COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3287 **Cir. Ct. No. 01-CV-210**

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

ALYSSA L. DUE, BY HER GUARDIAN AD LITEM, SUSANNE M. GLASSER, BRETT DUE AND DAWN M. DUE,

PLAINTIFFS-CO-APPELLANTS,

V.

JOHN B. KING AND TIMBERLANE, LLC,

DEFENDANTS-APPELLANTS,

THE CINCINNATI INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

JOHN BURTON KING TRUST, D/B/A KING RENTS, AND NETWORK HEALTH PLAN, C/O HEALTHCARE COST RECOVERY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed.*

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Alyssa L. Due, by her guardian ad litem, and her parents, Brett and Dawn M. Due (Due), and John B. King and Timberlane, LLC (King) appeal from a summary judgment in favor of The Cincinnati Insurance Company which held that Cincinnati did not owe coverage to King for Alyssa's personal injuries arising from exposure to lead in the house her parents rented from King. We affirm.

¶2 The following facts are undisputed. Alyssa's parents rented the house from King several months before she was born. At her one-year checkup, Alyssa had elevated levels of lead in her blood. The house had lead-based paint and lead-based varnish on numerous surfaces, although there was no flaking or peeling paint or varnish in the home. But Alyssa's mother observed Alyssa with her mouth on varnished windowsills. There was also some lead in the soil around the house. After lead remediation work in the house, Alyssa's lead levels returned to normal. Alyssa and her parents sued King for Alyssa's personal injuries stemming from the elevated lead levels she experienced.

¶3 King's primary commercial general liability insurer was Mt. Morris Mutual Insurance Company. Cincinnati was King's commercial umbrella liability insurer. The Mt. Morris policy contains an endorsement stating that the policy does not apply to "actual or alleged bodily injury that results directly or indirectly from the ingestion, inhalation or absorption of lead in any form." The Mt. Morris policy also contains a general pollution exclusion clause.

¶4 Cincinnati's policy has a general pollution exclusion clause, not a lead-specific pollution exclusion clause. Additionally, ¶13d of Cincinnati's policy

excludes from coverage "[a]ny liability caused by pollutants excluded by 'underlying insurance.'"

¶5 The circuit court concluded on summary judgment that the Mt. Morris policy has an unambiguous lead liability exclusion and a more general pollution exclusion and that Mt. Morris does not owe coverage for Due's claim. Among other reasons for granting summary judgment, the court concluded that regardless of how Alyssa was exposed to the lead, ¶13d of the Cincinnati policy excluded coverage for any claim also excluded by the underlying insurer, Mt. Morris. Due and King appeal.[1]

¶6 On appeal, Due and King argue that there are material factual questions as to how Alyssa came in contact with the lead and that a reasonable insured in King's position would not have known that the Cincinnati policy excluded coverage for Due's claim.

¶7 We review decisions on summary judgment by applying the same methodology as the trial court. ***M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** at 496-97.

¶8 Paragraph 13d of Cincinnati's policy excludes liability caused by pollutants excluded by Mt. Morris. Lead is a recognized pollutant within the

[1] Neither Due nor King has appealed from the summary judgment in favor of Mt. Morris on the coverage question.

meaning of a general pollution exclusion such as the one in Mt. Morris's and Cincinnati's policies. *See* ***Peace v. Northwestern Nat'l Ins. Co.***, 228 Wis. 2d 106, 130 n.16, 596 N.W.2d 429 (1999). Cincinnati's ¶13d is not ambiguous, and no reasonable insured could miss its significance: if Due's claim is excluded by the Mt. Morris policy, it is also excluded by the Cincinnati policy. Neither Due nor King has appealed from the circuit court's determination that Mt. Morris does not owe coverage.

¶9 Due and King argue that coverage is required by ***Peace***. This argument ignores the fact that the Mt. Morris policy has an additional clause which specifically excludes liability arising from exposure to lead in any form and in any manner. The lead exclusion, which was made by endorsement, became part of the policy, *see* ***Budget Rent-A-Car Systems, Inc. v. Shelby Insurance Group***, 197 Wis. 2d 663, 670, 541 N.W.2d 178 (Ct. App. 1995), and ¶13d of the Cincinnati policy operates to exclude liability for the lead exposure.

¶10 King argues that Cincinnati's later attempt to add, by endorsement, a specific lead exclusion demonstrates that the original policy was ambiguous. We need not reach this argument because we have held that ¶13d of the Cincinnati policy bars coverage.[2]

¶11 We also reject King's argument that even if Cincinnati does not have a duty to indemnify, it has a duty to defend. We have held that Cincinnati does not owe coverage. Therefore, it no longer has a duty to defend. *Cf.* ***Sch. Dist. of***

[2] If we were to reach this argument, we would hold that where an insurance policy is not ambiguous, we do not consider materials outside the policy. ***Peace v. Northwestern Nat'l Ins. Co.***, 228 Wis. 2d 106, 140, 596 N.W.2d 429 (1999).

Shorewood v. Wausau Ins. Cos., 170 Wis. 2d 347, 366, 488 N.W.2d 82 (1992) (insurer has a duty to defend whenever there is a possibility of liability within the policy's coverage).

By the Court.—Judgment affirmed.

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