COURT OF APPEALS
DECISION
DATED AND RELEASED

June 3, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-0748

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

WISCONSIN INSURANCE PLAN,

PLAINTIFF-APPELLANT,

v.

THRESHERMEN'S MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

MCM INSURANCE AGENCY AND
ABC INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. This is a dispute over insurance coverage and who should bear a fire loss. Anchor Savings and Loan was the mortgagee of a building that burned on January 3, 1991. Wisconsin Insurance Plan paid on the loss, and brought this action for contribution against Threshermen's Mutual Insurance Company. Threshermen's Mutual denied that it provided coverage to Anchor. The sole issue on this appeal is whether the Threshermen's Mutual insurance policy should be reformed to provide coverage. The trial court, following a bench trial, concluded that the policy should not be reformed. We affirm.

I.

In May of 1990, Threshermen's Mutual issued an insurance policy for the building. An earlier Threshermen's Mutual policy covering the building was cancelled because the building's owner did not pay the premiums. The premiums on the second policy were also not paid and Threshermen's Mutual cancelled this policy as well. The policy was cancelled before the January 3, 1991, fire. Neither the first cancelled policy nor the second cancelled policy listed Anchor as a mortgagee even though, as found by the trial court, the insurance agent who procured the policy "was asked to show Anchor in a loss payable clause." A representative of the building's owner testified at the trial that he told Anchor about the cancellation and, according to the representative's uncontradicted testimony, the building's owner made a conscious decision not to pay the premiums because it could not both afford them and maintain the building. Anchor agreed with the owner's decision as to how to allocate the building owner's

limited resources.[1] The trial court denied Wisconsin Insurance's request that the Threshermen's Mutual policy be reformed to provide coverage despite the

[1] The building owner's representative responded "Right" when a lawyer for Threshermen's Mutual summarized the decision not to carry insurance with Threshermen's Mutual:

> [Y]ou essentially made a choice that Anchor agreed with that what money you had coming in you were going to put it in and try to maintain the building?

Earlier in his testimony, however, he told the trial court that Anchor "wanted us to get insurance and pay our mortgage payments as soon as possible." Wisconsin Insurance Plan argues that this contradicts his later testimony that Anchor agreed with letting the Threshermen's Mutual insurance lapse for nonpayment of premiums. Wisconsin Insurance, however, takes the representative's testimony out of context:

> Q As I understand it, in 1990 you told these folks at Anchor that Threshermen's had canceled your policy, right?
>
> A Right.
>
> Q And what did they tell you?
>
> A They wanted us to get insurance and pay our mortgage payments as soon as possible.
>
> Q What did you tell them?
>
> A Well, we said we can either evict these people who are essentially squatters and fix – repair the building. Some of these people took the doors off, people took carpeting out, it was a real mess. We said we can make payments on this or this, we can't pay both. And Jim Hoemke said they had some kind of master policy that covered their foreclosures, and we were in foreclosure at that point, and so we thought we were all right, at least to protect Anchor.

It was after the building's owner had explained the fix they were in "that Anchor agreed" that the premium money could be used to maintain the building. The trial court specifically found "that Anchor was aware" that the Threshermen's Mutual policies had been cancelled and that the owner was making a business decision to divert money that would have gone to pay the premiums into the building's upkeep. We may not overturn on appeal a trial court's findings of fact unless we can conclude that they are "clearly erroneous." *See* RULE 805.17(2), STATS. The trial court's findings that Anchor both knew that the Threshermen's Mutual policies were cancelled and acquiesced in the building owner's decision to let the Threshermen's Mutual coverage lapse are supported by the record.

nonpayment of premiums, ruling that Anchor, in whose shoes Wisconsin Insurance stood, had "unclean hands":

> This is a proceeding in equity. It seems – what we have is the doctrine that we called in law school any way the clean hands doctrine, and this is Anchor. Anchor knew. Anchor now cannot be allowed to reform this contract and thus neither can Wisconsin Insurance Plan.

Although we disagree that, strictly speaking, the "clean hands" doctrine applies, we affirm.[2]

II.

A party seeking to recover in contribution must demonstrate that it and the party from whom contribution is sought are "liable for the same obligation" and that the party seeking contribution has "paid more than a fair share of the obligation." ***Kafka v. Pope***, 194 Wis.2d 234, 243, 533 N.W.2d 491, 494 (1995). Thus, Wisconsin Insurance Plan's claim turns on whether it and Threshermen's Mutual had a common liability in connection with insurance coverage for the fire. Wisconsin Insurance Plan contends that Threshermen's Mutual's cancellation of Anchor's policy was ineffective because Threshermen's Mutual did not give Anchor notice under § 631.36(2)(b), STATS., that the policy was being cancelled. Section 631.36(2)(b) provides that no cancellation (for various causes, including "[s]ubstantial breaches of contractual duties, conditions or warranties," § 631.36(2)(a)3, STATS.) is "effective until at least 10 days after the 1st class mailing or delivery of a written notice to the policyholder." Anchor was not listed on the Threshermen's Mutual policy, however, and it is this defect

[2] We may affirm the trial court if it reaches the proper result even though we may disagree with its legal analysis. ***State v. Holt***, 128 Wis.2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985).

that Wisconsin Insurance Plan seeks to change *via* the equitable remedy of reformation. *See* ***Trible v. Tower Ins. Co.***, 43 Wis.2d 172, 182, 168 N.W.2d 148, 154–155 (1969) (insurance policy may be reformed to provide coverage requested but not provided by the written policy); ***Lumbermen's Nat'l Bank v. Corrigan***, 167 Wis. 82, 87, 166 N.W. 650, 652 (1918) (policy can be reformed to add mortgagee as loss payee when that is the intent of the parties).

A party may not come into court in search of an equitable remedy when that party's action or inaction has contributed to the situation it seeks to correct. ***Emmco Ins. Co. v. Palatine Ins. Co.***, 263 Wis. 558, 569, 58 N.W.2d 525, 530 (1953); *cf.* ***Barly v. Public Fire Ins. Co.***, 203 Wis. 338, 343–344, 234 N.W. 361, 363 (1931) (mere failure to read insurance contract will not bar action for reformation). Although, as we noted above, we do not believe that the "clean hands" doctrine is strictly applicable here because Anchor was not "guilty of substantial misconduct" in connection with its business decision to approve the building owner's letting the Threshermen's Mutual policy lapse for nonpayment of premiums, *see* ***Huntzicker v. Crocker***, 135 Wis. 38, 41–43, 115 N.W. 340, 341–342 (1908), Anchor's ratification of the building owner's decision to use the premium money for other purposes prevents it from arguing that it nevertheless had coverage under the cancelled Threshermen's Mutual policy. *See* 66 AM. JUR. 2D, *Reformation of Instruments* § 75 (1973). Stated another way, we reject Wisconsin Insurance Plan's argument that:

> 1. even though Anchor accepted the building owner's decision to divert to other uses money that would have paid the premiums on the Threshermen's Mutual policy, and
>
> 2. even though Anchor knew that as a result there would be no coverage for the building under the Threshermen's Mutual policy,

the policy should be reformed to add Anchor as a listed loss payee so that Threshermen's Mutual failure to give to Anchor a written notice of cancellation triggers § 631.36(2)(b), STATS.

By the Court.—Judgment affirmed.

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