COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No.: 2018-P-0549

ADALEY SAEZ,

Plaintiff-Appellant,

v.

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Defendant-Appellee.

ON APPEAL FROM A SUMMARY JUDGMENT
ENTERED BY THE HAMPDEN COUNTY SUPERIOR COURT

APPLICATION OF THE APPELLANT FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

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I. Request for Leave to Obtain Further Appellate Review.

The plaintiff-appellant, Adaley Saez ("Adaley"), respectfully requests, pursuant to Massachusetts General Laws, Ch. 211A, § 11 and Mass. R. App. P. 27.1, that this Honorable Court grant her Leave to Obtain Further Appellate Review, following the *Memorandum and Order* of the Appeals Court dated May 6, 2019 and entered under Appeals Court Rule 1:28. A copy of this *Memorandum and Order* is attached here as Addendum Exhibit A.

In support of this request, Adaley states that the Appeals Court has misunderstood and has misapplied the law governing the proper interpretation of language, used in nearly every homeowners insurance policy in Massachusetts, defining an insured as a "resident" of the named insured's "household". If not reviewed and corrected and clarified, the decision of the Appeals Court will improperly signal to litigants and courts throughout the Commonwealth that these terms are unambiguous, and that insurers are not restricted by the usual rule construing ambiguities against the insurer.

In addition, the decision of the Appeals Court,

by misapprehending the record and by failing to adhere to established Massachusetts precedent, has worked a grave injustice upon Adaley, unfairly depriving her of recovery on a judgment entered by the Hampden County Superior Court, in an amount with interest now in excess of $1,000,000.

For these reasons, Adaley maintains that substantial reasons affecting the public interest and the interests of justice mandate further appellate review of the issues raised in this appeal.

II. Statement of Prior Proceedings.

This case arises from a vicious dog bite suffered by Adaley. She was attacked by two pit bulls kept by one Terrance L. Wilson ("Wilson"). Adaley claims that the defendant-appellee, Liberty Mutual Fire Insurance Company ("Liberty Mutual") blatantly failed to defend Wilson in litigation on the dog bite claim commenced in 2014 by Adaley against Wilson ("the 2014 Tort Litigation"). That litigation resulted in a substantial default judgment entered in favor of Adaley after Liberty Mutual failed after notice to defend Wilson. As of May 6, 2019, the amount of that judgment entered against Wilson in the 2014 Tort Litigation is $1,057,035.87.

In the case now before the Court, Liberty Mutual moved for summary judgment. Liberty Mutual argued in essence that Adaley could not establish that Wilson was an "insured" under the homeowners liability policy ("the Policy")that was issued by Liberty Mutual to Wilson's aunt, Marva Charles ("Marva"). Marva was the owner of a two family house in Springfield. She lived in the upstairs unit. Wilson's mother, Charla, lived in the downstairs unit. Marva was the named insured on the Policy. Wilson slept half of the time in Marva's unit and kept all of his possessions there and had unfettered access to Marva's unit. In fact, after the attack, Wilson took Adaley to Marva's unit to protect Adaley from the pit bulls.

Apart from opposing the motion of Liberty Mutual for summary judgment, Adaley pressed a cross-motion for partial summary judgment. Adaley argued that, on the facts and in the posture of this case, she was entitled to judgment as a matter of law against Liberty Mutual, on Counts I and II of her Complaint, her assigned breach of contract and her reach and apply claims, all in light of the failure of Liberty Mutual to defend Wilson.

Specifically, Liberty Mutual argued that it had

no duty to defend Wilson from the outset of the 2014 Tort Litigation, all because he was not a "resident" of Marva's "household", within the meaning of and as those terms were used in the Policy.

In response, Adaley argued that, because the Policy did not define the terms "resident" or the term "household", the Policy was ambiguous on its face and as applied to the facts of the case. Adaley argued that she was entitled to a favorable interpretation of the Policy on the issue of Wilson's "household" status. Adaley alternatively argued that there were issues of fact concerning the household status of Wilson that precluded summary judgment on that point. Adaley further argued that any issues of fact on Wilson's household status served to preclude Liberty Mutual from freeing itself of the defense obligation, and in fact worked to show that Liberty Mutual breached its duty to defend Wilson. Adaley thus argued that she was entitled to partial summary judgment establishing the liability of Liberty Mutual on her breach of contract and reach and apply claims respectively set forth in Counts I and II of her Complaint. Adaley further argued that there were issues of fact on her Ch. 93A and 176D claims that

precluded the entry of summary judgement on those claims.

After oral argument held on November 21, 2017, the Superior Court, Ford, J., by endorsement entered November 29, 2017, ruled in favor of and entered Summary Judgment for Liberty Mutual. The Superior Court also denied the cross-motion of Adaley for partial summary judgment. A copy of the *Memorandum of Decision and Order on Cross-Motions of the Parties for Summary Judgment* is attached here as Addendum Exhibit B.

Adaley proceeded with this appeal. Adaley claimed in the Appeals Court that the Superior Court committed clear and reversible error in entering summary judgment in favor of Liberty Mutual and in denying her cross-motion for partial summary judgment. By *Memorandum and Order* of the Appeals Court dated May 6, 2019, and entered under Appeals Court Rule 1:28, the Appeals Court affirmed the judgment of the Superior Court ("Memorandum and Order"). See Addendum Exhibit A. Adaley moved for reconsideration in the Appeals Court pursuant to Mass. R. App. P. 27. That motion was denied on May 22, 2019.

III. Statement of Facts Relevant to the Appeal.

In its recitation of the facts relevant to this Application, and except for those dispositive facts to which no reference was made as set forth below, the facts set forth in the *Memorandum and Order* of the Appeals Court are sufficient for the purposes of this Application.

IV. Statement of the Points With Respect to Which Further Appellate Review is Sought.

Adaley maintains that the Appeals Court decision is fundamentally unjust because it directly contradicts or substantially undermines prior Supreme Judicial Court precedent concerning the interpretation of ambiguities in insurance policies. In essence, the Appeals Court ignored this clear precedent and, most problematically, substantively rewrote the relevant terms of the Policy, all to affirm an erroneous Superior Court Judgment.

For the reasons set forth below, the Appeals Court has committed grievous error. Contrary to the conclusion of the Appeals Court, common sense and the record all inexorably show that the Policy was ambiguous and that the Superior Court impermissibly found facts in the context of summary judgment.

V. Statement Explaining Appropriateness of Further Appellate Review.

Adaley urges seven grounds which justify if not require further appellate review in this case. First, and on the issue of ambiguity, the Supreme Judicial Court ruled in *Vaiarella v. Hanover Ins. Co.,* 409 Mass. 523, 526 (1991), in addressing the meaning of "household member" in a standard Massachusetts auto policy, that "modern society presents an almost infinite variety of possible domestic situations and living arrangements" and therefore, it is impossible for the term "household" to have a "precise or inflexible meaning." *Id.* at 526-27.

Adaley argued strenuously that *Vaiarella* is not controlling because that case involved a standard Massachusetts automobile policy, under which ambiguities were not construed against the insurer. Adaley also argued strenuously that *Vaiarella* actually proved her point that the policy at issue was ambiguous. This is because the requirement under *Vaiarella* for a case by case and fact specific determination, and the process of weighing and evaluating several diverse factors, by definition, establishes that the terms on their face are not

precisely or commonly understood. Rather, the terms are plainly susceptible to more than one meaning in the eyes of reasonably intelligent persons and endlessly varying factual scenarios.

For that reason alone, and in the circumstances of this case involving policy language not required by statute, the terms "household" and "resident", as used in the Policy, are ambiguous on their face and as a matter of law. *Lumbermens Mut. Casualty Co. v. Offices Unlimited,* 419Mass. 462, 466, 645 N.E.2d 1165 (1995)("[A]mbiguity exists in an insurance contract when the language contained therein is susceptible of more than one meaning.")

The Appeals Court here simply ignored Adaley's arguments on these critical points. Without any mention or analysis of these arguments, the Court concluded that, on the facts adduced by Adaley, there is no reasonable definition of the term "household" that could encompass Wilson as a resident of Marva's household. This is patently erroneous, for the reasons set forth below.

Secondly, the Court held that "[i]n short, there is nothing to suggest that Wilson was part of a family living together ***in Marva's unit***. See Black's Law

Dictionary 808 (9th ed. 2009) ('household' defined as '[a] family living together')(emphasis added). Contrary to this ruling, "household" is not defined by the Policy as being limited to "Marva's unit". The Court has therefore impermissibly rewritten the Policy in this respect. This is particularly improper because when Liberty Mutual meant to refer to a "unit" on the Premises, and to give that reference definitional significance, it knew how to do so.

Specifically, the Policy does define "residence premises" as "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." Thus, Adaley has shown that, if Liberty Mutual intended to limit insured status in a two-family context to "residents" of the named insured's "family unit", it had the clear capacity to do so. The fact that there is no such "unit" limitation in the Policy definition of either an "insured" or of a "household", shows unequivocally that no such limitation was intended. Because the concept of "household" is not limited by the Policy to "Marva's unit", the Court erred as a matter of law in engrafting such a definitional limitation.

Thirdly, to justify its conclusion in this respect, the Court also cites *Black's Law Dictionary* (9th ed. 2009), citing a definition of "household" as "[a] family living together". The Court neglects to note that *Black's Law Dictionary* also defines a household as "[a] group of people who dwell under the same roof", *Black's Law Dictionary* (10th ed. 2014). Whichever of these definitions is used, Adaley has adduced facts that show that Wilson was living in Marva's home with his family members dwelling under the same roof.

Specifically, on the date of the pit bull attack, Adaley has shown that all eight persons living in both units on the Insured Premises, including Wilson, were family members and were blood relatives. They all resided in the two-family house being the Insured Premises and lived as a family under the same roof at and on the Insured Premises.

Adaley has shown that, at the time of the attack, Wilson was an insured under the Policy because he resided on the Insured Premises in the household of Marva, not necessarily as the Court ruled, in "Marva's unit". Instead, Wilson was a resident of Marva's "household" under either Black's Law Dictionary

definition. He was no doubt part of Marva's family. He was no doubt part of a "[a] family living together". He was also no doubt part of "[a] group of people who dwell under the same roof".

Fourthly, the contrary conclusion by the Appeals Court ignores these legal distinctions and factual realities. According to the facts adduced by Adaley, Wilson was, at the time of the Attack, occupying and sleeping half the time in a bedroom in Marva's unit on the third floor, all without paying regular rent to her. He slept the other half of the time on the couch in Charla's living room in the first-floor unit. Marva gave Wilson a key to her family unit and Wilson had access to Marva's family unit and to the third-floor bedroom, all with the knowledge and consent of Marva. Wilson kept all of his significant possessions there in his third-floor bedroom, including a TV, stereo, DJ equipment, bed, couch, music stuff and clothes.

Adaley also has shown that Wilson had access to the entire family unit of Marva without charge. Wilson did not pay rent except for once or twice. He was upset because Marva, his aunt and a family member, eventually asked him to pay rent. Immediately after

the Attack, Wilson took Adaley to the upstairs unit of Marva, all to protect her from the pit bulls. While Liberty Mutual disputed these facts, the Superior Court and the Appeals Court on review were each required to accept these facts, and reasonable inferences arising from these facts, as true for summary judgment purposes. Adaley was not granted these required indulgences.

On these facts adduced by Adaley, it is plausible and reasonable to conclude that Wilson was a "resident" of Marva's "household", as those terms are used in the Policy. That Wilson may have also been a resident of Charla's household is not dispositive, as the Superior Court and Appeals Court seemed to conclude. The Superior Court and Appeals Court completely failed to consider the fact that, under *Vaiarella,* it is possible to have a residence in more than one place at the same time. *Id.* 409 Mass. at 528 (1991). See also, *Horvitz* v. *Comm'r of Revenue*, 51 Mass. App. Ct. 386 (2001)(a person may have a residence in one place and a permanent home, that is, a domicile, in another.)

Fifthly, and assuming for argument that the Policy terms are not ambiguous as a matter of law,

they are clearly ambiguous in the context of the facts presented in this case. Under Massachusetts law, where a term is considered ambiguous in light of the facts, the interpretation of the term becomes a question of fact and not a question of law. *Compagnie de Reassurance D'ile de France v. New England Reinsurance Corp.,* 57 F.3d 56, 75 (1st Cir.1995) (citing *Commercial Union Ins. Co. v. Boston Edison Co.,* 412 Mass. 545, 557, (1992). As a question of fact, the meaning of "household" and "resident", as impacting the status of Wilson as an insured under the Policy, must be determined by the trier of fact, where, as in this case, there are disputes of fact or reasonable conflicting inferences that may be drawn from the undisputed facts. On the facts before the Superior Court and before the Appeals Court, viewed most favorably to Adaley, as the nonmoving party under Rule 56, it is reasonable and plausible to infer and conclude that Wilson was a resident of Marva's household.

Finally, the Court makes much of the fact that Wilson, Marva and Charla did not ever consider him to be a resident of Marva's household. First, any such statements are not relevant. On this point, and

"[b]ecause the meaning of an insurance policy is determined on an objective basis, the subjective understanding of the policyholder ordinarily does not have any significance for the interpretation of an insurance policy term. By definition, the plain meaning of an insurance policy term is independent of any individual person's situation or understanding. Similarly, the understanding of a reasonable person in this policyholder's position is an objective determination." *Restatement of the Law of Liability Insurance* § 4, Comment i; Final Draft No. 2, approved by the members of the American Law Institute at its May 2018 Annual Meeting.

Even if relevant, the statement is in essence an opinion on the ultimate issue in this case which is, in the circumstances, a mixed question of law and fact. As such, these statements would be inadmissible and are not properly before the court. Indeed, testimony that offers an interpretation and application of law to facts in order to reach a legal conclusion, or an opinion or conclusion on the ultimate issue to be decided, is not admissible as it treads on the judicial and fact finder functions. *Mattoon v. City of Pittsfield*, 56 Mass. App. Ct. 124,

137 (2002) ("Generally, a witness may testify to facts observed by him and may not give an opinion based on those facts. Lay and expert witnesses are precluded from giving an opinion, for the most part, that involves a conclusion of law or in regard to a mixed question of fact and law." (internal citations omitted). *Mayflower Emerald Sq., LLC v. Bonims II, Inc.*, 92 Mass. App. Ct. 1103 (2017)(when considering a motion for summary judgment, a trial judge must look only to admissible evidence in the record).

Finally, and to the extent that there were disputes of fact, application of *Vaiarella* was inappropriate. "The specific issue of whether a family member was "living in" the named insured's "household" so as to qualify for uninsured motorists' coverage is a question of law, *only where the underlying facts and circumstances of the insurance claim are uncontroverted or have been judicially determined*. *Vaiarella v. Hanover Ins. Co.*, 409 Mass. 523, 526 (1991)." emphasis added).

When appropriate analytic scrutiny is employed, the inescapable conclusion is that the Policy terms "resident" and "household", when used to define coverage, present the "quintessential ambiguity and

thus a quintessential factual question for resolution by the jury." *Cicciarella v. Amica Mut. Ins. Co.*, 66 F.3d 764, 768-70 (5th Cir. 1995).

The contrary ruling of the Superior Court deprived Adaley of a favorable construction of the Policy, resulting in the erroneous entry of summary judgment against her.

VI. Conclusion.

On the basis of the foregoing, and in order to prevent a substantial injustice, the appellant, Adaley Saez, respectfully requests, pursuant to Massachusetts General Laws, Ch. 211A, § 11 and Mass. R. App. P. 27.1, that this Court take the proper step of granting this Application for Leave to Obtain Further Appellate Review, and specifically requests that the Court:

1. Reconsider and vacate the Appeals Court decision of May 6, 2019;
2. Vacate findings and judgment entered against her; and
3. grant her such other relief as may be appropriate.

Dated: May 28, 2019

THE APPELLANT,
ADALEY SAEZ,

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CERTIFICATE OF COMPLIANCE

This Application complies with the rules of court that pertain to the filing of applications for further appellate review, including, but not limited to, Mass. R. App. P. 27.1; and Mass. R. App. P. 20 (form of briefs, appendices, and other papers; and Mass. R. App. P. 16 (compliance with the applicable length limit of Rule 27.1) which limit was ascertained by the use of Courier New 12 point monospaced font used on non-excluded pages, being 10 characters per inch.

Mark J. Albano

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Mark J. Albano

Addendum Exhibit A

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-549

ADALEY SAEZ

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In 2014, the plaintiff (Saez) sued Terrance Wilson, pursuant to G. L. c. 140, § 155, and in negligence, for injuries caused by two pit bulls belonging to him. Wilson did not seek to be defended or indemnified in that suit by the defendant (Liberty Mutual), which had issued a homeowners policy to Wilson's aunt, Marva Charles (Marva), who owned the two-family residence where the dog attack occurred.[1] Saez, however, notified Liberty Mutual of her suit against Wilson, taking the position that Liberty Mutual owed Wilson both a defense and indemnification for her claims against him. Liberty Mutual disagreed; Wilson defaulted; judgment entered in favor of Saez.

[1] Years earlier, in 2004, Saez had sued Marva and her sister, Charla Charles (Charla), Wilson's mother, over the same injuries. That suit terminated by stipulations of dismissal, and no payments were made by any party. Marva was defended by Liberty Mutual in the 2004 suit.

Thereafter, in exchange for Saez agreeing not to pursue her judgment against him, Wilson assigned to Saez his rights (such as they might be) under the homeowners policy. This suit followed, in which Saez, as Wilson's assignee, sued Liberty Mutual for breach of contract, violation of G. L. c. 175, §§ 112 & 113, G. L. c. 176D, and G. L. c. 93A. All of Saez's claims depend on whether Wilson was an "insured" under the homeowners policy. A Superior Court judge entered summary judgment in Liberty Mutual's favor on this question. Saez has appealed, and we affirm.

We review a decision on summary judgment de novo, based on the record presented to the motion judge. Kiribati Seafood Co., LLC v. Dechert LLP, 478 Mass. 111, 116 (2017). Where, as here, the parties filed cross motions for summary judgment, we view "the evidence . . . in the light most favorable to the party against whom judgment is to enter" (citation omitted). Eaton v. Federal Nat'l Mtge. Ass'n, 93 Mass. App. Ct. 216, 218 (2018).[2] "Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Boazova v. Safety Ins. Co., 462 Mass. 346, 350 (2012). Where the opposing party has the burden of proof, the moving party must demonstrate that the opposing

[2] Liberty Mutual moved for summary judgment on all counts in Saez's complaint; Saez cross-moved on count one (breach of contract) and count two (G. L. c. 175, §§ 112 & 113).

party "has no reasonable expectation of proving an essential element of that party's case" (citation omitted). Ravnikar v. Bogojavlensky, 438 Mass. 627, 629 (2003).

Liberty Mutual issued a homeowners policy to Marva for the period September 11, 2003 to September 11, 2004. The policy defines an "insured" as "[Marva] and residents of [Marva's] household who are . . . [Marva's] relatives." Thus, as the party seeking coverage, Saez bore the burden of demonstrating a triable issue that Wilson was a resident of Marva's household. See Andrade v. Aetna Life & Cas. Co., 35 Mass. App. Ct. 175, 176-177 (1993). That question is to be analyzed "on a case-by-case basis with an evaluation and balancing of all relevant factors." Vaiarella v. Hanover Ins. Co., 409 Mass. 523, 527 (1991). Metropolitan Prop. & Cas. Ins. Co. v. Morel, 60 Mass. App. Ct. 379, 382 (2004) (Morel).

The insured premises was a two-family house located at 69-71 Ranney Street, Springfield. Each residential unit was accessed by a separate door. Marva owned the building and lived with her children in the upstairs unit, which had the street address "71." Marva's sister, Charla, rented the downstairs unit (street address "69") and lived in the downstairs unit with her two daughters. Marva and Charla treated the two units as completely separate, and considered Wilson to be a member of Charla's household -- not Marva's.

Wilson is Charla's son and Marva's nephew. After graduating from college in 2003, Wilson moved to Atlanta. When things did not work out in Atlanta, Wilson returned to Springfield while he looked for work in New York. He was living in Springfield in February 2004, when Saez was attacked by his dogs. At some point after the incident, Wilson found work in, and moved to, New York. He has lived there ever since.

During the period he was in Springfield, Wilson stayed with his mother, sleeping on the couch in her living room. Wilson considered himself a resident of his mother's unit, not of Marva's. He considered the two households to be separate: "I mean, we all used the same backyard and the same driveway, but her house was her house and ours was ours. You know, she would eat in hers and cook and watch TV in hers. It wasn't like she came down and cooked in our house, you know." His mail was addressed to number 69, and his driver's license gave that as his street address. Although Wilson never considered himself a resident of Marva's household, he began using one of the third-floor bedrooms in Marva's unit to entertain guests, to store his clothes, and to play music. In addition, taking the record in the light most favorable to Saez, we accept that Wilson slept in the third-floor bedroom half of the time. Eventually, Marva asked Wilson to pay rent for the use of the third-floor bedroom, and "[he] may have paid her once or twice" before he moved to

New York. Wilson had a key to access Marva's apartment so he could get to the third-floor bedroom. He never ate with Marva or her children in her unit, he performed no chores for Marva, he did not babysit for Marva's children, and Marva never gave him any money. Contrast Morel, 60 Mass. App. Ct. at 383-384 (putative insured resided full-time in household and was economically dependent on insured).

Even accepting, as Saez asks us to do, that Wilson's connection to the third-floor bedroom was sufficient to find he resided there temporarily in 2004, she nonetheless failed, under the "pragmatic balancing approach adopted in Vaiarella," Morel, 60 Mass. App. Ct. at 383, to raise a triable issue as to whether Wilson was a resident of Marva's household or to raise any ambiguity in applying the term "household" to these facts. See Andrade, 35 Mass. App. Ct. at 178 ("Although there may be many definitions which fit the terms 'household' and 'relative,' none allows for Andrade's desired construction"). Although "modern society presents an almost infinite variety of possible domestic situations and living arrangements, [such that] the term 'household member' can have no precise or inflexible meaning," the resolution of how a particular set of facts applies to that policy language is a question of law. Vaiarella, 409 Mass. at 526-527.

Here, Wilson's use of the third-floor bedroom appears to have been a matter of convenience to him while he was temporarily in Springfield. There is nothing to suggest he or Marva expected or intended it to be a long-term arrangement or to extend beyond the use of the bedroom. Wilson did not spend time with Marva or her children, shared no activities with them, and was not economically dependent on Marva. The fact that Wilson had a key by which he could access other parts of Marva's unit does not mean that he did so or that he or Marva intended him to. See Vaiarella, 409 Mass. at 528 (membership in household cannot be based on future intentions rather than on an established arrangement). In short, there is nothing to suggest that Wilson was part of a family living together in Marva's unit. See Black's Law Dictionary 808 (9th ed. 2009) ("household" defined as "[a] family living together"). By contrast, he received his mail at his mother's unit, used it as his address (including on his driver's license), met his friends in the living room there, slept on the living room couch, considered himself a resident, and kept his dogs there.[3]

Because Saez did not raise a triable issue that Wilson was a resident of Marva's household, she failed to demonstrate that she could meet her burden to establish that he was an insured

[3] The fact that one of the dogs was removed to the upstairs unit after the attack in order to remove it from the scene adds little, if anything, to the calculus.

under the policy. Her claims against Liberty Mutual accordingly fail as a matter of law, and we affirm the entry of summary judgment in Liberty Mutual's favor.

Judgment affirmed.

By the Court (Vuono, Wolohojian & Hand, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: May 6, 2019.

[4] The panelists are listed in order of seniority.

Addendum Exhibit B

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss. SUPERIOR COURT
CIVIL ACTION NO. 16-347

ADALEY SAEZ

v.

LIBERTY MUTUAL FIRE INSURANCE COMPANY

MEMORANDUM OF DECISION AND ORDER ON CROSS MOTIONS OF THE PARTIES FOR SUMMARY JUDGMENT

The plaintiff's complaint contains four counts. Count 1 alleges breach of an insurance contract. Count 2 asserts a cause of action under G. L. c. 175, §§ 112 and 113. Count 3 alleges a violation of G. L. c. 176D for failure to provide a defense. Count 4 alleges a violation of the same statute for failure to effectuate a fair and reasonable settlement with the plaintiff. As to all four counts, the overarching issue is whether there was insurance coverage. Both parties have moved for summary judgment. On November 21, 2017, I conducted a hearing on these motions.

BACKGROUND

The summary judgment record reveals the following. On February 12, 2004, the plaintiff, Adaley Saez (hereafter "Saez"), then a ten-year old child, was bitten by two dogs while she was on the premises located at 69-71 Ranney Street in Springfield. The premises were owned by Marva Charles (hereafter "Marva"), and comprise two separate apartment units, each consisting of its own bedrooms, living room, dining room, kitchen, and bathroom. The upper unit, which occupies the second and third floors of the building, is designated as 71 Ranney Street, and Marva has lived in that unit since she purchased the property in 2000. The lower unit is designated as 69 Ranney Street. Marva's sister, Charla Charles (hereafter "Charla") moved into

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that lower unit in late 2000 and began paying Marva monthly rent. Each unit has a separate entrance, and each received separate electric and utility bills. The upstairs is heated by gas and the downstairs is heated by oil, and separate heating bills were sent to each unit. The two units also have separate telephone lines, and each unit received its own mail. There was access between the two units through a basement stairway if the back doors were kept unlocked, but each sister had a key to her own unit. Both Marva and Charla considered 69 and 71 Ranney Street to be completely separate households.

In the summer of 2003, Marva and Charla went on vacation together. While they were away, Charla's adult son, Nathaniel Wilson (hereafter "Nathaniel"), stayed in his mother's apartment to look after it, and brought his two Pit Bulls with him. During the time that Marva and Charla were absent from the premises, Nathaniel was arrested and incarcerated. The two Pit Bulls were in the downstairs apartment when Charla returned. She kept the dogs there and cared for them until the day in question in this case.

Marva lived in the upstairs unit (No. 71) with her three children. Charla lived in the downstairs unit (No. 69) with her two daughters. At around the time of the incident, Charla's other adult son, Terrence Wilson (hereafter "Wilson"), was staying with his mother in the downstairs unit for the time period between his graduation from college and the commencement of his employment in New York City. He assisted in caring for Nathaniel's two dogs, and allegedly became an owner or keeper of the animals. During his deposition, Wilson testified that he received his mail at 69 Ranney Street, that the address on his driver's license was 69 Ranney Street, and that he never considered himself to be a resident of 71 Ranney Street and never used that address for any purpose. He also testified that he never cooked food in the upstairs unit and

never took any of his meals there. Marva allowed him to use a bedroom on the second floor of her unit (the third floor of the building). Wilson would occasionally entertain friends in that room, would play music and watch television there, and sometimes would fall asleep there. In the beginning, Marva did not charge him rent for the use of that room, but at some point she did charge rent which Wilson grudgingly paid for a short time before he left Springfield and moved to New York. From the time he began using the room, Wilson kept some of his possessions there, such as items of clothing, a stereo, some "music stuff," and a television. Wilson had a key to the entryway of the upstairs unit, but the only room he would access was the bedroom.

On the day in question, Saez was living in a house two doors down from 69-71 Ranney Street. She walked to the premises to visit one of Charla's daughters, with whom she was friendly. As that child was emerging from the downstairs apartment, the dogs escaped from that unit and bit Saez, causing injury to her. Wilson then ran out of the downstairs unit, and brought Saez to the upstairs unit in order to separate her from the dogs. Saez's mother arrived on the scene shortly thereafter and transported her daughter to the hospital. The dogs were later euthanized, and Wilson moved from his mother's apartment to New York City.

On the date of the incident, Marva was insured under a homeowners policy issued by the defendant, Liberty Mutual Fire Insurance Company (hereafter "Liberty Mutual"). The policy defines "Insured" as "You and residents of your household who are your relatives . . ." The policy goes on to provide that "[i]f a claim is made or a suit is brought against an 'insured' for damages because of 'bodily injury' . . . [Liberty Mutual] will provide a defense at our expense by counsel of our choice, even if the suit is groundless . . . ."

In 2004, Saez (through her mother as her legal representative) filed a lawsuit in the Hampden

Superior Court against Marva and Charla, seeking damages for the injuries she sustained as a result of the dog bites. Liberty Mutual was notified of the suit and retained counsel to defend its insured, Marva. However, through discovery Liberty Mutual determined that Charla was not a member of Marva's household and therefore declined to provide her with a defense. The company sent a certified letter to Charla, notifying her of that decision. The matter was resolved when the parties filed a voluntary stipulation of dismissal. At the hearing on these motions, Saez's attorney told me that he dismissed his claim because he had to concede that Charla was not a resident of Marva's household.

Ten years later, after Saez had reached the age of majority, she filed a lawsuit in the Hampden Superior Court against Wilson for damages suffered as a result of the dog bites. The complaint alleged that Wilson was "a resident of the household of Marva J. Charles . . . ." Wilson was served at his last and usual place of abode, i.e., 69-71 Ranney Street, but did not contact Liberty Mutual to notify the company of the suit because he had no reason to consider himself to be insured by Liberty Mutual. However, on August 25, 2014, Saez's attorney sent a letter to Liberty Mutual, notifying the company of the claim, enclosing a copy of the complaint, and suggesting that Wilson was entitled to a defense. Liberty Mutual declined to provide a defense, and Wilson was defaulted. Thereafter, a judge of this court (McDonough, J.) held a hearing to assess damages, and awarded damages against Wilson in the amount of $776,912.50. With interest, the present amount of the judgment is approximately $917,000.

Prior to the assessment of damages hearing, Saez and Wilson entered into an "Agreement of Settlement and Assignment." That agreement provided that Wilson would assign his rights against Liberty Mutual to Saez and that Saez would seek to enforce any judgment that she might

obtain only against Liberty Mutual, not against Wilson. On October 30, 2015 (one day before the Agreement of Settlement and Assignment was actually executed), Saez's attorney sent a letter to Liberty Mutual, stating that Wilson was Liberty Mutual's "insured" and enclosing copies of Saez's pretrial memorandum in the case against Wilson and a notice that the assessment of damages hearing would take place on December 16, 2015, at 2:00 p.m. Liberty Mutual responded with a cryptic letter stating that "we could not locate a claim for this party." Accordingly, Liberty Mutual did not retain counsel to appear at the assessment of damages hearing, and judgment was entered against Wilson as previously set forth.

DISCUSSION

"The responsibility of construing the language of an insurance contract is a question of law for the trial judge, and then for the reviewing court." Assetta v. Safety Insurance Company, 43 Mass. App. Ct. 317, 318 (1997). The court will "construe the words of the policy in their usual and ordinary sense." Hakim v. Massachusetts Insurers' Insolvency Fund, 424 Mass. 275, 280 (1997). When appropriate, the court will "consider what an objectively reasonable insured, reading the relevant policy language, would expect to be covered." Hazen Paper Co. v. United States Fidelity & Guarantee Co., 407 Mass. 689, 700 (1990). "A policy of insurance whose provisions are plainly and definitely expressed in appropriate language must be enforced in accordance with its terms." Hyfer v. Metropolitan Life Insurance Co., 318 Mass. 175, 179 (1945). The words of a policy must be construed according to "the fair meaning of the language used, as applied to the subject matter." Manning v. Fireman's Fund American Insurance Cos., 397 Mass. 38, 40 (1986).

As a result of the Agreement of Settlement and Assignment, Saez stands in Wilson's shoes

and has no greater rights than those enjoyed by Wilson. Her claims depend entirely upon whether Wilson was an "insured" under Marva's policy with Liberty Mutual. "When policy language identifying those to whom coverage is afforded constitutes part of the basic insurance agreement, a person claiming coverage, like [Wilson], must demonstrate that he is an insured." Gordon v. Safety Insurance Co., 417 Mass. 687, 689 (1994). "Generally, a duty to defend does not exist until it is shown that the person claiming coverage was, in fact, an insured under the policy." Timpson v. Transamerica Insurance Co., 41 Mass. App. Ct. 344, 346 (1996). I conclude that Saez (standing in Wilson's shoes) has no reasonable expectation of making that necessary showing. See Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

Saez correctly points out that her complaint against Wilson alleged that Wilson was a blood relative of Marva and that he was a resident of Marva's household, that he was the owner or keeper of the two dogs that attacked Saez (thereby rendering him strictly liable for her injuries), and that he was negligent in failing to warn Saez of the presence of his dangerous dogs. She argues that such allegations themselves are sufficient to trigger a duty to defend. It is true that "the question of the initial duty of a liability insurer to defend third-party actions against the insured is decided by matching the third-party complaint with the policy provisions: if the allegations of the complaint are 'reasonably susceptible' of an interpretation that they state or adumbrate a claim covered by the policy terms, the insurer must undertake the defense." Citation Insurance Company v. Newman, 80 Mass. App. Ct. 143, 146 (2011), quoting Sterilite Corp. v. Continental Casualty Co., 17 Mass. App. Ct. 316, 318 (1983). However, "[t]he content of publicly available court records in the underlying case and related cases is readily knowable by an insurer and, where that information is relevant to the duty to defend, may be considered in

deciding whether the insurer had a duty to defend. A policyholder is not entitled to a defense where court records in the case where the policy holder was a party demonstrate that the insurer has no duty to defend." Billings v. Commerce Insurance Company, 458 Mass. 194, 205 (2010).

There is no question that Wilson was Marva's relative; he was indisputably her nephew. Thus, the issue of coverage turns on whether he was a "resident" of her household. I conclude that the information obtained by Liberty Mutual in connection with the 2004 lawsuit established that he was not, and Liberty Mutual was entitled to rely on that information in declining to provide Wilson with a defense. The company learned in 2004 that Marva and Charla lived in separate apartments, that they considered their households to be entirely separate, that Charla was paying monthly rent to Marva, and that each unit received its own mail and heating bills and had separate telephone lines. It also learned that Wilson was Charla's son and that he was staying with his mother between graduation from college and commencement of his employment in New York. In addition, it learned that Wilson would sometimes use a bedroom (to which he had a key) on the second floor of Marva's apartment to entertain guests, play music, and watch television, and that he would occasionally fall asleep in that bedroom. It determined that Wilson initially paid no rent for the use of that room, but that eventually Marva decided to require a monthly rental payment from him and that he paid rent once or twice before departing for New York. Based on that information, Liberty Mutual decided not to provide Charla with a defense in 2004, and the same information is applicable to the situation which arose in the 2014 litigation.

In Vaiarella v. Hanover Insurance Company, 409 Mass. 523 (1991), the Supreme Judicial Court set forth a number of factors to be considered in determining whether someone is a "household member." One factor is whether a child who has long been a member of his parents'

household but who is temporarily living outside the household when an incident occurs intends to return to that household. Id. at 527-528. In this case, there is no evidence in the summary judgment record that Wilson had "long" been a member of his Aunt Marva's household or that he ever intended to return there. Another factor to be considered is that Wilson did not receive mail at Marva's address, and that the address listed on his driver's license was 69 Ranney Street, i.e., his mother's address, not his aunt's. Id. at 528-529. A third factor is whether Marva and Wilson depended on each other for financial support. Id. at 529. There is not a shred of evidence in the summary judgment record that they did. The Vaiarella factors weigh heavily in Liberty Mutual's favor. The fact that the policy in question was not a standard automobile policy and therefore could have been drafted in any way Liberty Mutual saw fit is of no consequence. See Metropolitan Property and Casualty Insurance Company v. Morel, 60 Mass. App. Ct. 379, 383 (2004) (interpreting an excess policy, the Court saw "no reason . . . why the reasoning of Vaiarella is not relevant here").

Moreover, there is evidence in the record that Wilson himself never believed that he was a member of his Aunt Marva's household, that he never used her address for any purpose, and that he never cooked or ate a single meal there. He did not notify Liberty Mutual of the lawsuit against him because he had no reason to suppose that he might be an "insured" under Marva's policy. Where Wilson himself did not feel that he was covered by Marva's policy, it is difficult to conclude that "an objectively reasonable [putative] insured . . . would expect to be covered." Hazen Paper Co. v. United States Fidelity & Guaranty Co., 407 Mass. at 700. The mere fact that Wilson may have temporarily kept some personal belongings in Marva's second floor bedroom is

not enough to change the result. See Vaiarella v. Hanover Insurance Co., 409 Mass. at 529-530.[1] In addition, the fact that Wilson paid rent for the use of that room, albeit only for a short period of time, is a clear indication that he was not a resident of Marva's household.

Saez also argues that there is some ambiguity in the words "resident" and "household," and that the ambiguity should be construed against Liberty Mutual. I disagree. "An ambiguity is not created simply because a controversy exists between the parties, each favoring an interpretation contrary to the other." Lumbermens Mutual Casualty Co. v. Offices Unlimited, Inc., 419 Mass. 462, 466 (1995). "Nor does the mere existence of multiple dictionary definitions of a word, without more, suffice to create an ambiguity, for most words have multiple definitions. A term is ambiguous only if it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one." Citation Insurance Company v. Gomez, 426 Mass. 379, 381 (1998). The fact that the apartment house had only one roof, and therefore that Marva and Wilson lived under that one roof, does not mean that they were residents of the same household, as Saez seems to suggest. That approach would result in an extremely strained and unreasonable interpretation of the words "resident" and "household." The court "must construe the words of the policy in their usual and ordinary sense," and in the context of this case I conclude that the meaning of those words is clear and unambiguous. See Hakim v. Massachusetts Insurers' Insolvency Fund, 424 Mass. at 280. See also Hingham Mutual Fire Insurance Co. v. Gee, 79 Mass. App. Ct. 1126 (2011) (concluding that the term "residents of your

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[1] There is a dispute as to how often Wilson fell asleep in that second floor bedroom. Saez points out that, during his deposition, Wilson stated that he slept there "half the time." However, at other points in his deposition he made it abundantly clear that the "main area" where he would sleep was his mother's couch. I do not consider that dispute to be over a ***material*** fact, in view of the other overwhelming indications that he was a member of his mother's household, not his aunt's. In fact, on the first page of her opposition, Saez states: "The material facts in this case are not in dispute."

household" was not ambiguous). Even viewing the evidence in the light most favorable to Saez, I conclude that Liberty Mutual has demonstrated, on the basis of undisputed material facts, that Wilson was not a resident of Marva's household.

In addition, Saez asserts that, because her complaint alleges that Wilson was a resident of Marva's household, the default judgment against Wilson conclusively establishes that fact. Once again, I disagree. Even if Liberty Mutual had breached its duty to defend, it would not be bound by that allegation because it was not relevant to liability. See Metropolitan Property and Casualty Insurance Company v. Morrison, 460 Mass. 352, 362 n.11 (2011). Whether or not Wilson was a resident of Marva's household would have had no bearing on whether he was strictly liable for the injuries caused by the dog bites. In any event, because I conclude that, for the reasons previously set forth herein, Saez has not shown, as a threshold matter, that Liberty Mutual had a duty to defend Wilson, I rule that the fact of Wilson's residency in Marva's household has not been conclusively established. Id. at 361. In fact, I reiterate that it has been conclusively established by Liberty Mutual that Wilson was ***not*** a resident of Marva's household. Liberty Mutual is entitled to summary judgment on Count 1, the breach of contract claim, because it had no duty to defend Wilson.

I conclude that Liberty Mutual is entitled to summary judgment on the other claims as well. Count 2 sets forth a claim under G. L. c. 175, § 113, which operates to reach and apply insurance proceeds "if the judgment debtor was at the accrual of the cause of action insured against liability therefor." Because Wilson was not insured against liability under Liberty Mutual's policy, the statute does not apply. The statute "does not enlarge nor modify in any respect the substantial liability created by the contract of insurance." Mayer v. Medical Malpractice Joint Underwriting

Association, 40 Mass. App. Ct. 266, 272 (1996). Counts 3 and 4 allege violations of G. L. c. 93A and 176D, by virtue of Liberty Mutual's failure to defend and to make a reasonable settlement offer. As previously set forth herein, Liberty Mutual had no duty to defend. Because Wilson was not its insured, I conclude that it had no legal obligation to attempt to settle the case with Saez. See Transamerica Insurance Company v. KMS Patriots, 52 Mass. App. Ct. 189, 197 (2001). There is nothing in the summary judgment record suggesting that Liberty Mutual acted in bad faith or that it engaged in any unfair or deceptive insurance practices. It would have been better if it had responded to Saez's attorney's letters in a more meaningful and informative way, but there is no indication that Saez was in any way prejudiced or injured by its failure to do so. See Doe v. Liberty Mutual Insurance Co., 423 Mass. 366, 371-372 (1996). As a matter of law, these claims fail.

ORDER

For the foregoing reasons, the defendant's motion for summary judgment is hereby **ALLOWED**, and the plaintiff's cross motion for partial summary judgment is hereby **DENIED**. The Clerk shall enter final judgment for the defendant.

Dated: November 29, 2017

Daniel A. Ford
Justice of the Superior Court

SUMMARY JUDGMENT MASS. R. CIV. P. 56	**Trial Court of Massachusetts** **The Superior Court**
DOCKET NUMBER 1679CV00347	Laura S Gentile, Clerk of Courts
CASE NAME Adaley Saez vs. Liberty Mutual Fire Insurance Company	COURT NAME & ADDRESS Hampden County Superior Court Hall of Justice - 50 State Street P.O. Box 559 Springfield, MA 01102

JUDGMENT FOR THE FOLLOWING DEFENDANT(S)

Liberty Mutual Fire Insurance Company

JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S)

Saez, Adaley

This action came before the Court, Hon. Daniel Ford, presiding, upon Motion for Summary Judgment of the defendant named above, pursuant to Mass. R. Civ. P. 56. The parties having been heard, and/or the Court having considered the pleadings and submissions, finds there is no genuine issue as to material fact and that the defendant is entitled to a judgment as a matter of law.

It is ORDERED and ADJUDGED:

The plaintiff's cross motion for summary judgment is hereby DENIED.

Final judgment is hereby entered for the defendant.

DATE JUDGMENT ENTERED	CLERK OF COURTS/ ASST. CLERK
11/29/2017	X Daphne M. Moore

CERTIFICATE OF SERVICE

I, Mark J. Albano, Esq., hereby certify that I made service of the foregoing document, by email and by first class mail, postage prepaid, to the following person on this the 28th day of May, 2019:

Kevin P. Polansky, Esq.
NELSON MULLINS RILEY & SCARBOROUGH LLP
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Mark J. Albano
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Mark J. Albano, Esq.