

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-3778

Summary Calendar

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MILDRED WATERHOUSE FLEMING,

Plaintiff-Appellee,

v.

BRYAN DANTONI, ET AL.,

Defendants,

CARLENE S. FLEMING,

Defendant-Appellant.

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TRAVELERS INSURANCE COMPANY,

Plaintiff,

v.

MILDRED WATERHOUSE FLEMING,

Defendant-Appellee,

v.

CARLENE SMOLLEN FLEMING,

Defendant-Appellant.

\* \* \* \* \*

MILDRED W. FLEMING, Testamentary  
Administratrix, Etc.,

Plaintiff-Appellee,

v.

THE NEW ENGLAND MUTUAL LIFE INSURANCE  
COMPANY, ET AL.,

Defendants,  
THE NEW ENGLAND MUTUAL LIFE INSURANCE CO.,  
Defendant-Appellee,  
CARLENE S. FLEMING,  
Defendant-Appellant.

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Appeals from the United States District Court  
for the Eastern District of Louisiana  
( CA-87-5361-H c/w 88-3596-H, 90-1528)

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(May 18, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:\*

I.

In 1988, Carlene Smollen Fleming was convicted of first degree murder for the death of her husband, George Fleming. State v. Fleming, 574 So. 2d 486, 488 (La. Ct. App. 1991), writ denied, 592 So. 2d 1313 (La. 1992). A Louisiana court of appeals upheld the judgment, id. at 497, and the Louisiana Supreme Court declined to review Carlene's conviction on February 14, 1992, 592 So. 2d 1313 (La. 1992).

In 1988, Travelers Insurance Company filed an interpleader action in federal district court seeking to deposit the benefits from a life insurance policy issued to George Fleming. Travelers

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

asserted that there were conflicting claims asserted against the policy by Mildred Fleming, the secondary beneficiary under the disputed policy and George Fleming's mother, and Carlene Fleming, the primary beneficiary and George Fleming's wife. Mildred Fleming filed a motion for summary judgment asserting that Carlene Fleming was not eligible to claim the policy's benefits under LA. REV. STAT. ANN. § 22:613 (West 1994), because she had killed her husband. The district court granted her motion. Thereafter the district court entered an order staying execution of the judgment pending a decision by the Supreme Court in Sullivan v. Louisiana, 113 S. Ct. 2078 (1993). The district court determined that in light of Sullivan "the potential of post-conviction relief [was still] real." In July 1993, because the Supreme Court had decided Sullivan, this court remanded, without addressing the merits, the case to the district court to allow it to review its judgment. Following remand, the district court determined that "there is little, if any, reason to expect that Carlene Fleming will be granted post conviction relief," and thus lifted the stay of the execution of the judgment.

In 1989, Mildred Fleming filed suit in Louisiana state court seeking the proceeds of an insurance policy issued by New England Mutual Life Insurance Company (New England) in the name of George Fleming. In 1990, New England removed the suit to federal district court, and it was consolidated with the interpleader action filed by Travelers. Thereafter, New England and Mildred Fleming, in her capacity as testamentary executrix of George

Fleming's estate, filed motions for summary judgment seeking a determination by the district court that Carlene Fleming was not entitled to recover the benefits from the insurance policy. Both New England and Mildred Fleming argued that LA. REV. STAT. ANN. § 22:613 (West Supp. 1994) foreclosed Carlene Fleming from recovering any proceeds from the policy. The district court agreed, and it entered a Rule 54(b) judgment.

Carlene Fleming appeals the district court's order entered on December 9, 1992, naming Mildred Fleming the sole beneficiary under the Travelers' policy. Carlene Fleming also appeals the district court's decision concerning her ability to recover funds from the policy issued by New England.

## II. STANDARD OF REVIEW

We review the granting of summary judgment de novo, applying the criteria which the district court used in the first instance. Federal Deposit Ins. Corp. v. Dawson, 4 F.3d 1303, 1306 (5th Cir. 1993), petition for cert. filed, 62 U.S.L.W. 3659 (U.S. Mar. 21, 1994) (No. 93-1486); Fratre v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992). That is, we review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party. Dawson, 4 F.3d at 1306. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

III.

On appeal, Carlene Fleming asserts that because she has not exhausted her post-conviction remedies, she should not be prematurely denied a claim to the insurance proceeds. She asserts that it would be inconsistent with the overall thrust of section 22:613 to insure that a wrongdoer does not profit from his or her misdeeds to hold that a judgment is final before all avenues of attack have been exhausted. She also asserts that this is especially true in her case because a serious issue exists as to whether she really committed the offense.

Section 22:613(D) provides:

D. (1) No beneficiary, assignee, or other payee under any personal insurance contract shall receive from the insurer any benefits thereunder accruing upon the death, disablement, or injury of the individual insured when said beneficiary, assignee, or other payee is:

(a) Held by a final judgment of a court of competent jurisdiction to be criminally responsible for the death, disablement, or injury of the individual insured[.]

The district court determined that Carlene Fleming could not recover benefits from the Travelers or the New England insurance policy because she had been "[h]eld by a final judgment of a court of competent jurisdiction to be criminally responsible for the death . . . of the individual insured . . . ." We agree.

In In re Hamilton, 446 So. 2d 463 (La. Ct. App.), writ denied, 448 So. 2d 105 (La. 1984), the issue before the court was whether a conviction for manslaughter satisfied section 22:613(D)(1)'s requirement that the beneficiary be found to be criminally responsible for the death of the insured before the

beneficiary is precluded from recovering the benefits under an insurance policy. The court concluded that the party's guilty plea to manslaughter charges barred her from receiving proceeds under the policy. Id. at 464-65. The court also stated that

[b]ecause the Criminal District Court for the Parish of Orleans (a court of competent of jurisdiction) found the beneficiary . . . to be criminally responsible for the death of the insured, we conclude that the trial judge was wrong in granting her Motion for Summary Judgment and denying the motion of [the deceased's wife]. Accordingly the judgment of the trial court is reversed and the motion in favor of [the deceased's wife] is hereby granted.

Id. at 465-66.

Further, in State v. Bennet, 610 So. 2d 120 (La. 1992), the Louisiana Supreme Court determined when a decision of a court of appeals was final. The court determined that when a writ application has been timely filed with the Louisiana Supreme Court, a judgment of a court of appeals in a criminal proceeding is final when the writ application is denied. Id. at 125-26.

In the present suit, all of the parties acknowledge that Carlene Fleming has exhausted all direct appeals of her conviction. We uphold the district court's determination that Carlene Fleming has been "[h]eld by a final judgment of a court of competent jurisdiction to be criminally responsible for the death" of George Fleming. The fact that Carlene Fleming has exhausted all direct appeals of her conviction was sufficient to render her conviction final for purposes of section 22:613(D). We do not decide, because we need not, whether the judgment of conviction entered by the trial court was similarly "final" for purposes of section 22:613(D).

IV.

For the foregoing reasons, we AFFIRM the judgments of the district court.