

IN THE SUPREME COURT OF TEXAS

=====
No. 98-0661
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TEXAS FARMERS INSURANCE COMPANY, PETITIONER

v.

DAISY MURPHY, RESPONDENT

=====
ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS
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Argued on January 14, 1999

JUSTICE ENOCH, joined by JUSTICE OWEN, dissenting.

The issue the parties brought to this Court is whether post-arson division of community property allows an innocent spouse to recover insurance proceeds that she would otherwise not be entitled to recover. Confusing this issue, the Court instead appears to abandon the long-standing public policy, never questioned before this case, that an arsonist cannot benefit from his crime. I dissent.

In this case, the insurance policy's concealment/fraud clause unambiguously bars coverage for all insureds if any insured commits fraud or intentionally conceals or misrepresents a material fact. Had Farmers asserted the concealment/fraud provision as a defense to coverage, that provision would have prevented both Daisy and Robert from recovering any benefits under the policy because Robert's filing a claim on property that he deliberately destroyed was a fraud. But Farmers expressly refused to make this argument. Thus, I agree with the Court that Farmers waived any defense under

the policy's concealment/fraud clause. I cannot agree, however, with the Court's public policy analysis.

The Court today articulates a position heretofore unknown in Texas jurisprudence: The public policy preventing an arsonist from benefitting from his crime "does not overcome an innocent spouse's contractual right to recover her or his one-half interest in the policy benefits" because "[t]he . . . rule [the Court prefers] is to allow innocent spouses to recover according to their contracts, *regardless of partition or divorce.*"¹ This sounds reasonable enough, but what does it really say? It really says: **an arsonist can now benefit from his crime.** For if an arsonist destroys his community property home and his innocent spouse recovers her community interest, he recovers too; that's what "community property" means.

The Court tries to deflect this abandonment of sound public policy by remarking that it "reaffirm[s] our longstanding public policy preventing an arsonist from benefitting from fraud by denying recovery of his or her own one-half interest in the claim against the insurer."² But the Court does nothing of the sort. First, had there been no partition, the Court's "prefer[red] rule" would permit Robert the arsonist to recover by allowing Daisy to recover even if the assets are community. And second, the Court does not deny Robert recovery, because it cannot — Robert has no claim before this Court! Robert did appeal to the court of appeals, where he lost. But he did not petition this Court for review. So contrary to its bold assertion, the Court does not reaffirm longstanding public policy that arsonists should not benefit from their crime.

¹ ___ S.W.2d at ___ (emphasis added).

² *Id.*

The Court also tries to obscure the meaning of its "prefer[red] rule" by commenting that my dissent "raises the theoretical possibility" that a future arsonist might benefit under the Court's rule.³ I don't "raise" any "possibilities"; I just point out that that's what the result is under the Court's "prefer[red] rule."

And that "rule" is unprecedented (which explains why the Court doesn't cite any precedent for it). The only reported decisions that consider this issue both conclude that if benefits would inure to the community and thus to the arsonist, the innocent spouse cannot recover.⁴ And just two years ago, we agreed with this conclusion because we denied the application for writ of error in the only case that has presented the issue to this Court, *Chubb Lloyds Insurance Company v. Kizer*.⁵ We did so precisely because before today there has never been any conflict or confusion about the principle that an arsonist cannot benefit from his crime.

Not only is the Court's "prefer[red] rule" unprecedented, it is also unwarranted. The principle that an arsonist cannot benefit from his crime is not even under attack in this case (except by the Court). The only issue that has divided Texas courts, the only issue that the parties briefed, and the only issue that needs to be decided in this case is whether divorce or partition after the intentional torching of the property allows the innocent spouse to recover assets that at the time of the loss were community.⁶ I say no.

³ *Id.*

⁴ See *Chubb Lloyds Ins. Co. v. Kizer*, 943 S.W.2d 946, 952 (Tex. App.—Fort Worth 1997, writ denied); *Norman v. State Farm Fire & Cas. Co.*, 804 F.2d 1365, 1366-67 (5th Cir. 1986).

⁵ 943 S.W.2d at 948.

⁶ Compare *Webster v. State Farm Fire & Cas. Co.*, 953 F.2d 222, 224 (5th Cir. 1992) (holding that innocent spouse does not recover despite prejudgment divorce), with *Travelers Cos. v. Wolfe*, 838 S.W.2d 708, 712 (Tex. App.—Amarillo 1992, no writ) (holding that innocent spouse may recover because of prejudgment divorce).

As the Fifth Circuit correctly concluded in *Webster v. State Farm Fire & Casualty Company*, post-arson partition or divorce should not result in recovery for the innocent spouse.⁷ The *Webster* court reasoned that "[a]t all points of time pertinent to State Farm's decision to deny recovery — the date the policy was issued, the date of the fire, the date the Websters filed their claim, and the date the claim was refused — the property was community."⁸ Similarly here, at the time of the arson, Daisy and Robert's home was undisputedly a community asset. Whether spouses divorce or partition after the arson does not affect the public policy analysis. The public policy remains the same in this situation — the arsonist may not benefit from his crime, nor may the arsonist's community benefit.

True, the Family Code allows spouses to "partition or exchange between themselves any part of their community property, then existing or to be acquired."⁹ But this statutory right cannot be employed, through post-arson acts, to convert an otherwise unenforceable contract into an enforceable one. And because the "innocent spouse" cannot unilaterally partition but must have the consent of the "guilty spouse,"¹⁰ to allow partition after the arson would permit the arsonist to control whether there is coverage. By not agreeing to partition, the arsonist prevents coverage, and by agreeing to partition, the arsonist creates coverage. This control over partition may allow the arsonist to force the innocent spouse to give up part of the remaining community estate in exchange for the arsonist's consent to partition. Public policy does not permit this.

⁷ 953 F.2d at 224.

⁸ *Id.* at 223.

⁹ TEX. FAM. CODE § 4.102.

¹⁰ See TEX. CONST. art. XVI, § 15; TEX. FAM. CODE § 4.104.

Moreover, allowing post-arson acts to control whether there is recovery also runs the risk of collusion between spouses to create coverage through sham partitions or divorces. The arsonist would be allowed to recover, but only if he follows his original fraud, the arson and insurance claim, with a subsequent fraud, a sham partition or divorce. Again, public policy precludes such a result.

But rather than tackling the case as it was presented to us, the Court's "prefer[red] rule" is that Daisy and Robert's partition meant nothing; she recovers regardless. And adding further confusion, the Court, after announcing its "prefer[red] rule" and noting my criticism of it, responds to that criticism with the pithy observation that "Robert does not benefit here; the partition agreement divested him of any interest in Daisy's recovery."¹¹ So I guess the partition mattered after all.

Unfortunately, under the somewhat contradictory positions of not wanting to "encourag[e] divorce" but also not wanting "to regulate an innocent spouse's marital relationship with the culpable spouse,"¹² the Court sends a signal to arsonists that if they just don't tell their spouse that they burned the house down, they might get part of the insurance proceeds. Public policy should be anchored to a more secure footing. I would simply hold that if the destroyed property is a community asset at the time of the loss and it is determined that a community member was the arsonist, public policy bars recovery for either spouse. And a post-loss, prejudgment partition or divorce or a determination of innocence of the other community member does not change this. Although it is unfortunate that under this rule some truly innocent spouses, such as Daisy, would not recover, it would be even more unfair to allow the arsonist to control whether there is recovery and to shift the costs of his or her

¹¹ ___ S.W.2d at ___.

¹² *Id.* at ___.

intentional misconduct to other policy holders who must now pay for arson while the arsonist can benefit from it.

The long-standing public policy of this state is that an arsonist cannot benefit from his or her crime. When a recovery benefits the arsonist's community estate, the arsonist benefits. An innocent spouse cannot avoid the application of this policy by a post-arson partition of the community estate. Thus, I dissent.

Craig T. Enoch
Justice

Opinion delivered: July 1, 1999