…. Because Blake did not reside at the insured location at the time of the accident, coverage is excluded and Plaintiff is entitled to summary judgment…" *Id*. at 958.

The federal court in *Moutry v. Travelers Home & Marine Ins. Co.*, reached the same conclusion. No. 22-CV-0070-BHL, 2023 WL 2019342, at *2–3 (E.D. Wis. Feb. 15, 2023). There, the court applied Georgia law and concluded that under the "plain terms" of the policy no coverage existed because the plaintiff failed to reside in the house at any time during the policy period:

> It was not absurd for the insurer to require residency as a condition of coverage. By using the property as a rental rather than a residence, Moutry exposed himself to different risks, which (had he properly informed his insurer) likely would have necessitated a higher premium, as typically attaches to rental rather than residential properties.

Id. at *4.

Here, although Mr. Pour, Sr. did not formally use his Champlin home as a rental, his failure to reside in the home—and his allowing others to do so without him—similarly altered the risk for Liberty Mutual in a manner inconsistent with a homeowner's policy. Indeed, at the time the loss occurred, somewhere between six and eight people lived in the three-bedroom house, and Mr. Pour, Sr. was not even aware of who, exactly, was living there. (Aple App. 138-139; R. Doc. 33-06 at pp.25:4-26:19). And with Liberty Mutual unaware of the additional house dwellers, and unaware that Mr. Pour was not one of those dwellers, it could have been exposed to significant additional liability than contemplated at the inception of the policy. *See Moutry,* 2023 WL 2019342, at *4.

A. "Residence premises" is a defined term, not a "representation at the time of application."

With that policy framework in mind, Appellants' current arguments that the applicable language is a "representation about the Champlin home at the time it is insured" is unavailing. (App. Brief at 12-20). As an initial matter, as the district court correctly noted, Mr. Pour, Sr. did not reside in the home at the time the policy incepted either. (App. 36; R. Doc. 41 at 9). As such, whether the policy required Mr. Pour, Sr. to reside in the Champlin house on May 15, 2021 or September 5, 2021 is largely irrelevant, as he did not reside there on either date. (*Id.*)

But setting aside the fact that Mr. Pour, Sr. never resided in the home during the policy period, the Minnesota cases cited by Appellants in their brief (all of which are more than one hundred years old) are unavailing. The Policy's "residence premises" language is not "a verbal or written statement made *by the assured* to the underwriter," as was the case in *Aetna Ins Co. v. Grube*, 6 Minn. 82 (Minn. 1861) (emphasis added). Rather, this is express language from *the insurer,* within the body of the policy, defining the property Liberty Mutual would insure. Similarly, the language at issue in this policy is not related to the description of mobile equipment (such as in *Everett v. Continental Ins. Co*., 21 Minn. 76 (Minn. 1874)), or of a building used for more than one purpose (such as in *Frost's Detroit Lumber Works v. Millers' Mut. Ins. Co.*, 34 N. W. 35 (Minn. 1887)). Rather, the express language of *this* policy provides coverage for the "residence premises," and the definition of

"residence premises" comprises the buildings and structures where the named insured *resides*.[8] (Aple App. 009; R. Doc. 28-1 at LMPIC000008).

Indeed, it is the *express language* in the Policy that also distinguishes it from those of the cases cited by Appellants to suggest it is a description rather than a "condition of coverage," such as *Ins. Co. of North American v. Howard*, 679 F.2d 147 (9th Cir. 1982), *Reid v. Hardware Mut. Ins. Co. of Carolinas*, 166 S.E.2d 317, 321 (S.C. 1969), and *Alvarez v. Country Mut. Ins. Co.*, 833 F. App'x 459 (9th Cir. 2021)(unpublished).[9] None of those cases have the same language as the policy, at

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[8] Appellants attempt to insert ambiguity into the policy by suggesting that the coverage in Section D "uses the phrase 'where you reside' inconsistently" with other sections in the policy. (App. Brief at 20). But this is not the case: Appellants ignore that Section D addresses "***that part of the*** 'residence premises' where you reside." (Aple App. 011; R. Doc. 28-1 at LM000010). The definition of "residence premises" includes not only single-family dwellings, but also two-family dwellings and any other buildings used as residences. (Aple App. 009; R. Doc. 28-1 at LM000008). The "Loss of Use" coverage in Section D.1 covers only *that part of* those structures in which the named insured resides. (Aple App. 011; R. Doc. 28-1 at LM000010). The term's usage in the policy, therefore, is not inconsistent as all such structures require residency for coverage, but Section D.1's coverage is limited to the building or part of the building specifically used by the named insured as a residence. (*Id.*). So for example, if a named insured owned and lived in a duplex and the unit in which the insured did *not* live suffered damage from a covered cause of loss, the building's structural damage would be covered, but no "loss of use" coverage would be available under Section D.1 because "that part of the 'residence premises' where [the insured] reside[s]" was still "fit to live in." (*Id.*). Any such coverage would need to be claimed under Section D.2, which covers loss of use for "that part of the 'residence premises' rented to others." (*Id.*)

[9] It should also be noted that *Howard* and *Alvarez* both derive from federal or state courts in Oregon and apply Oregon's case law to hold that "if an insurance company wishes to have a homeowner's policy terminate upon rental of his home, it must so

issue here, which expressly includes residency in its definition of the insured location. This is a distinction expressly noted by the Michigan Supreme Court when evaluating similar policy language to the policy here:

> The policy language, and the context in which the language is found in the policy before us, differs from that in either *Reid* or *Howard*. The language at issue is found in the definitions section. "[W]here you reside" is not used to describe the dwelling but is an independent part of the definition of "residence premises." To be a "residence premises" the insured must reside at the insured premises and the property must be shown as the residence premises in the declarations portion of the policy.
>
> Were we to accept the argument that this definition is merely an affirmative warranty, we would freeze coverage at the time the policy is entered into and render subsequent events irrelevant.

Heniser v. Frankenmuth Mut. Ins. Co., 534 N.W.2d 502, 507–08 (Mich. 1995); *see also* App. 35-36; R. Doc. 41 at 8-9 ("the relevant language in the Policy ('where you reside') is materially different from the relevant language in *Howard* ('owned and occupied')").

Much like *Heniser,* to be a "residence premises" under the Liberty Mutual policy, the insured must reside at the insured premises. And absent such residence,

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provide explicitly and unambiguously in the policy of insurance." *Alvarez*, 833 F. App'x at 459. These rulings do not appear to have been adopted in any other jurisdiction, and in fact they have been expressly or impliedly rejected. *See Kelly v. Metro. Grp. Prop. & Cas. Ins. Co*., 810 F. App'x 377, 383 (6th Cir. 2020); *Heniser,* 534 N.W.2d at 507–08; *Moutry,* 2023 WL 2019342 at *2–3.

(1) the property is not considered a "residence premises" providing Dwelling coverage, and (2) others living in the home cannot be considered "insureds." (Aple App. 009; R. Doc. 28-1 at LMPIC000008). To suggest otherwise would allow an insured to use the property for any purpose he or she wanted, after the date of application (which, in this case, was *years* before he moved out and the fire occurred), regardless of how that use affected the risk for the insurer. The district court correctly concluded that such a result "makes no sense." (App. 36; R. Doc. 41 at 9).

Put plainly, Liberty Mutual accepted the risk based upon the representation that Mr. Pour, Sr. resided in the home, and, more importantly, its policy is expressly written to cover losses for a home in which Mr. Pour, Sr. resides. Because he does *not* reside in the home, the policy does not cover the damages at issue in this lawsuit.

B. Liberty Mutual does not require "continuous" occupancy for coverage to apply.

In asserting that coverage should apply, Appellants argue, as they did to the district court, that Liberty Mutual insists on an insured's "continuous occupancy" to grant coverage and go so far as to erroneously suggest that under Liberty Mutual's interpretation of its policy, anyone with multiple homes cannot insure *any* of them because none of them would be a 'residence premises' as Liberty Mutual defines the

term. (Brief at 27).[10] The sole problem with Plaintiffs' assertion, however, is that Liberty Mutual has never taken such a position. In fact, Liberty Mutual testified in this case that an insured can own, insure, and reside in multiple homes. (Aple App. 157-158; R. Doc. 33-09 at pp.13:7-14:15).[11] This case, however, does not involve a

[10] Liberty Mutual fully recognizes that its policy distinguishes between principal and other residences in certain provisions to limit certain types of coverage depending on the property's usage. (*See, e.g.,* App. Brief at 22). This language, however, has no bearing on the circumstances of this case, as no evidence exists that Mr. Pour, Sr. used the Champlin house as a primary *or* secondary residence.

[11] Appellants contend that "Liberty Mutual's policy does not state any length of time or number of days which an insured must 'reside' in the home," and that therefore it is "free to deny claims for all its insureds based on arbitrary time requirements for cabin owners and 'snowbirds.'" (App. Brief at 28). Setting aside for a moment that no reasonable trier of fact would find that Mr. Pour, Sr. still resided in the home at the time of the loss under *any* criteria, (App. 39-41; R. Doc. 41 at 12-14), Appellants had the opportunity to ask what criteria Liberty Mutual uses to determine residency during Liberty Mutual's Rule 30(b)(6) deposition, having listed several topics that would have allowed them to do so, but failed to make any such inquiries. (Aple App. 184-186; R. Doc. 39-7). Had they asked, they would have learned that rather than pointing to any specific duration of physical presence, Liberty Mutual considers all information and documentation they obtain during the course of each separate claim investigation to determine residency, evaluating each claim based upon its individual facts. While the following is not an exhaustive list, some examples of facts that Liberty Mutual considers are how often an insured stays there, the insured's intended use of the property, whether the named insured receives mail at the location, keeps a vehicle there, has a bedroom in the residence, and whether personal belongings are being utilized within the living space (and not simply being stored in non-living spaces, such as garages, attics, and storage spaces). (Aple App. 183; R. Doc. 39-5 at ¶¶ 6-7). Liberty Mutual's residency considerations are, in fact, quite similar to the facts a Minnesota court considers in determining whether a family member "resides" in a policyholder's home for liability coverage purposes. *See, e.g, Progressive Direct Ins. Co. v. Rithmiller*, 505 F. Supp. 3d 899, 904–07. (D. Minn. 2020).

question of "continuous occupancy"; rather, Mr. Pour, Sr. failed to actually reside in his Champlin home *at all* after February 2019.

Because Appellants misstate Liberty Mutual's coverage position, the cases cited to contradict the position (again, a position Liberty Mutual has never actually taken) are factually distinguishable. In *FBS Mortg. Corp. v. State Farm Fire & Cas. Co*., the fire occurred while the insured was incarcerated, but there was no dispute that his absence was temporary, and he intended to return upon release. 833 F. Supp. 688, 693–94 (N.D. Ill. 1993). *Ins. Co. of North America v. Howard* involved not only different policy language (as further explained above), but different facts: a recently widowed insured temporarily leased her home while she grieved, and contemplated her future, in Florida. 679 F.2d at 148-149.

All of these cases involve situations where an insured either maintained a physical presence at the residence, or their absence from the property was temporary. Such is not the case here, where Mr. Pour, Sr. has not expressed any specific intent to further reside in the home.

The Sixth Circuit in *Kelly v. Metro. Grp. Prop. & Cas. Ins. Co*. recognized this distinction in a case in which an insured *permanently* moved from the insured location:

> [In *Howard*], the Ninth Circuit held that "[a] recent widow who leases her home for a one-year period (with or without a 30 day cancellation provision) while she attempts to resolve her future plans has certainly not gone

> into the business of renting homes. Her action was a temporary expedient and constituted an occasional rental." The court observed that the homeowner had testified at her deposition that she rented her home "because she had intended to visit Florida and did not want the house to be vacant for any length of time. She also testified that she did not want to give up her home and had not made any final decision whether to do so." ... Kelly, by contrast, has not testified to comparable facts. Rather than merely intending to "visit [Ohio]," Kelly has relocated there. While her motivations may be similar—Kelly, like the homeowner in *Howard*, purportedly did not want her house to be vacant—the indefinite nature of Floyd's rental, its length (much more than "a one-year period"), and Kelly's relocation to Ohio, suggest that it was not a "temporary expedient."

810 F. App'x 377, 383 (6th Cir. 2020).[12]

Here, rather than some temporary visit to another state, Mr. Pour, Sr. admits that he now lives in Georgia, moved his belongings there, and did not stay in the home *at all* in the year leading up to the fire. (Aple App. 001; R. Doc. 8; Aple App.

[12] In the briefing before the district court, Appellants faulted Liberty Mutual for citing cases involving "vacant and unoccupied homes, homes where the insureds never lived, and properties rented to third-parties" because house was occupied (albeit not by Mr. Pour, Sr.) by family members. (R. Doc. 36 at pp. 6-10). Appellants' attempt to distinguish these cases by placing them into certain categories, however, misses the broader point: the cases Liberty Mutual cites involve situations where an insured, regardless of the reason, did not reside in the home at the time of the loss. (*See* Section II, supra, pp. 21-24*; see also* R. Doc. 32 at pp. 11-14). It is unclear why Appellants believe that allowing individuals to continue to live in the home rent free after the named insured moved out should distinguish this lawsuit from cases where individuals pay rent (*see* R. Doc. 36 at pp. 9-10) or why a rent-free arrangement should qualify Appellants for an exception to the Policy's express residency requirement, and Appellants did not provide any explanation or authority suggesting such a distinction should be made.

083; R. Doc. 33-01 at p.34:1- 10). This is not, therefore, a case in which Mr. Pour, Sr. is claiming coverage for a secondary residence; he is instead seeking coverage for a house in which he no longer resides. And much like *Kelly*, Mr. Pour, Sr. has allowed others—including his ex-wife and one of her children—to live there in his stead. (Aple App. 077; R. Doc. 33-01 at p.17:10-25; Aple App. 138-139; R. Doc. 33-06 at pp.25:4-26:19). Because the undisputed evidence demonstrates that Pour, Sr. did not reside in the home at any point during the policy period, much less at the time of the fire, the home did not qualify as a "residence premises" under the terms of the policy and therefore there can be no coverage for the Dwelling. (Aple App. 009; R. Doc. 28-1 at LMPIC000008).

III. The Policy is consistent with the Minnesota Standard Fire Insurance Policy.

Appellants also rely upon their incorrect contention that Liberty Mutual "requires the named insured, Roland Pour, Sr., to continuously live at the Champlin home" to suggest that the Policy violates "essential public policy." (App. Brief at 30). Again, Liberty Mutual has never stated that "continuous occupancy" is required for coverage. (*See* Section II.B, *supra*). And as the district court correctly noted, "[b]ecause the Policy does not require continuous occupancy, the Policy does not conflict with the occupancy language in the Standard Policy." (App. 42; R. Doc. 41 at 15).

Indeed, nothing in the Minnesota Standard Fire Insurance Policy addresses residency requirements; that is to say, nothing in Minn. Stat. §65A.01 dictates that a fire insurance policy cannot limit coverage to buildings used for certain purposes. Although Minn. Stat. §65A.01 defines the *extent* of coverage Liberty Mutual must provide, Liberty Mutual still maintains a right to sell insurance products based upon a property's usage or type of risk involved. By way of example, homeowners policies insure property in which insureds reside, "landlord" policies insure residential properties that insureds rent (or are occupied by someone other than the insured) (*see* Aple App. 164-180; R. Doc. 33-11), commercial policies cover commercial property, and renters policies cover the personal property of renters. For that reason, Liberty Mutual offers different types of policy products, all of which comply with Minn. Stat. §65A.01, yet they are intended to insure distinct types of property or risks.

In *Keelen v. Metro. Prop. & Cas. Ins. Co*., No. CIV.A. 11-1596, 2012 WL 1933747 (E.D. La. May 29, 2012), an insured made a similar argument to the one made here, suggesting that a homeowner's policy containing a similar residency requirement violated a comparable Louisiana Standard Policy (La.Rev.Stat. § 22:1311) because it did not provide coverage for a home the insured rented (but in which he did not reside). The court specifically examined one of the two cases cited by Appellants in support of their "public policy" argument, *Dixon v. First Premium*

Ins. Grp., 934 So. 2d 134 (La. App. 2006), and rejected any inference that the Standard Policy's exclusion for abandonment after 60 days conflicted with that policy's residency requirement:

> The thrust of *Dixon* was the vacancy issue; here, it is the residence requirement. Furthermore, *Dixon* does not offer a persuasive reason why the sixty-day grace period for vacancy/occupancy should supersede the personal residence requirement in the policy. Insurance policies that "are not equivalent to or do not exceed the terms of the standard fire policy" have the terms of the standard policy incorporated by operation of law. La.Rev.Stat. § 22:1313(B), (C). But there is no term in the Standard Policy that relates to residence requirements; that is to say, nothing in § 22:1311(F) dictates that a fire insurance policy cannot limit coverage to buildings used for certain purposes. Section 22:1311(F) excludes coverage for loss when a building "whether intended for occupancy by owner or tenant" is vacant for more than sixty days; the Standard Fire Insurance Policy clearly contemplates that insurance policies may cover buildings occupied by their owners or by tenants, but it does not mandate that policies cover both situations. Hence, it is a common and unquestioned practice that insurers issue different policies for dwellings depending on whether the property owner lives at the property (a homeowners' policy) or rents it (a rental dwelling policy)….*Dixon* ignores this framework and ignores the very language that makes a policy a homeowners' policy, as compared to a rental dwelling policy. To interpret *Dixon* as Plaintiff suggests would create rental dwelling coverage where none exists or was intended in direct contravention to the unambiguous language of the policy. That is a radical proposition, and the Court has not found any case that has followed *Dixon* on this point. The Court is convinced that the Louisiana Supreme Court would not follow *Dixon* and would not hold that the sixty-day vacancy provision in the Standard

> Fire Insurance Policy supersedes the "residence premises" requirement in the policy at issue here.

Keelen, 2012 WL 1933747, at *6 (citations omitted).

Indeed, although *Dixon* has not been formally overturned, no Louisiana appellate court has ever cited *Dixon* for this holding since its issuance eighteen years ago.[13] And contrary to any inference Appellants attempt to assert from *Dixon*, Louisiana court decisions and statutes continue to recognize residency and other usage requirements in policies issued in that state. *See Y'Barbo v. Diamond*, 770 So.2d 891, 895 (La. App. 2000) ("A rental dwelling policy is designed to provide insurance coverage to the owners of property that is rented to others (or held for rental) rather than the lessees of property."); La.Rev.Stat. § 22:47(15) ("Homeowners' Insurance. A policy of insurance on a one- or two-family *owner*-occupied premises ...."") (*emphasis added*); *see also Stills v. Mims*, 973 So.2d 118, 121 (La. App. 2007) ("The removal of the risks associated with business enterprises or rental properties helps to lower the rates of homeowner's insurance by eliminating non-essential coverages.")

[13] Conversely, at least two cases have cited *Keelen* and its holding favorably. *See Kennett v. USAA Gen. Indem. Co.*, No. CV 16-14765, 2019 WL 3081668, at *4, n.20 (E.D. La. July 15, 2019), *aff'd*, 809 F. App'x 228 (5th Cir. 2020); *GeoVera Specialty Ins. Co. v. Joachin*, No. CV 18-7577, 2019 WL 8273471, at *10 (E.D. La. June 28, 2019), *aff'd*, 964 F.3d 390 (5th Cir. 2020)

The sole remaining case cited by Appellants in support of their statutory argument, *FBS Mortg. v. State Farm Fire & Cas. Co*., 833 F. Supp. 688 (N.D. Ill. 1993), is equally inapposite. One could certainly argue that the portion of the decision involving the Standard Policy is *dicta*, given that the court had already resolved the issue of residency before reaching its conclusion on that issue, and making its Standard Policy ruling "alternatively." *Id.* at 695. But even accepting the holding as something *more* than dicta, the ruling was based upon State Farm's unique interpretation of the residency provision in its homeowner's policy, which "denie[d] coverage in the absence of continuous, physical inhabitation of the Insured Premises by the Named Insured at the time of loss." *Id.* That interpretation, according to the court, "broadens the Standard Policy's exclusions by requiring physical occupation of the Insured Premises for a period of less than 60 days before the loss." *Id.*

Perhaps *this* is why Appellants argue so strenuously (yet incorrectly) that Liberty Mutual required Mr. Pour, Sr. to "continuously live" in the home. (App. Brief at 27, 30-31). But Liberty Mutual has never argued that "continuous, physical inhabitation of the Insured Premises by the Named Insured" is necessary for coverage. What *is* required is the named insured's use of the home in some fashion as his or her "residence." In other words, for homeowner's coverage to apply, the insured *must actually treat* the property as his or her home.

Thus, this case is readily distinguishable from *FBS*, where the only reason for the insured's temporary absence was his incarceration. He otherwise maintained the home as his primary residence and, therefore, State Farm's position that a named insured's "continuous *physical* inhabitation" was required for insurance under those circumstances conflicted with the Standard Policy's occupancy provisions. *FBS*, 833 F. Supp. at 695. Here, Mr. Pour failed to retain residency at the Champlin home in any meaningful way and has expressed no intent to reside in the home in the future. The fact that Liberty Mutual requires a homeowner to use the property as *his home* for homeowners' coverage to apply, even if only on a part-time basis, does not conflict with or invalidate the coverage mandated under the Standard Policy; instead, like any other policy, the requirement prescribes how the property may be used. *See Slater v. State Farm Fire & Cas. Co*., No. 1:09-CV-01437-JOF, 2011 WL 13176733, at *5–6 (N.D. Ga. Jan. 28, 2011), *aff'd*, 450 F. App'x 809 (11th Cir. 2011) (rejecting the reasoning of *FBS* and finding no residency under the facts of the case). In other words, unlike *FBS*, Liberty Mutual is not denying coverage based upon the lack of the named insured's "continuous inhabitation" of the Champlin house; instead, it is denying coverage because he does not use the house as a "residence premises." (Aple App. 067-070; R. Doc. 28-7 at LMPIC000572-575).

Put simply, there is a clear distinction between the insurance *product* an insurance company provides (and the requirements to obtain coverage for that

product), and the *coverage* that must be provided under the Standard Policy once that product has been issued. *Keelen,* 2012 WL 1933747 at *6. Liberty Mutual's requirement that a home be used as the named insured's "residence premises" is sensible and reasonable for its homeowner's product and does not conflict with the occupancy language of Minn. Stat. § 65A.01.[14] To suggest otherwise would be a "radical" deviation from standard insurance practice that would effectively blur any distinction between the different insurance products Liberty Mutual (or any other insurance carrier) provides, and (1) impede an insurer's ability to underwrite and value risk; and (2) require insurers to provide coverage for a "residence premises" in which the insured does not reside (or uses for purposes other than residency), in direct contravention to the Policy's express terms and conditions. Appellants' argument notwithstanding, such a determination would not be in the public interest, as an underwriting company would not be able to distinguish between homeowners, landlord or dwelling, or commercial property policies, and therefore all property policy premiums would need to be calculated based upon the property being used for any purpose. No court of any jurisdiction has interpreted the Standard Fire Policy form so broadly, nor should it, as "public policy" would not favor it.

[14] And to be clear, this property can be either a primary or secondary home, but an insured still has to *reside* there. (Aple App. 009; R. Doc. 28-1 at LMPIC000008).

IV. The coverage provided was not illusory

Appellants next contend that the policy is "illusory," not because of the residency requirement (as they suggested in their underlying briefing) (*see* R. Doc. 36 at 5), but because the words "residence premises" are not expressly used in the declarations page. (App. Brief at 23-24). According to Appellants, this means there is "no coverage for the Champlin home no matter who resides there or how long they reside there." (*Id.* at 24). As Appellants acknowledge, this was not an argument they raised to the district court, and as such it should not be considered here. *Wright v. Newman*, 735 F.2d 1073, 1076 (8th Cir. 1984); *see also Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Seniority Research Grp. v. Chrysler Motor Corp.*, 976 F.2d 1185, 1187 (8th Cir. 1992) ("Normally, a party may not raise an issue for the first time on appeal as a basis for reversal.").

But even if this Court were to consider this new argument, it is not persuasive. As an initial matter, Liberty Mutual has never taken the position that the policy does not provide dwelling coverage because of the property's description in the Declarations page. Its position is based upon Mr. Pour, Sr.'s *failure to reside* at that location. (Aple App. 067-069; R. Doc 28-7). Moreover, the Declarations page's use of the term "Insured Location" instead of "residence premises" does not create the

"illusory" coverage Appellants argue. Specifically, "Insured Location" is expressly defined in the Policy as well:

> **4.** "Insured location" means:
>
> a. The "residence premises";
>
> b. The part of other premises, other structures and grounds used by you as a residence and:
>
> (1) Which is shown in the Declarations; or
>
> (2) Which is acquired by you during the policy period for your use as a residence;
>
> c. Any premises used by you in connection with a premises in 4.a. and 4.b. above;
>
> d. Any part of a premises:
>
> (1) Not owned by an "insured"; and
> (2) Where an "insured" is temporarily residing;
>
> e. Vacant land, other than farm land, owned by or rented to an "insured";
>
> f. Land owned by or rented to an "insured" on which a one or two family dwelling is being built as a residence for an "insured";
>
> g. Individual of family cemetery plots or burial vaults of an "insured"; or
>
> h. Any part of a premises occasionally rented to an "insured" for other than "business" use.

(Aple App. 009; R. Doc. 28-1 at LMPIC000008). In other words, the "Insured Location" comprises the policy's defined term "residence premises" and adds other

structures in which a named insured resides. (*Id.*) In this case, then, the terms are synonymous and interchangeable because the "insured location" *is* the "residence premises," and therefore if it is shown as the "insured location" in the Declarations, then it is also "shown as the 'residence premises' in the Declarations." The court should not reverse the district court's decision on an issue of semantics that was never previously raised. *See Seniority Research Grp.*, 976 F.2d 1185 at 1187.

V. Roland Pour, Jr., Kmontee Pour, and Kmontee Pour's children are not "insureds" under the Policy.

Appellants next argue that "Kmontee Pour and Roland Pour, Jr. were insureds under Liberty Mutual's Policy." (App. Brief at 34). But if Roland Pour, Sr. does not "reside" in the home, then his children and grandchildren cannot make a claim for their personal property because they are not "insureds" as the Policy defines that term:[15]

> 3. "Insured" means you and residents of your household who are:
>
> a. Your relatives; or
>
> b. Other persons under the age of 21 and in the care of any person named above.

[15] In a footnote, Appellants note that Liberty Mutual's declination letter did not address personal property. (App. Brief at 34, n. 6). Although true, at the time of the denial Appellants had not made any specific claim for personal property for any of Mr. Pour's family members. (*See* Aple App. 095-096; R. Doc. 33-1 at pp.69:4-70:4). The itemization of Appellants' personal property was not submitted until the expert-discovery phase of litigation.

(Aple App. 009; R. Doc. 28-1 at LMPIC000008). Minnesota courts have determined that the phrase "resident of your household" is unambiguous, and as Appellants note, those courts have used the following three-factor test for determining whether a person is a resident of a named insured's household:

> (1) Living under the same roof;
>
> (2) in a close, intimate and informal relationship; and
>
> (3) where the intended duration is likely to be substantial, where it is consistent with the informality of the relationship, and from which it is reasonable to conclude that the parties would consider the relationship " * * * in contracting about such matters as insurance or in their conduct in reliance thereon."

Mut. Serv. Cas. Ins. Co. v. Olson, 402 N.W.2d 621, 623–24 (Minn. App. 1987) (*citing Firemen's Ins. Co. v. Viktora*, 318 N.W.2d 704, 706 (Minn. 1982); *Skarsten v. Dairyland Ins. Co.*, 381 N.W.2d 16, 19 (Minn. App. 1986)).

Here, Mr. Pour, Sr.'s children and grandchildren fail to qualify as residents of his household for one key reason: they do not live under the same roof as Mr. Pour, Sr.[16] And if they are not "residents of his household," they are not insureds and

[16] In fact, one of the residents of the household, Doris Bartee, has a tenant policy under which it appears that at least one of the named Appellants here has made a separate claim as an insured. (*See* Aple App. 144-154; R. Doc. 33-08, Aple App. 162; R. Doc. 33-10 at p.84:18-22). Under that policy, because Ms. Bartee actually resides in the household, her children would presumably be considered insureds.

cannot make a claim under the policy. (Aple App. 009; R. Doc. 28-1 at LMPIC000008).

Appellants' arguments in favor of finding "insured" status for all of Mr. Pour, Sr.'s relatives who currently reside in the Champlin house, regardless of where Mr. Pour himself resides, make no reference to the Policy language.[17] Again, the Policy requires that a relative actually share a household with the named insured in order to be considered an "insured" as well. (Aple App. 009; R. Doc. 28-1 at LMPIC000008). The *Skarsten* case cited by Appellants did not address whether the *named insureds* resided in the home, which was not a disputed issue in the case. Rather, the *Skarsten* court examined the daughter's relationship to the property to determine if she continued to "reside" there (she returned there at least once a month, had her own room, her parents named her as a dependent on tax returns, she received mail there, and considered it her permanent address), and concluded the evidence

[17] Instead of addressing the Policy's definition of "insured," Appellants make a confusing and inaccurate argument that because Roland Pour, Sr. was denied coverage for the building he was somehow no longer a "named insured" and, as such, "there can be no insureds under the policy." (App. Brief at 36). Continuing this argument, Appellants assert that "if Roland Pour, Sr. is covered as a 'named insured' under Liberty Mutual's policy, his Champlin home is a 'residence premises' and therefore, Kmontee Pour and Roland Pour, Jr., are also entitled to coverage." (*Id.*) Of course, Roland Pour, Sr. can be, and *is*, a "named insured" under the Policy regardless of whether the structure is covered property; as Appellants concede elsewhere the Policy still provides personal property coverage for him. *(See, e.g.*, *id.* at 3, 6, 8, 38). The fact that he chose to move does not negate other of the Policy's terms and conditions that are unaffected by residency requirements.

supported "residency" at that location. *Skarsten v. Dairyland Ins. Co.*, 381 N.W.2d 16, 18 (Minn. App. 1986).

Here, the issue is *not* whether Mr. Pour, Sr.'s two sons reside in the home. That issue is undisputed. The issue is whether *Mr. Pour, Sr*. resides there. He does not. And since he does not reside there, he does not share a "household" with his children as contemplated under Minnesota law—or under any generally accepted definition of that term—at any time during the Policy period. *See, e.g., Viktora*, 318 at 707 (defining household as "including those who dwell together as a family under the same roof") (*citing Van Overbeke v. State Farm Mut. Auto. Ins. Co*., 227 N.W.2d 807, 810 (Minn. 1975); *Tomlyanovich v. Tomlyanovich*, 58 N.W.2d 855 (Minn. 1953)); *see also* https://www.merriam-webster.com/dictionary/household (defining "household" as "those who *dwell under the same roof* and compose a family") (*emphasis added*)). Therefore, under the policy, whether Appellants share an "informal relationship" is irrelevant if they do not actually live together. Summary judgment in favor of Liberty Mutual on the claims brought by Roland Pour, Jr. and Kmontee Pour was therefore proper.

VI. The court property granted full summary judgment

Finally, Appellants fault the district court for granting full summary judgment when Mr. Pour, Sr. has not yet been paid for the damage to his personal property. (App. Brief at 38). But as Appellants have acknowledged, Liberty Mutual does not

dispute that the policy provides such coverage, as it provides personal property coverage for the named insured, subject to the policy's terms and conditions, "anywhere in the world." (Aple App. 010; R. Doc. 28-1 at LMPIC000009). As such, a question certainly exists as to whether a "case or controversy" actually exists with respect to this particular issue. *See, e.g.*, *Ali v. Cangemi*, 419 F.3d 722, 723 (8th Cir. 2005) (citing *Haden v. Pelofsky*, 212 F.3d 466, 469 (8th Cir. 2000) (cases no longer satisfy the case-or-controversy requirement when they "lose their life" and a justiciable dispute no longer exists).

With that said, Mr. Pour ceased all communications with Liberty Mutual several months prior to his filing of this lawsuit and failed to respond to specific queries about the personal property made by the adjuster handling that portion of the claim. (*See* Aple App. 095-096; R. Doc 33-01 at pp.69:4-70:4). Appellants did not present their evidence of personal property until the expert-discovery stage, and once the district court issued its ruling Liberty Mutual attempted to pay Mr. Pour, Sr.'s personal property claim. That effort was stalled because Appellants delayed their response to questions about certain line items in the estimate that are not attributed to any single individual. It is only because of that failure that Liberty Mutual has not yet paid for Mr. Pour's personal property to date.[18]

[18] Arguably, Liberty Mutual could have denied Mr. Pour, Sr.'s personal property claim for failure to cooperate and failure to present his claim. (*See* Aple App. 022-023; R. Doc. 28-1 at LMPIC000021-22). But Liberty Mutual is not taking that

Put simply, the district court did not err in granting summary judgment because no dispute actually exists on the issues of Mr. Pour, Sr.'s personal property. Liberty Mutual intends to pay for that personal property once Mr. Pour, Sr. addresses the deficiencies in his claim presentation. Reversal is therefore not warranted.

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position at this time; it reserves the right to do so, however. With that stated, Mr. Pour on July 10, 2024 presented additional documentation in support of his personal property claim. Liberty Mutual is currently reviewing those documents.

CONCLUSION

In this case, other than still owning the property, Mr. Pour, Sr. did not come close to meeting any criteria that would establish residency. He simply moved out of the home in 2019 and ceased to reside there. At the time he moved—or any time thereafter—he could have sought the "dwelling" coverage provided by endorsement for owners of property that do not reside there, but he did not do so. (Aple App. 164-180; R. Doc. 33-11). Mr. Pour's failure to make any changes to his coverage upon his change in residency affected how the policy treated the Champlin property, as well as those who remained (or moved into) in the home.

The district court correctly concluded that (1) because of the express language in the Liberty Mutual policy, residency was required for dwelling coverage to apply, (2) no reasonable factfinder could conclude that Mr. Pour, Sr. resided at the Champlin house, (3) the residency requirement does not violate Minnesota statute, and (4) because Mr. Pour, Sr. did not reside in the Champlin house, the remaining appellants do not qualify as "insureds" under the policy. The judgment, therefore, should be affirmed in its entirety.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure the counsel for appellee, Liberty Mutual Personal Insurance Company, hereby certifies that this brief complies with the requirements of Fed. R. App. P. 32(a)(7)(B) in that it is printed in a 14-point, proportionately spaced typeface (Times New Roman) utilizing Microsoft Office Word 365 and contains 11,158 words, including headings, footnotes and quotations, but excluding the cover page, disclosure statement, table of contents, table of authorities, statement regarding oral argument, certificate of counsel, proof of service, and the signature block.

Under 8th Cir. R. 28A(h)(2) counsel also certifies that this brief has been scanned for viruses and is virus free.

DATED: July 15, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2024, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/*Daniel W. Berglund*
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