2012 IL App (1st) 112500-U

FOURTH DIVISION
December 6, 2012

No. 1-11-2500

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEAK PROPERTIES, INC., and INDIANA INSURANCE COMPANY,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 08CH20656
AMERICAN FAMILY MUTUAL INSURANCE COMPANY,	)	The Honorable Stuart E. Palmer, Judge Presiding.
Defendant-Appellee.	)	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concur in the judgment.

Held: Summary judgment appropriate in declaratory judgment action where appellee insurance company had no duty to defend insured property manager in claim based on damages stemming from exposure to lead paint where insurance policy specifically excluded coverage for injuries stemming from exposure to lead paint. Circuit court affirmed.

¶ 1 ORDER

¶ 2 Appellants Peak Properties and Indiana Insurance Company (Indiana Insurance) appeal from the circuit court's grant of summary judgment to appellee American Family Mutual

Insurance Company (American Family). This judgment arose out of a declaratory judgment action (735 ILCS 5/2-701 (West 2010)) filed by Peak Properties and Indiana Insurance against American Family Insurance, wherein Peak Properties and Indiana Insurance sought a declaration that American Family owed coverage and a defense to Peak Properties in an underlying claim brought by Nedley against Peak Properties. Peak Properties, which is a property management company, and Indiana Insurance, which insured Peak Properties, contend that the circuit court erred in finding that American Family had no duty to defend Peak Properties in a lawsuit filed by prior tenants regarding harm allegedly caused by exposure to lead paint in two buildings managed by Peak Properties. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The undisputed facts in this case show that American Family issued an insurance policy to Don Schein to cover an apartment building located at 4645-4655 North Elston Avenue in Chicago. The policy, a businessowners package policy, was effective from November 8, 1999, to November 8, 2000. It provided:

> "We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies."

"Insured" was defined in the policy to include the named insured as well as "any person or organization while acting as the named insured's real estate manager."

¶ 5 The portion of the policy describing its business liability insurance provided:

"SECTION II–BUSINESS LIABILITY AND MEDICAL PAYMENTS INSURANCE

This section of the policy protects you and your business against claims that result from injury to others, or damage to others' property. * * * "

The policy also included a lead liability exclusion, which exclusion is at issue in the case at bar:

"THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

LEAD LIABILITY EXCLUSION

This endorsement modifies insurance provided under the Businessowners Package Policy.

Section II Coverage A and B is change to add the following exclusions:

We do not pay for:

1. actual or alleged bodily injury arising out of the ingestion, inhalation or absorption of lead in any form;

2. actual or alleged property damage arising out of the presence of lead in any form. Property damage also includes an claim for diminution of value of real estate or personal property due to its contamination with lead in any form.

3. actual or alleged personal injury or advertising

injury, if provided by Coverage B Personal Injury and Advertising Injury Liability, arising out of the presence of lead in any form.

4. any loss, cost or expense arising out of any request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize or in any way respond to or assess the effects of lead.

5. any loss, cost or expense arising out of any claim or suit by or on behalf of any governmental authority or any other responsible party or entity for damages resulting from testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing or in any way responding to lead or assessing the presence or effects of lead.

All other terms remain unchanged."

¶ 6 In June 2003, Jeanie Nedley, as parent and next friend of Sarah Nedley, a minor, filed her first amended complaint against two property owners: (1) Barbara and Carl Usry of 5626 North Broadway Avenue in Chicago; and (2) Don Schein and Elston Garden, LLC., of 4649 North Elston Avenue in Chicago. Through this complaint, Nedley alleged that her daughter, Sarah, sustained lead poisoning in both residences due to the plaintiffs' negligence when she resided in the building as a tenant. She alleged that, as building owners, the defendants had a duty to:

"maintain or keep the premises in a safe and habitable condition, comply with all applicable building, housing, health, and

> safety codes that materially affect health and safety, including those codes relating to lead-based substances, and/or warn its tenants of hazardous conditions existing at the premises."

From July 2000 through the date of filing the first-amended complaint, the Nedley plaintiff resided at 4649 North Elston Avenue and, during this time, was "continually exposed to intact and accessible lead paint surfaces as well as deteriorating lead-based paint, lead dust, lead contamination" and, as a result, contracted lead poisoning.

¶ 7 She further alleged:

> "11. At the time Defendants offered the premises to minor Plaintiff's family, and at various times thereafter, Defendants expressly promised that the premises was and would continue to be kept, in a safe and habitable condition. Plaintiff agreed to occupy, and remain in said premises, based upon the express promises of Defendants.
>
> 12. Defendants either did not undertake any repairs or did not properly repair the premises and failed to fulfill or meet the promises made. During the time that Plaintiff resided in the premises, said premises was in a state of deterioration and disrepair, containing deteriorating lead paint and lead dust.
>
> 13. Due to the condition of the premises, Plaintiff was exposed to toxic levels of lead as a result of deteriorating lead paint

and lead dust.

14. As a result of the exposure in the premises, Plaintiff became poisoned by lead, causing serious injuries."

¶ 8 In March 2004, American Family filed a complaint for declaratory judgment against Elston Garden, Schein, and the Nedleys. It alleged, in pertinent part, that American Family owed no duty to defend Schein and Elston Garden in the Nedley lawsuit because the Nedley lawsuit sought to recover for bodily injury arising out of the ingestion, inhalation, or absorption of lead, which injury was not covered by the American Family insurance policy by way of the lead liability exclusion. In February 2005, the circuit court entered summary judgment in favor of American Family in its declaratory judgment action.

¶ 9 In September 2003, the Nedleys filed a second-amended complaint in which Peak Properties was added as a defendant. Peak Properties was the property manager at 4649 North Elston, the apartment building owned by Schein. In this second-amended complaint, the Nedleys alleged that Sarah was exposed to toxic levels of lead as a result of deteriorating lead paint and lead dust, and that she became poisoned by this lead. Specifically, the Nedleys alleged, again, that:

"15. While plaintiff resided at 4649 N. Elston, Apartment #1, she was continually exposed to deteriorating lead-based paint, lead dust, lead contamination and contracted lead poisoning."

They also alleged:

"20. At the time Defendant Peak Properties, Inc. offered

> the premises to Minor plaintiff's family, and at various times thereafter, defendant expressly promised that the premises was, and would continue to be kept, in a safe and habitable condition. Minor Plaintiff's family agreed to occupy, and remain in said premises, based upon the express promises of defendant.
>
> 21. Defendants either did not undertake any repairs or did not properly repair the premises and failed to fulfill or meet the promises made. During the time that plaintiff resided in the premises, said premises were in a state of deterioration and disrepair, containing deteriorating lead paint and lead dust.
>
> 22. Due to the condition of the premises, plaintiff was exposed to toxic levels of lead as a result of deteriorating lead paint and lead dust.
>
> 23. As a result of the exposure in the premises, plaintiff became poisoned by lead, causing serious injuries."

¶ 10 Indiana Insurance Company insured Peak Properties as its named insured on a commercial general liability policy, effective July 14, 1999, to July 14, 2000. Peak Properties and Indiana Insurance also believe that, as the property manager at 4649 North Elston, Peak Properties qualified as an insured under American Family's businessowners policy as "any person (other than your employee), or any organization, while acting as your [the named insureds'] real

estate manager."[1]

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[1]The management agreement between Peak Properties and Don Schein provides that Peak shall collect all rent, hire personnel and independent contractors, maintain the property, and perform various other services in the name of the owner. It also provides, in pertinent part:

> "5. INSURANCE: Unless otherwise agreed in writing, [Don Schein] shall at its own expense, maintain in effect at all times during the term of this management agreement, insurance terms with limits, which may be a combination of primary and excess coverage, satisfactory to Peak. Such insurance will name both the Property and Agent as insured."

And:

> "18. INDEMNIFICATION: The owner(s) shall defend and indemnify Peak, its subsidiaries . . . and assignees and hold them harmless from all suits or other claims including, but not limited to, those alleging any negligence of agent or its employees in connection with the property or the management thereof and from liability for damage to property and injuries to or death of any employee or person. The owner(s) shall pay all expenses, including but not limited to, attorneys' fees, costs, and expenses incurred to represent agent in regard to any claim, proceeding or suit stemming from the management of the Property."

¶ 11 Indiana Insurance undertook Peak Properties' defense for the Nedley second-amended complaint.

¶ 12 In 2008, pertinent to the case at bar, Peak Properties and Indiana Insurance filed a first-amended complaint for declaratory judgment against American Family. In this complaint, they suggested that American Family should be estopped from denying coverage to Peak Properties in the Nedley lawsuit and that American Family defend and indemnify Peak Properties for the Nedley lawsuit. Through this motion, they alleged that the Nedley second-amended complaint against Peak Properties revealed actual or potential coverage for Peak Properties under American Family's policy because:

> "(a) it pleaded Peak Properties, Inc. failed to comply with building and housing codes, but did not state or cite the codes violated; []
>
> (b) it pleaded Peak Properties, Inc. expressly warranted to maintain the premises in safe and habitable condition, but did not state what was promised; []
>
> (c) it pleaded Peak Properties, Inc. had a duty to inspect the property for known or knowable hazards including lead paint surfaces, but did not state the source of the duty and lead paint is a 'latent' condition which is undetectable by visual inspection and only detectable by testing and no law required Defendant Peak

Properties, Inc. to test for lead paint surfaces. []"

They alleged that, because of this actual or potential coverage for Peak Properties, American Family had a duty to contact Peak Properties to ask if Peak Properties wanted a defense. They also alleged that Indiana Insurance's policy coverage for Peak Properties was in excess over any coverage provided to Peak Properties by the owner of the property it managed as the real estate manager.

¶ 13 The depositions of Tori Jepsen and Robert McCormack were taken in the Peak Properties declaratory action. Tori Jepsen is an attorney with American Family. Jepsen testified that the named insured, Elston Garden, sought a defense from American Family from the Nedley lawsuit. Jepsen reviewed the claim and reviewed the policy. She determined that there was no coverage available because, in pertinent part, the policy included a lead liability exclusion. In August 2003, Jepsen sent a letter to the named insured declining coverage and advising the insured to obtain its own defense counsel. She testified that the Nedley case was diaried when the file came into her office and was then not removed from the docket. She testified that there is no need to monitor the underlying case when there has been a denial of coverage.

¶ 14 Robert McCormack testified at deposition that he is a paralegal with American Family. In regards to the Nedley case, McCormack would get the next court date from the Daley Center computer. If a case came up on the Friday call sheet for the following week, he would go to the Daley Center to get the next court date.

¶ 15 In 2009, Peak Properties settled the Nedley lawsuit for $425,000. Thereafter, Peak Properties and Indiana Insurance filed a motion for summary judgment on the first-amended

complaint for declaratory judgment. They contended that American Family breached its duty to defendant and was now estopped from asserting policy defenses it may have had to coverage because: (1) it failed to defend Peak Properties under a reservation of rights; or (2) it failed to file a complaint for declaratory judgment asking the court to determine whether a defense was owed.

¶ 16 American Family filed a cross-motion for summary judgment on the first-amended complaint for declaratory judgment.

¶ 17 After a hearing, the trial court found no breach of American Family's duty to defend where the factual allegations in the underlying suit, when compared to the lead paint exclusion in the policy, did not give rise to a potential for coverage. It entered summary judgment in favor of American Family, stating in open court:

> "THE COURT: American Family is right, and that the issue that decides the case today is whether or not at the outset it was clear that there was no coverage or not. * * * As to the rule of the estoppel, I'll read from the Huelage (phonetic) case. I think that has the best quote: 'The general rule of estoppel provides that an insurer that takes the position that a complaint potentially alleging coverage is not covered under a policy that includes a duty to defend may not simply refuse to defend the insured. Rather the insurer has 2 options. 1, to defend the suit under a reservation of rights or, 2, seek a declaratory judgment.' That there is no judgment.

And I think this is what's important. 'If the insurer fails to take either of the 2 steps and is later found to have wrongly denied coverage, the insured is estopped from raising policy defenses to coverage.'

The important part of that sentence is and is later found to have wrongfully denied coverage. So, really what it brings us back around to is: Did they wrongfully deny coverage? Because if they were right, then there's no estoppel.

If the facts allege [*sic*] in the underlying case fall potentially within the policy's coverage, the insurer is obligated to defend its insured even if the allegations [are] fraudulent. The policy says, under exclusions it says: This insurance does not apply to. And then at the start of most exclusions it says: We will not pay.

So, my question is: Is there an allegation in the complaint that arguably does not fall within that exclusion? And if there isn't an allegation in the complaint that arguably falls outside that exclusion, then there is no coverage based on my reading of the policy.

As a result of the fact that there's no coverage based on my reading of the policy and in comparison of the complaint estoppel cannot apply.

> Therefore, summary judgment is granted on behalf of the American Family and against Peak Properties. As to Peak Properties for summary judgment, it is denied."

¶ 18 Peak Properties and Indiana Insurance appeal.

¶ 19 II. ANALYSIS

¶ 20 Peak Properties and Indiana Insurance contend that the trial court erred in granting American Family's motion for summary judgment and that they were entitled to summary judgment as a matter of law. Specifically, Peak Properties and Indiana Insurance argue that: (1) American Family should be estopped to assert coverage defenses against plaintiffs because Peak Properties was a necessary and indispensable party to American Family's complaint for declaratory judgment and, therefore, American Family should have defended it against the Nedley second-amended complaint under a reservation of rights or filed its complaint for declaratory judgment against Peak Properties; (2) American Family breached its duty to defend when it did not contact Peak Properties to ask if it wanted a defense when the second-amended Nedley complaint was filed; and (3) the Nedley second-amended complaint actually revealed potential or possible coverage for Peak Properties. Although the plaintiffs present us with these three issues on appeal, the primary issue here is actually whether American Family owed a duty to defend and indemnify Peak Properties in the Nedley lawsuit. We find it had no such duty and, accordingly, find that the circuit court properly granted summary judgment in favor of American Family.

¶ 21 Summary judgment is proper when the pleadings, affidavits, depositions and admissions of record, construed strictly against the moving party, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See *Morris v. Margulis,* 197 Ill. 2d 28, 35 (2001). This relief is an appropriate tool to employ in the expeditious disposition of a lawsuit in which " 'the right of the moving party is clear and free from doubt.' " *Morris*, 197 Ill. 2d at 35, quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986). Summary judgment, however, is a drastic measure [of disposing litigation] and should be granted when the movant's right to judgment is clear and free from doubt." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). "[T]he construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court and appropriate subjects for disposition by summary judgment." *Konami (America), Inc. v. Hartford Insurance Co. of Illinois*, 326 Ill. App. 3d 874, 877 (2002).

¶ 22 Where cross-motions for summary judgment are filed in an insurance coverage case, the parties acknowledge that no material questions of fact exist and only the issue of law regarding the construction of an insurance policy is present. *American Family Mut. Ins. Co. v. Fisher Development, Inc*., 391 Ill. App. 3d 521, 525 (2009), citing *Liberty Mutual Fire Insurance Co. v. St. Paul Fire & Marine Insurance Co.*, 363 Ill. App.3d 335, 338-39 (2005). We review the circuit court's decision to grant or deny such a motion for summary judgment *de novo* (*Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007)), and we will only disturb the decision of the trial court where we find that a genuine issue of material fact exists (*Addison v. Whittenberg*, 124 Ill. 2d 287, 294 (1988)).

¶ 23 To determine whether an insurer has a duty to defend, the court generally compares the provisions of the insurance contract to the allegations in the underlying complaint. *Crum and Forster Managers Corporation v. Resolution Trust Corporation*, 156 Ill. 2d 384, 393 (1993). "If the conduct alleged in the underlying action is within or potentially within the policy's coverage, the insurer is duty bound to defend its insured, even if the insurer discovers that the allegations are groundless, false, or fraudulent." *Bituminous Casualty Corporation v. Fulkerson*, 212 Ill. App. 3d 556, 562 (1991) (*citations omitted).*

¶ 24 "In construing an insurance policy, the primary function of the court is to ascertain and enforce the intentions of the parties as expressed in the agreement. [Citation.] To ascertain the intent of the parties and the meaning of the words used in the insurance policy, the court must construe the policy as a whole, taking into account the type of insurance for which the parties have contracted, the risks undertaken and purchased, the subject matter that is insured and the purposes of the entire contract. [Citation.] If the words in the policy are plain and unambiguous, the court will afford them their plain, ordinary meaning and will apply them as written." *Crum & Forster Managers Corp,* 156 Ill. 2d at 391. If the insurer relies on an exclusionary provision, it must be "clear and free from doubt" that the policy's exclusion prevents coverage. *Country Mutual Insurance company v. Olsak*, 391 Ill. App. 3d 295, 305 (2009).

¶ 25 Accordingly, we begin our analysis by determining whether the conduct alleged in the underlying action is within or potentially within the policy's coverage. Like the court below, we find it is not, and affirm the grant of summary judgment for American Family.

¶ 26 The American Family insurance policy excludes coverage for the damages sought by the

Nedleys–*i.e.*, recovery for injuries caused by lead paint. Specifically, the lead paint exclusion included in the insurance policy in question precludes coverage for bodily injury, actual or alleged, arising out of the ingestion, inhalation or absorption of lead of any kind. The exclusion provides:

> "LEAD LIABILITY EXCLUSION
>
> This endorsement modifies insurance provided under the Businessowners Package Policy.
>
> Section II Coverage A and B is change to add the following exclusions:
>
> We do not pay for:
>
> 1. actual or alleged bodily injury arising out of the ingestion, inhalation or absorption of lead in any form;
>
> 2. actual or alleged property damage arising out of the presence of lead in any form. Property damage also includes an claim for diminution of value of real estate or personal property due to its contamination with lead in any form.
>
> 3. actual or alleged personal injury or advertising injury, if provided by Coverage B Personal Injury and Advertising Injury Liability, arising out of the presence of lead in any form.
>
> 4. any loss, cost or expense arising out of any request, demand or order that any insured or others test for,

monitor, clean up, remove, contain, treat, detoxify or neutralize or in any way respond to or assess the effects of lead.

5. any loss, cost or expense arising out of any claim or suit by or on behalf of any governmental authority or any other responsible party or entity for damages resulting from testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing or in any way responding to lead or assessing the presence or effects of lead.

All other terms remain unchanged."

The Nedley complaint clearly sought damages as a result of the ingestion, inhalation, or absorption of lead paint. Based upon the clear terms contained within the insurance policy, recovery for this type of injury is excluded.

¶ 27 The Nedley complaint contained three counts against Peak Properties: negligence; breach of express warranty; and willful and wanton misconduct. Each of these counts alleged that the minor plaintiff sustained lead poisoning, including:

"22. Due to the condition of the premises, plaintiff was exposed to toxic levels of lead as a result of deteriorating lead paint and lead dust.

23. As a result of the exposure in the premises, plaintiff became poisoned by lead, causing serious injuries.

24. The poisoning of plaintiff occurred repeatedly

throughout her residence in the premises aforesaid."

As to the negligence count against Peak Properties, the plaintiff alleged:

"95. As a direct and proximate result of the acts of Defendant, Plaintiff has suffered serious injuries, including:

a. lead poisoning which has spread throughout her system and has affected her in many ways, both physically and neurologically;

b. permanent neurological and developmental disabilities; and

c. permanent impairment of her ability to earn a living and provide her own needs."

As to the breach of express warranty count against Peak Properties, the plaintiff alleged:

"98. Defendant did, as named above, expressly warrant and covenant to keep and maintain said premises in a safe and habitable condition, and minor Plaintiff's family relied thereon.

99. Defendant breached this express warranty and covenant by allowing defective paint conditions and lead hazards to be present in the residence, rendering the premises unsafe and unhabitable.

100. As a direct and proximate result of the acts of Defendant, Plaintiff has suffered serious injuries, including:

a. lead poisoning which has spread throughout her system and has affected her in many ways, both physically and neurologically;

b. permanent neurological and developmental disabilities; and

c. permanent impairment of her ability to earn a living and provide for her own needs."

As to count three, the willful wanton misconduct and gross negligence count, plaintiff alleged:

"103. Defendant knew or should have known that lead hazards that were highly dangerous to children existed in their properties.

104. Defendant knew that Plaintiff, a minor under the age of 6, was residing on the property.

105. Nevertheless, Defendant rented the property to Plaintiff's family without warning them of the dangerous conditions and without remedying the dangerous conditions as required by state and federal statutes.

106. Even after receiving notice from the Department of Health, Defendant failed to properly and promptly remedy the lead based paint hazards.

107. This negligence by Defendant amounts to willful,

wanton, and wreckless [*sic*] misconduct.

108. As a proximate result of the willful, wanton, and wreckless [*sic*] misconduct of Defendant, Plaintiff has suffered serious injuries, including:

a. lead poisoning which has spread throughout her system and has affected her in many ways, both physically and neurologically;

b. permanent neurological and developmental disabilities; and

c. permanent impairment of her ability to earn a living and provide for her own needs."

¶ 28 Comparing the allegations contained in the complaint to the terms of the insurance policy, including the lead exclusion contained therein, it is evident that the allegations do not give rise to a potential for coverage. The Nedley complaint was based on allegations that the minor plaintiff was injured due to deteriorating lead paint and lead dust. The policy language specifically excludes from coverage actual or alleged bodily injury arising out of the ingestion, inhalation, or absorption of lead in any form (providing: "We do not pay for * * * actual or alleged bodily injury arising out of the ingestion, inhalation or absorption of lead in any form"). The policy unambiguously bars coverage for the claims asserted in the Nedley complaint such that it is clear and free from doubt that the policy's lead exclusion bars coverage. Therefore, American Family had no duty to defend Peak Properties. See, *e.g.*, *Crum & Forster Managers Corp.,* 156 Ill. 2d at

391 ("If the words in the policy are plain and unambiguous, the court will afford them their plain, ordinary meaning and will apply them as written."); see also *Country Mutual Insurance Company*, 391 Ill. App. 3d at 305 (If the insurer relies on an exclusionary provision, it must be "clear and free from doubt" that the policy's exclusion prevents coverage).

¶ 29 We find *Pope ex rel. Pope v. Economy Fire & Casualty Company*, 335 Ill. App. 3d 41 (2002), instructive to the case at bar. In *Pope*, appellee-insurer Economy Fire & Casualty Company issued an insurance policy covering an apartment building owned by appellant Nancy Basta. The policy excluded coverage for bodily injury "arising out of actual, threatened or alleged exposure to asbestos, lead paint, fiberglass or radon gas." *Pope ex rel. Pope*, 335 Ill. App. 3d at 48. A former tenant in Basta's insured apartment building filed a lawsuit, alleging injuries sustained as the result of his ingestion of lead-based paint or lead dust while renting the apartment. *Pope ex rel. Pope*, 335 Ill. App. 3d at 43. The insurer refused coverage to Basta. *Pope ex rel. Pope*, 335 Ill. App. 3d at 44. The trial court granted summary judgment on a declaratory judgment action in favor of the insurer, holding that the insurer did not commit an anticipatory breach of its duty to defend its insured in connection with the lawsuit. *Pope ex rel. Pope*, 335 Ill. App. 3d at 43.

¶ 30 On appeal, the plaintiff challenged the declaratory judgment, arguing, in relevant part, that the lead paint exclusion in the policy did not bar coverage for his negligence claims because the exclusion did not specify an exclusion for lead dust. *Pope ex rel. Pope*, 335 Ill. App. 3d 43. This court affirmed, holding, in pertinent part, that the lead-paint exclusion precluded coverage for the plaintiff-tenant's exposure to lead dust. *Pope ex rel. Pope*, 335 Ill. App. 3d 48.

Specifically, the *Pope* court compared the language of the policy with the allegations of the complaint and found the allegations did not give rise to a potential for coverage. *Pope ex rel. Pope*, 335 Ill. App. 3d 48. It stated:

> "We reject plaintiff's assertion that the complaint alleges additional facts that potentially fall within the coverage provided by Economy. Plaintiff's argument raises an issue of first impression in Illinois: whether the lead paint exclusion precludes coverage for plaintiff's exposure to lead dust where the exclusionary provision contains no express reference to lead dust. When an insurer relies upon an exclusionary clause in an insurance policy to deny coverage, the applicability of the clause must be clear and without doubt because any doubts as to coverage will be resolved in favor of the insured. *Yamada Corp. v. Yasuda Fire & Marine Insurance Co.*, 305 Ill. App. 3d 362, 371 (1999). However, courts should not torture the language of a policy to find coverage where it is clear that none exists. *Cohen Furniture Co. v. St. Paul Insurance Co.*, 214 Ill. App. 3d 408, 411 (1991)." *Pope ex rel. Pope*, 335 Ill. App. 3d 48-49.

The court held that Economy owed no duty to defend Basta where, when it compared the allegations in the complaint to the language of the policy, it found no potential for coverage because the complaint was "replete with references to lead paint and states that plaintiff ingested

lead by either eating it or by breathing or ingesting the lead-contaminated dust created by 'crumbling, deteriorating or oxidizing lead-based paint.' " *Pope ex rel. Pope*, 335 Ill. App. 3d at 48.

¶ 31 Similarly, here, when comparing the allegations in the complaint to the language in the policy, there is clearly no potential for coverage because the Nedley's complaint is replete with references to lead paint and injury due to the ingestion of lead paint, which coverage is specifically excluded by the insurance policy. In fact, unlike the policy in *Pope*, there is no question here that the allegations in the complaint mirror the policy's lead exclusion language, *i.e.*, the alleging lead poisoning due to exposure to lead-based paint hazards where the policy's "lead liability exclusion" specifically excludes coverage for "actual or alleged bodily injury arising out of the ingestion, inhalation or absorption of lead in any form[.]".

¶ 32 In addition, because American Family had no duty to defend Peak Properties and the facts alleged do not even fall potentially within the insurance coverage, it also had no duty to indemnify Peak Properties. Where an insurer owes no duty to defend, then it owes no duty to indemnify, because the duty to defend is broader than the duty to indemnify. *Crum & Forster*, 156 Ill. 2d at 398 ("The duty to indemnify arises only if the facts alleged *actually* fall within coverage. (*Outboard Marine Corp*., 154 Ill. 2d at 128). In cases such as the instant case where no duty to defend exists and the facts alleged do not even fall *potentially* within the insurance coverage, such facts alleged could obviously never *actually* fall within the scope of coverage. Under no scenario could a duty to indemnify arise. Clearly, where there is no duty to defend, there will be no duty to indemnify[.]"). Accordingly, we conclude that summary judgment in

favor of American Family was appropriate.

¶ 33 Peak Properties and Indiana Insurance urge us to determine that the Nedley complaint "did not clearly, specifically and unequivocally plead facts showing no coverage and no possibility of coverage for Peak Properties pursuant to American Family's Lead Liability Exclusion" because "too many questions existed as to what duties Peak Properties, as property manager, had to the tenants, if any." They claim that the Nedley complaint was "vague and indefinite as to the property manager's liability." Peak Properties and Indiana Insurance, however, fail to identify any policy language that would make the lead exclusion inapplicable to Peak Properties. Rather, as discussed above, the lead exclusion clearly applies in the instant situation, excluding coverage for actual or alleged bodily injury arising out of the ingestion, inhalation or absorption of lead. The specific counts against Peak Properties allege that the minor plaintiff was injured via exposure to toxic levels of lead. Coverage for this type of injury is clearly and unequivocally excluded by the insurance policy issued by American Family. Accordingly, Peak Properties' and Indiana Insurance's claim fails.

¶ 34 Peak Properties and Indiana Insurance also contend that American Family is estopped to deny coverage to Peak Properties for the Nedley lawsuit because: (1) it failed to file a declaratory judgment action to determine coverage regarding the second-amended Nedley complaint; or (2) it should have defended Peak Properties for the Nedley second-amended complaint under a reservation of rights. They argue that American Family was required to elect to either defend the named insured or file a declaratory judgment action. We disagree.

¶ 35 Estoppel is an equitable doctrine providing, in this context, that an insurer taking the

position that a complaint potentially alleging coverage is not covered under a policy that includes a duty to defend may not simply refuse to defend the insured, but must either defend under a reservation of rights or seek a declaratory judgment that there is no coverage. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 150 (1999). Peak Properties' and Indiana Insurance's argument fails because the obligation to elect one of the options enunciated by the *Ehlco* court is triggered only when the complaint gives rise to a potential for coverage, which is not the case here. See *Gould & Ratner v. Vigilant Insurance Company*, 336 Ill. App. 3d 401, 411-12 (2002) ("Absent a clear duty to defend, an insurer would have no reason or obligation to file a declaratory judgment before the underlying suit is resolved. To hold to the contrary would lead to an illogical result: insurers would be required to promptly file actions for declaratory judgments to preserve their rights every time they are informed of a claim from an insured, even where there is clearly no potential for coverage"); see also *Pope ex rel Pope*, 335 Ill. App. 3d at 51-52 (By not defending under a reservation of rights or filing a declaratory action, insurer risked being found in breach of its duty to defend. But where insurer's "duty was never triggered, it cannot be estopped from raising coverage defenses, including the lead paint exclusion."). Here, as discussed above, there is no duty to defend. Accordingly, American Family was under no obligation to file a declaratory action and, accordingly, is not now estopped for its failure to do so.

¶ 36 Accordingly, the trial court did not err in granting American Family's motion for summary judgment.[2]

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[2]Due to our disposition herein, finding that American Family did not have a duty to

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 39 Affirmed.

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defend Peak Properties, we need not address Peak Properties' and Indiana Insurance's remaining claims.