COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1270 **Cir. Ct. No. 94CV005407**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

LOU EMMA HALE AND CLARISSA HALE, A MINOR, BY HER GUARDIAN AD LITEM, E. PATRICK CRANLEY,

PLAINTIFFS,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

JAMES MCCORMICK, ROBERT MCCORMICK, DENNIS CIMPL, AND DAVID CIMPL, D/B/A CIM MAC PROPERTIES,

DEFENDANTS-APPELLANTS,

MERIDIAN RESOURCE CORPORATION,

DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County: GARY B. SCHLOSSTEIN, Reserve Judge. *Affirmed.*

Before Fine, Curley and Peterson, JJ.

¶1 PER CURIAM. CIM MAC Properties appeals from the trial court's order granting summary judgment in favor of American Family Mutual Insurance Company and denying CIM MAC's motion for a declaratory judgment.[1] The trial court concluded that CIM MAC's insurance policy with American Family excluded coverage for personal injuries to a tenant who ingested lead paint chips. CIM MAC claims that the trial court erred because: (1) American Family altered its interpretation of the insurance contract after CIM MAC's rights attached; (2) American Family failed to comply with the notice requirements of WIS. STAT. § 631.36(5) (1999-2000) in connection with that altered interpretation; and (3) there is a material issue of fact in dispute regarding whether the lead paint chips "discharged, dispersed, released, or escaped" into the environment.[2] We affirm.

I. BACKGROUND

¶2 In 1991, Clarissa Hale, a minor, and her mother, Lou Emma Hale, lived in an apartment owned by CIM MAC Properties. According to the complaint and Lou Emma Hale's deposition testimony, Lou Emma Hale found her daughter near the living-room windowsill with a "mouth full of paint chips" in May of 1991. Clarissa suffered lead poisoning and Clarissa and Lou Emma Hale sued American Family and CIM MAC for the resulting injuries.

[1] The owners of CIM MAC Properties are James McCormick, Robert McCormick, Dennis Cimpl, and David Cimpl. We will refer to them collectively as "CIM MAC."

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶3 During 1991, CIM MAC had a Business Key Policy of insurance with American Family that obligated American Family to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' … to which this insurance applies … [and] [w]e will have the right and duty to defend any 'suit' seeking those damages." This coverage was limited by the following clause:

> **2. Exclusions.**
>
> This insurance does not apply to:
>
> ….
>
> **f. (1)** "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:
>
> **(a)** At or from premises you own, rent or occupy;

Under the policy, pollutants were defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

¶4 American Family moved for summary judgment, claiming that the pollution exclusion clause in its policy unambiguously excluded coverage for injuries caused by "chipping and flaking lead paint in a residential dwelling." CIM MAC filed an opposition to American Family's summary judgment motion, and, also filed a motion for a declaratory judgment, claiming that it was entitled to a declaration that its policy with American Family provided coverage for the ingestion of lead-based paint because: (1) American Family did not consider lead-related liability to be within the scope of the pollution exclusion clause at the time the contract was entered into; (2) American Family did not comply with WIS. STAT. § 631.36(5), which requires an insurer to give notice when less favorable

terms will take effect upon renewal; and (3) there was a disputed issue of material fact as to whether the paint chips discharged, dispersed, released, or escaped into the environment. The trial court granted American Family's motion for summary judgment and denied CIM MAC's motion for a declaratory judgment.

II. DISCUSSION

¶5 This appeal involves the interpretation of an insurance policy, and, therefore, presents a question of law that we review without deference to the conclusions of the trial court. ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis. 2d 808, 810, 456 N.W.2d 597, 598 (1990). Our review of the trial court's grant of summary judgment is *de novo*. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987). First, we examine the pleadings to determine whether a proper claim for relief has been stated. ***Id.***, 136 Wis. 2d at 315, 401 N.W.2d at 820. If the complaint states a claim and the answer joins the issue, our inquiry then turns to whether any genuine issues of material fact exist. ***Id.*** WISCONSIN STAT. § 802.08(2) sets forth the standard by which summary judgment motions are to be judged:

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

¶6 First, CIM MAC claims that in 1991, when the incident occurred, American Family did not interpret the pollution exclusion clause to exclude exposure to lead paint. CIM MAC alleges that American Family retroactively changed its interpretation of the clause after ***Peace ex rel. Lerner v. Northwestern National Insurance Co.***, 228 Wis. 2d 106, 596 N.W.2d 429 (1999), was decided. ***Peace*** concluded that a pollution exclusion policy like the one in this case

prevented a property owner from receiving coverage for a lead-based injury. ***Id.***, 228 Wis. 2d at 110-111, 596 N.W.2d at 431.

¶7 CIM MAC claims that the insurance policy does not sufficiently define the word pollutant or clearly state what is "encompassed" by the term. It urges us to consider American Family's underwriting documents and two lists of "classes of risks," which do not contain lead as a "pollution exposure," as evidence that American Family did not consider lead exposure to be an exclusion under the policy.

¶8 ***Peace*** is clear, however, that the language of the pollution exclusion clause in this case is unambiguous. When a contract is unambiguous, its construction is a question of law we review *de novo*. ***Koenings v. Joseph Schlitz Brewing Co.***, 126 Wis. 2d 349, 366, 377 N.W.2d 593, 602 (1985). "A court may not depart from the plain meaning of a contract where it is free from ambiguity." ***Algrem v. Nowlan***, 37 Wis. 2d 70, 79, 154 N.W.2d 217, 221 (1967) (quoted source omitted). Moreover, where the intent of the parties is made clear by the language and the nature of the agreement, we do not resort to extrinsic evidence to determine that intent. ***Bruns v. Rennebohm Drug Stores, Inc.***, 151 Wis. 2d 88, 94, 442 N.W.2d 591, 594 (Ct. App. 1989). Instead, the policy language is interpreted according to its plain and ordinary meaning as understood by a reasonable insured. ***Kremers-Urban Co. v. American Employers Ins. Co.***, 119 Wis. 2d 722, 735, 351 N.W.2d 156, 163 (1984).

¶9 ***Peace*** considered a pollution exclusion clause that is identical to the one in this case to determine whether the clause applied to exposure to lead-based paint. ***Peace***, 228 Wis. 2d at 112 n.4, 120, 596 N.W.2d at 432 n.4, 435. ***Peace*** determined that the policy language was unambiguous because the term pollutant

was specifically defined. ***Id.***, 228 Wis. 2d at 136, 596 N.W.2d at 442. ***Peace*** concluded that "lead paint chips, flakes, and dust … are widely, if not universally, understood to be dangerous and capable of producing lead poisoning," thus, a reasonable landlord "understand[s]" that lead is a pollutant. ***Id.***, 228 Wis. 2d at 137–138, 596 N.W.2d at 443. Thus, irrespective of how American Family may have viewed the clause inside its company, its internal analysis of the language is immaterial because there is no evidence in the record that CIM MAC either knew of that interpretation or relied on it in purchasing the policy. Accordingly, under ***Peace***, exposure to lead paint is excluded from coverage by the language of the pollution exclusion policy.[3]

¶10 Next, CIM MAC contends that American Family violated WIS. STAT. § 631.36(5) because it did not notify CIM MAC of a change in the policy which resulted in less favorable terms. CIM MAC claims that American Family changed its interpretation of the policy, as discussed in ¶6 of this opinion, to exclude exposure to lead paint without giving CIM MAC notice of the changed policy interpretation.

¶11 WISCONSIN STAT. § 631.36(5)(a) requires an insurer to notify its insured when "the insurer offers or purports to renew the policy but on less favorable terms or at higher premiums."[4] American Family was not required to

[3] The application of the pollution exclusion clause is also subject to the condition that the pollutant discharged, dispersed, released or escaped into the environment. We will discuss this requirement below.

[4] WISCONSIN STAT. § 631.36(5)(a) states in its entirety:

> (a) *General*. Subject to pars. (b) and (d), if the insurer offers or purports to renew the policy but on less favorable terms or at higher premiums, the new terms or premiums take effect on the renewal date if the insurer sent by 1st class mail or delivered to

(continued)

give notice to CIM MAC of any change of how American Family may have internally interpreted the language because the policy's language—that is, its definition of a pollutant did not change. As discussed above, in 1991, when the incident occurred, the policy was clear that pollutants, such as lead, were not covered. *See* ***Peace***, 228 Wis. 2d at 110–111, 596 N.W.2d at 431. The notice that American Family later sent out to its insured to "clarify" that lead-based injuries would not be covered did not either alter or purport to alter the language of the policy in effect at the time Clarissa ate the paint chips. Accordingly, WISCONSIN STAT. § 631.36(5) does not apply because lead was always excluded from coverage under ***Peace***; thus, the terms of the policy did not change.

¶12 Finally, CIM MAC alleges that there is a factual dispute as to whether Clarissa ate paint chips that "discharged, dispersed, released, or escaped" into the environment, a requirement for the policy's exclusion to take effect. CIM MAC claims that it is unclear whether Clarissa peeled the paint chips off an intact, accessible surface or whether she picked the paint chips up from the floor. Thus,

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> the policyholder notice of the new terms or premiums at least 60 days prior to the renewal date. If the insurer notifies the policyholder within 60 days prior to the renewal date, the new terms or premiums do not take effect until 60 days after the notice is mailed or delivered, in which case the policyholder may elect to cancel the renewal policy at any time during the 60-day period. The notice shall include a statement of the policyholder's right to cancel. If the policyholder elects to cancel the renewal policy during the 60-day period, return premiums or additional premium charges shall be calculated proportionately on the basis of the old premiums. If the insurer does not notify the policyholder of the new premiums or terms as required by this subsection prior to the renewal date, the insurer shall continue the policy for an additional period of time equivalent to the expiring term and at the same premiums and terms of the expiring policy, except as permitted under sub. (2) or (3).

CIM MAC alleges that, even if the pollution exclusion clause applies to lead-based injuries, this case cannot be decided on summary judgment because there is a factual dispute about the manner in which Clarissa was exposed to the paint chips.

¶13 The deposition testimony of Lou Emma Hale and the language of the complaint demonstrate, however, that Clarissa ate paint chips that "discharged, dispersed, released, or escaped" into the environment. Lou Emma Hale stated that when she found Clarissa with paint chips in her mouth:

> there was [sic] paint chips … scooted off the window and on the floor and everything. I can remember seeing a little around, so I don't know if I just thought she peeled it or not. You know, I remember where I saw them at.

Furthermore, the complaint alleged "Clarissa Hale, did in fact ingest … peeling and flaking paint." It is not disputed that when Clarissa ate the paint, it was already in chip form. Nowhere does the complaint allege that Clarissa was exposed to paint from an intact, accessible surface. "By implication, lead that [leaves] 'intact accessible painted surfaces' through paint chips, flakes, and dust [has] discharged, dispersed, released, or escaped." ***Peace***, 228 Wis. 2d 129, 596 N.W.2d at 439. Thus, it does not matter whether Clarissa picked the paint chips up off of the floor or peeled the paint chips off of the windowsill. The paint was already in chip form, thus, it could not have come from an intact surface. Accordingly, the pollution exclusion policy applies and we affirm the trial court's grant of summary judgment.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.