COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1998

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

DENNIS J. FLYNN,

PLAINTIFF-RESPONDENT,

V.

AMERICAN FAMILY MUTUAL INSURANCE CO.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: RAYMOND E. GIERINGER, Reserve Judge. *Reversed and cause remanded with directions.*

EICH, C.J.[1] American Family Mutual Insurance Company appeals from a small-claims judgment awarding Dennis Flynn $2575 on his claim for coverage under an American Family homeowner's policy. Flynn purchased the

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(a), STATS.

policy to cover property on which he was planning to build a house. As the contractor excavated the building's foundation during construction, it was discovered that underground drain tile was located in the area and, when the tile was cut during excavation, water began to collect. To solve the water problem, Flynn paid a subcontractor $2575 to reroute the drain tile. Flynn submitted a claim to American Family, which denied coverage. Flynn sued, claiming that the repairs were a covered loss under the policy.

Answering Flynn's complaint, American Family asserted that the action was barred by the suit limitation clause of the policy, as well as by § 631.83(1)(a), STATS. American Family also claimed that the policy did not cover the loss.

After trial to the court—at which Flynn was the only witness—the trial court issued a memorandum decision concluding that Flynn's action was timely and that American Family's policy covered the loss. American Family appeals.

It is undisputed that the incident causing Flynn's loss occurred on February 21, 1996. The repairs were completed in late February or early March, and Flynn brought this action more than one year later, on April 4, 1997. American Family argues that the action was untimely both under the terms of its policy, which states that no action may be brought against the insurer "unless it is started within one year after the date of loss," and under § 631.83(1)(a), STATS., which provides that actions on "fire insurance" policies must be commenced "within 12 months after the inception of the loss."

The trial court found that the policy limitation was valid but concluded, on what can best be described as equitable grounds, that it would be

"unconscionable" to enforce the limitation because Flynn did not receive a copy of the policy until after he had incurred the loss. The court reasoned that American Family's delay in providing a copy of the policy to Flynn "induce[d]" Flynn in turn to delay commencing action against American Family. According to the court, this inducement estopped American Family from enforcing the limitation provisions of its policy.

The parties agree that the facts are not in dispute and that we review the trial court's decision *de novo*. We owe no deference to the trial court's decision because the issues in dispute involve the interpretation of an insurance contract, ***Davis v. Allied Processors, Inc.***, 214 Wis.2d 294, 298, 571 N.W.2d 692, 694 (Ct. App. 1997), and the application of a statute to a particular set of facts. ***State v. Jason R.N.***, 201 Wis.2d 646, 650, 549 N.W.2d 752, 754 (Ct. App. 1996).

Flynn argues that the applicable statute of limitations is § 631.83(1)(d), STATS., which states, "Except as provided in this subsection … section 893.43 applies to actions on insurance policies." Section 893.43, STATS., is the general six-year statute of limitations applicable to contract actions. Flynn contends that because American Family's policy purports to shorten the statutory limitation from six years to one year, it is void under § 631.83(3)(a), which states that no insurance policy may "[l]imit the time for beginning an action on the policy to a time less than that authorized by the statutes."

The net effect of these statutes is simply stated: the general six-year statute of limitations applies to insurance policies unless another period is set forth in ch. 631, STATS., and no policy may validly shorten the applicable statutory limitation. American Family first points to the language of its policy stating: "**Suit Against Us.** No action can be brought unless it is started within one year after the

date of loss." The question thus becomes whether the "fire insurance" statute, § 631.83(1)(a), STATS., may be properly applied to the policy in this case. We believe it is applicable.

We recognized in ***Villa Clement, Inc. v. National Union Fire Insurance Co.***, 120 Wis.2d 140, 353 N.W.2d 369 (Ct. App. 1984), that the term "fire insurance" has historically been treated as a generic term for property indemnity insurance covering a broad spectrum of perils—as, in effect, an "all-risk" policy. Indeed, the loss involved in ***Villa Clement*** was a loss caused by flooding.[2] We see little question that § 631.83(1)(a), STATS., applies to the policy at issue here. And because the twelve-month limitation set forth in the statute meets the "[e]xcept as provided in this subsection" language of § 631.83(1)(d), that limitation—not the general limitation of § 893.43, STATS.—applies to Flynn's policy. As a result, the policy limitation is valid and applicable to Flynn's action.[3]

As indicated, because Flynn did not receive a copy of the policy until sometime after the loss occurred—approximately three weeks later, according to Flynn—the trial court ruled that American Family should be estopped from enforcing the policy limitation. American Family argues on appeal that the

---

[2] Flynn does not discuss or counter American Family's argument based on ***Villa Clement v. National Union Fire Insurance Co.***, 120 Wis.2d 140, 353 N.W.2d 369 (Ct. App. 1984).

[3] Citing ***Gross v. Lloyds of London Insurance Co.,*** 121 Wis.2d 78, 358 N.W.2d 266 (1984), Flynn suggests that we should not enforce the one-year policy limitation because it is not "conspicuously" printed in the policy. ***Gross*** stands only for the proposition that "[i]n order for an insurer to be relieved of its duty to defend upon tender of the policy limits, the 'tendered for settlements' language must be highlighted in the policy … by means of conspicuous print … which gives clear notice to the insured." ***Id.*** at 89, 358 N.W.2d at 271. ***Gross*** is inapposite. That case concerned a liability policy; this case concerns a homeowner's indemnity policy. Unlike ***Gross***, there is no issue of third party liability or a duty to defend. We note, too, that the language of the limitation clause is highlighted in the policy. The introductory identifying language, "**Suit Against Us**," is in bold type with initial capitals.

trial court erroneously relied on ***Dishno v. Home Mutual Insurance Co***., 256 Wis. 448, 41 N.W.2d 375 (1950), in so ruling. We agree. ***Dishno*** involved ongoing settlement negotiations extending well beyond one year following the loss—negotiations in which, according to the supreme court, the insurer never mentioned or suggested that the loss would not be covered. ***Id***. at 451, 41 N.W.2d at 376.[4] No such negotiations occurred during the year following Flynn's loss, and Flynn, unlike the insured in ***Dishno***, received the policy only a few weeks after the loss and still did nothing for forty-nine weeks thereafter. Flynn has not directed us to any evidence in the record indicating that American Family was at all deleterious in forwarding the policy to him, or that it acted in any way—intentionally or otherwise—to induce him to delay filing his action. Flynn apparently requested the coverage on or about February 16, 1996, when American Family's binder was issued. The loss occurred less than a week later, on February 21, and the policy was completed and mailed to Flynn on March 4. Flynn acknowledged receiving it sometime in "mid-March."

Additionally, as American Family points out, whether Flynn was aware of the policy limitation or not, § 631.83(1)(a), STATS., plainly limits the filing of actions on policies such as this to one year following the loss, and neither the trial court nor Flynn has referred to any authority explaining whether, and if so, in what circumstances, a court may exercise jurisdiction in the face of a plain violation of a statute of limitation. We conclude, therefore, that Flynn's action was untimely under both the language of the policy and the applicable statute of

[4] Flynn does not respond to this argument, nor does he comment on ***Dishno v. Home Mutual Insurance Co***., 256 Wis. 448, 41 N.W.2d 375 (1950), in his brief.

limitation.[5] We therefore reverse the judgment and remand this action to the circuit court with directions to enter judgment dismissing the complaint.

By the Court.–Judgment reversed and cause remanded with directions.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4, STATS.

[5] Even if the action could be considered timely—or, as the trial court determined, if the violation of the statute of limitations should be excused—we are persuaded by American Family's argument that its policy did not cover Flynn's loss. The policy covers only "property damage," which is defined as "physical damage to or destruction of tangible property, including loss of use of th[e] property." The policy also excludes from coverage any costs incurred "to restore, repair, rebuild or stabilize land." American Family points out that Flynn's testimony revealed that he paid the subcontractor to reroute the drain tile, and that he was "not asserting" that the contractor had to pump out the excavation "or do any remedial repairs on the property." According to Flynn, "[T]he repair that was accomplished [by the subcontractor] was simply to route the drain tile around the house." Thus, there is no evidence of any "physical damage to or destruction of tangible property" and, as a result, there can be no coverage for Flynn's loss. And to the extent the trial court viewed Flynn's loss as a "loss of use" of the property because "the construction could not continue until the tile problem was solved," we note that we held in ***Ehlers v. Johnson***, 164 Wis.2d 560, 564, 476 N.W.2d 291, 293 (Ct. App. 1991), that recovery under nearly identical policy language was limited to a loss of use "that accompanies physical injury or destruction" of the property.