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COURT OF APPEALS

STATE OF NEW YORK

NESMITH,

Appellant,

-against-

No. 187

ALLSTATE INSURANCE COMPANY,

Respondent.

20 Eagle Street
Albany, New York 12207
October 15, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE ABDUS-SALAAM

Appearances:

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Janice Brea
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 187, Nesmith.
2 Counsel.

3 MR. RICHTER: Good afternoon. May it
4 please the court, counsel - - -

5 CHIEF JUDGE LIPPMAN: Do you want rebuttal
6 time, counsel?

7 MR. RICHTER: I would, Your Honor. One
8 minute, please.

9 CHIEF JUDGE LIPPMAN: One minute. Go
10 ahead.

11 MR. RICHTER: My name is Mark Richter and
12 my firm, Nixon & Richter, represents the plaintiff-
13 appellant, commonly referred to as the Nesmith
14 children, in this appeal.

15 Nine years ago - - -

16 CHIEF JUDGE LIPPMAN: What are the indicia
17 of two separate occurrences here? What - - - what -
18 - - what separates these two occurrences in this
19 case?

20 MR. RICHTER: Well, several factors, Your
21 Honor.

22 CHIEF JUDGE LIPPMAN: So name them,
23 quickly.

24 MR. RICHTER: Okay. You're talking about a
25 different tenancy, different tenants. You're talking

1 about a different time period, a different policy
2 period. You're talking - - -

3 CHIEF JUDGE LIPPMAN: We're talking about
4 the same apartment, though, right?

5 MR. RICHTER: Same apartment, Your Honor,
6 but we're also talking about a span of fifteen,
7 sixteen months between two separate sets of hazards.

8 JUDGE GRAFFEO: Are they different
9 locations in the apartment?

10 MR. RICHTER: The overwhelming majority
11 were, Your Honor.

12 JUDGE GRAFFEO: I mean, is it just
13 windowsills, what - - -

14 MR. RICHTER: No, Your Honor. As set forth
15 in - - -

16 JUDGE GRAFFEO: Because there was some
17 attempt to rectify - - -

18 MR. RICHTER: Absolutely. In July of - - -

19 JUDGE GRAFFEO: - - - lead paint.

20 MR. RICHTER: In July of 1993, Mr. Wilson
21 was put on notice that a child who was residing at
22 the property had an elevated blood lead level. As a
23 result of that, the Monroe County Department of
24 Health came to the property and did a thorough
25 inspection; it's called an environmental

1 investigation.

2 JUDGE GRAFFEO: And he did some repaint; he
3 did some sanding and repainting.

4 MR. RICHTER: Yes, he did. New York State
5 - - -

6 JUDGE GRAFFEO: So are we talking about the
7 same locations in the apartment, or we don't know
8 that on this record?

9 MR. RICHTER: Well, only three of the
10 eleven locations that were cited in 1993 were sited
11 again in 1994. There were 58 locations tested in
12 1994 during our client's tenancy, which revealed
13 overwhelmingly that there were hazards in different
14 locations.

15 But that's really not the focus of our
16 appeal, Your Honor. What the focus is - - - and
17 there are really two focuses, Judge - - - is that
18 Allstate has, for the last nine years, been relying
19 upon this court's decision in Hiraldo v. Allstate.
20 And I know three of you were on the bench at that
21 time and decided that case.

22 I pulled the record on appeal; I read page
23 by page; I looked at the briefs in it, submitted in
24 connection with that case. And what was very clear
25 to me is that when this court examined those facts,

1 it had significantly different facts presented to it.

2 We were talking about, in Hiraldo, there
3 was one child who resided in an apartment for three
4 consecutive - - -

5 JUDGE PIGOTT: Well, the gravamen of the
6 opinion, as I understand it, was that the
7 non-cumulation clause is the whole ballgame. I think
8 Judge Smith, when he wrote it, said, but for that,
9 this would be much a much more difficult - - -

10 MR. RICHTER: That's right, Your Honor.
11 That's exactly right. But in Hiraldo - - -

12 JUDGE PIGOTT: But you're confronting the
13 non-cumulation clause, too.

14 MR. RICHTER: I - - - we are, Your Honor.
15 But we are asking this court to focus on a different
16 phrase.

17 JUDGE PIGOTT: A different what?

18 MR. RICHTER: A different phrase in the - -
19 -

20 JUDGE PIGOTT: Phrase.

21 MR. RICHTER: - - - non-cumulation clause.
22 You see, in Hiraldo - - -

23 JUDGE SMITH: Which one?

24 JUDGE ABDUS-SALAAM: Which one?

25 MR. RICHTER: "Same general conditions".

1 JUDGE ABDUS-SALAAM: Isn't that the phrase
2 that this court also suggested in Appalachian that if
3 you wanted to create or draft a not - - - almost
4 bulletproof non-cumulation clause, that you should
5 use that language?

6 MR. RICHTER: Judge, you're right, but the
7 facts were significantly different than what we have
8 here. You see, in this case, we're talking about a
9 change that occurred in the - - -

10 JUDGE SMITH: Why did these children not
11 face the same general conditions that the children of
12 the previous tenant had faced?

13 MR. RICHTER: I'm sorry, Judge?

14 JUDGE PIGOTT: Why did these children not
15 face the same general conditions that the previous
16 children in the same apartment had faced? The same
17 general conditions?

18 MR. RICHTER: Well, Judge, our position is,
19 when you look at the phrase, "same general
20 conditions", the average policyholder reviewing that
21 provision would look at the phrase, "same", and
22 expect it to mean identical; exactly.

23 JUDGE SMITH: Would he skip the word,
24 "general"?

25 MR. RICHTER: Well, "general", it's - - -

1 when you put the words - - - let me back up, Judge.
2 This phrase, "same general conditions", is a
3 critically important phrase in determining this case.
4 Notwithstanding that, and notwithstanding Allstate's
5 knowledge that policies of insurance like the one in
6 the case at bar are intended to protect an insured
7 for claims such as this, where you can have multiple
8 tenants in a multiple residence who potentially could
9 be subjected to - - -

10 CHIEF JUDGE LIPPMAN: Without the - - -
11 without the remediation that you had in this case,
12 could you have the same general conditions?

13 MR. RICHTER: Without - - - if - - - well,
14 that would be - - - that would be Hiraldo. If you
15 had - - -

16 CHIEF JUDGE LIPPMAN: So if the big - - -
17 is in your mind the reason why this is not the same
18 general conditions because they tried to cure it and
19 the county said that it's cured?

20 MR. RICHTER: That is one of the main
21 reasons, Judge, is because - - -

22 CHIEF JUDGE LIPPMAN: Because otherwise, it
23 could be same general conditions, right?

24 MR. RICHTER: Well, Judge, it's - - - going
25 back to the physiology - - -

1 CHIEF JUDGE LIPPMAN: Even though you agree
2 that even though it's different children, it could
3 still be the same general conditions.

4 MR. RICHTER: Well, if - - - if this was
5 Ramirez - - -

6 CHIEF JUDGE LIPPMAN: If you had - - - if
7 you had a problem, a new tenant came in, you still
8 had the problem, same general conditions?

9 MR. RICHTER: If the landlord didn't do
10 what he did in this case - - -

11 CHIEF JUDGE LIPPMAN: Yeah, yeah; that's
12 what I'm asking you.

13 MR. RICHTER: Right.

14 CHIEF JUDGE LIPPMAN: So your view is, this
15 is not the same general condition because the
16 landlord came in, tried to fix it, and the county
17 says, landlord did fix it.

18 MR. RICHTER: That's correct.

19 CHIEF JUDGE LIPPMAN: That's what makes it
20 not same general conditions.

21 MR. RICHTER: That's - - - that's the main
22 - - -

23 CHIEF JUDGE LIPPMAN: In essence - - -

24 MR. RICHTER: - - - reason, Judge. That's
25 the main argument.

1 CHIEF JUDGE LIPPMAN: - - - your main
2 argument.

3 MR. RICHTER: That's the main argument in
4 this case is - - -

5 JUDGE READ: Why should that make a
6 difference? Because they tried to fix it and didn't
7 do a complete job or didn't do a really good job, how
8 did that change the underlying condition? It just
9 didn't ameliorate it sufficiently.

10 MR. RICHTER: Well, New York State devine -
11 - - defines a lead hazard as a condition conducive to
12 lead poisoning. If there's lead in the home, as this
13 court has recognized in the context of, like,
14 asbestos litigation, a hazardous substance, in and of
15 itself, does not create an occurrence or an injury.
16 It's only when - - - in this case a child is exposed
17 to a deteriorating paint condition, and not just is
18 exposed to it; and suffers an injury as a result of
19 it, then you have an occurrence under the policy.

20 In this case - - -

21 CHIEF JUDGE LIPPMAN: Let me ask you a
22 question.

23 MR. RICHTER: Yes.

24 CHIEF JUDGE LIPPMAN: Taking one step
25 further, what I'm asking you and Judge Read is asking

1 you, is your argument not only that they tried to fix
2 it but is the key to your argument that the county
3 says they did whatever they're supposed to do? Is
4 that a key part of your argument or not?

5 MR. RICHTER: It's not. We have other
6 proof indirectly - - -

7 CHIEF JUDGE LIPPMAN: You mean that, as
8 Judge Read says, they try to fix it and they did a
9 terrible job, it's not the same general condition?

10 MR. RICHTER: It's not the same general
11 condition, because we have - - -

12 CHIEF JUDGE LIPPMAN: Why not?

13 MR. RICHTER: Well, because if - - -

14 CHIEF JUDGE LIPPMAN: If they try to fix
15 it, they did a terrible job, the condition still
16 exists, why isn't it the same general condition?

17 MR. RICHTER: Well, in this case, we have
18 proof that there were hazards in - - - most of the
19 hazards were in completely different areas. And - -
20 -

21 JUDGE ABDUS-SALAAM: There were some same
22 areas.

23 MR. RICHTER: Very few.

24 JUDGE ABDUS-SALAAM: Windowsills and some
25 panels and some other things.

1 MR. RICHTER: Very, very few. I mean - - -

2 JUDGE ABDUS-SALAAM: So would you be asking
3 us to look at each situation and parse, on the same
4 general conditions, whether they existed in the
5 hallway or in the bedroom or the bathroom or - - -

6 MR. RICHTER: I understand, Your Honor. As
7 a practical matter in these lead cases, for a
8 plaintiff to establish their claim, the plaintiff has
9 to show that they suffered exposure to a hazardous
10 condition. And the way that happens is through
11 county records, through testimony of experts, and
12 what we have, as we do in this case, is the county
13 will go out and it will do a thorough investigation
14 of the property - - - interior, exterior - - - and
15 that will resolve your - - -

16 CHIEF JUDGE LIPPMAN: What is the county
17 saying that okay, it's remediated - - - what exactly
18 does that mean? What are they saying?

19 MR. RICHTER: What that means, Judge - - -

20 CHIEF JUDGE LIPPMAN: Are they saying the
21 apartment is free of any lead or whatever?

22 MR. RICHTER: No.

23 CHIEF JUDGE LIPPMAN: What are they saying?

24 MR. RICHTER: No, Judge, they're not saying
25 that. What they're saying is that there are no

1 hazards present anymore. You can have lead - - -

2 CHIEF JUDGE LIPPMAN: So whatever dangerous
3 condition existed has now been removed, is what the -
4 - -

5 MR. RICHTER: It's been remediated - - -

6 CHIEF JUDGE LIPPMAN: - - - county's seal
7 of approval means?

8 MR. RICHTER: It's been discontinued - - -

9 CHIEF JUDGE LIPPMAN: And is there no
10 circumstance, if they give you that seal of approval,
11 where it could be still a continuous situation?

12 MR. RICHTER: As a practical matter, Judge,
13 you wouldn't have that. You wouldn't have that. You
14 know, what you have - - -

15 CHIEF JUDGE LIPPMAN: Let's say that the
16 kid gets hurt because of the radiator; the
17 remediation comes in and says, you fixed up things
18 relating to the ceiling, and then the next kid gets
19 hurt from the radiator again - - - radiator again.
20 Continuous condition or not?

21 MR. RICHTER: Well, Judge, you'd have to
22 look at the totality of the - - -

23 CHIEF JUDGE LIPPMAN: That could be. That
24 could be, right - - - conceivably - - - continuing
25 conditions?

1 MR. RICHTER: Well, I'd have to - - -

2 CHIEF JUDGE LIPPMAN: You're saying in this
3 case it's not, I understand that.

4 MR. RICHTER: Correct, Judge, I'm saying
5 that it's not and - - -

6 CHIEF JUDGE LIPPMAN: But it could be, in
7 that circumstance?

8 MR. RICHTER: Well, you know, there could
9 be just about any factual scenario.

10 JUDGE GRAFFEO: Theoretically, can you tell
11 us what does the non-cumulation clause apply to?

12 MR. RICHTER: It applies to the situation
13 that this court was presented with in Hiraldo where
14 you have one child, or different family members,
15 within the same tenancy, who are living in the same
16 apartment, who were subjected to the same set of
17 hazards.

18 JUDGE READ: So it's got to be the same
19 tenancy?

20 MR. RICHTER: It's - - - well, that's one
21 of the factors that we argue is relevant. That's one
22 of the factors that we argue is relevant, but - - -

23 JUDGE ABDUS-SALAAM: What if the previous
24 family moved out and then two days later, a new
25 family moves in; and you're saying that would be a

1 different - - - a different injury, because it's a
2 different family, even though the lead paint was
3 never remediated?

4 MR. RICHTER: If the lead paint was not
5 remediated, if the conditions continued to exist and
6 we were within the same policy period, arguably, only
7 one limitation would apply. Obviously, that's
8 extremely different from what we have in this case,
9 Judge.

10 CHIEF JUDGE LIPPMAN: Okay, counsel.
11 Thanks. You'll have rebuttal.

12 MR. RICHTER: Thank you.

13 CHIEF JUDGE LIPPMAN: Thank you.

14 MR. MASCIA: Good afternoon. May it please
15 the court, the only difference - - -

16 CHIEF JUDGE LIPPMAN: Counselor, counselor.
17 How could that - - - this not be a different
18 condition, when you have two different families, two
19 different time periods. You have remediation in the
20 middle. How could this be one continuous injury?

21 MR. MASCIA: Because that's exactly - - -

22 CHIEF JUDGE LIPPMAN: Does it make any
23 sense?

24 MR. MASCIA: Well, it's exactly what the
25 language in the policy says, Your Honor.

1 CHIEF JUDGE LIPPMAN: Is that - - -

2 JUDGE PIGOTT: Let me ask you this, then.

3 CHIEF JUDGE LIPPMAN: Go ahead.

4 JUDGE PIGOTT: Suppose you got a hole in
5 the front porch, and a kid falls in it and gets hurt,
6 and then you got to pay him 300,000 dollars and
7 that's your policy. Is the homeowner now uninsured
8 when the next tenant comes in and their kid falls in
9 the hole?

10 MR. MASCIA: Absolutely, Your Honor,
11 because that's the same condition that caused the
12 original injury.

13 JUDGE PIGOTT: Wouldn't the homeowner be a
14 little surprised that he's paying you an annual
15 premium and now, all of a sudden, he's not covered?

16 MR. MASCIA: I don't believe so, Your
17 Honor, because when you read the policy, and the
18 policy says, "regardless of the number of injured
19 persons", okay, "claims" - - - "or claimants" - - -

20 CHIEF JUDGE LIPPMAN: Do you think your
21 policy is crystal clear?

22 MR. MASCIA: I think the policy - - -

23 CHIEF JUDGE LIPPMAN: You don't think it's
24 ambiguous at all?

25 MR. MASCIA: I think it's completely

1 unambiguous. This is the exact same clause that we
2 dealt with nine years ago in Hiraldo, and the only
3 factual difference between this case and Hiraldo is
4 the fact that there is this alleged remediation that
5 took place.

6 JUDGE PIGOTT: No, the difference is this.
7 You had one kid who was trying to get 300,000 dollars
8 over three years on three separate policies for the
9 same exposure, and he's saying, you know, I'm - - -
10 I'm getting exposed, getting exposed, so the 300,000-
11 dollar policy is now a 900,000-dollar policy, and we
12 said that's not true.

13 MR. MASCIA: But - - -

14 JUDGE PIGOTT: Now you've got two different
15 people at two different times in two different
16 apartments, to the extent that one was remediated and
17 one wasn't, and you want to say that they're the
18 same, and they're just - - - they're not.

19 MR. MASCIA: Well, but Your Honor, if you
20 look at the Hiraldo decision, this court cited with
21 approval, in deciding that case, the Greene,
22 Greenidge, and Bahar cases, okay? And at least one
23 of the those three cases involved multiple plaintiffs
24 who lived in the same apartment during policy
25 periods, and - - -

1 JUDGE PIGOTT: Okay.

2 MR. MASCIA: - - - and the facts of that -

3 - -

4 JUDGE PIGOTT: And if the first person - -

5 - if the first people here - - - if in Hiraldo they
6 had five kids; you've got a 300,000-dollar policy.

7 You've got five people in an automobile; you've got a
8 300,000-dollar policy. But that doesn't mean, when
9 you have an accident the next day that your policy's
10 been used up and you've - - - and you've no - - - you
11 have no coverage in the State of New York.

12 MR. MASCIA: But in an accident policy,
13 Your Honor, in contrast to this policy, the types of
14 non-cumulation provisions that exist here simply
15 don't exist.

16 CHIEF JUDGE LIPPMAN: Counsel, what about
17 the remediation?

18 MR. MASCIA: The reme - - -

19 CHIEF JUDGE LIPPMAN: What could be
20 clearer? The county says they fixed it.

21 MR. MASCIA: Well, first of all - - -

22 CHIEF JUDGE LIPPMAN: And they're different
23 people. It just doesn't - - -

24 MR. MASCIA: First of all - - -

25 CHIEF JUDGE LIPPMAN: - - - add up in terms

1 of being one continuing condition.

2 MR. MASCIA: Because the condition - - -

3 CHIEF JUDGE LIPPMAN: That doesn't matter,
4 the remediation?

5 MR. MASCIA: The condition, Your Honor, is
6 not the lead - - - a lead hazard that the appellants
7 would have the court believe is the condition.

8 CHIEF JUDGE LIPPMAN: So you're saying the
9 remediation was a totally different condition and - -
10 - and that they remediated something that had nothing
11 to do with the same injury that these kids got and
12 then the second had in a separate lease? Totally
13 different things than what was remediated?

14 MR. MASCIA: What we have here, Your Honor,
15 what the condition is, is lead paint that exists in
16 the insured premises.

17 CHIEF JUDGE LIPPMAN: Yeah, and I thought
18 that - - -

19 MR. MASCIA: Now - - -

20 CHIEF JUDGE LIPPMAN: I thought the county
21 says, the lead paint problem is remediated.

22 MR. MASCIA: What the county said was that
23 those areas that they identified in which there had
24 been deteriorating paint, in which there was lead
25 paint exposure, had been remediated. But as we know

1 from looking at the records as well, there were at
2 least three areas, okay - - - one internal and two
3 external - - - in which fourteen months later, there
4 was an identification of the same problem. So there
5 wasn't clearly a full, what I would call an abatement
6 - - -

7 JUDGE PIGOTT: You're picking on the county
8 for that.

9 MR. MASCIA: No.

10 JUDGE PIGOTT: Well, you aren't? The - - -
11 do you need a CO on these things?

12 MR. MASCIA: Do you need a what?

13 JUDGE PIGOTT: Certificate of occupancy?

14 MR. MASCIA: I don't believe so, Your
15 Honor.

16 JUDGE PIGOTT: The county, apparently, was
17 satisfied that there had been an appropriate
18 remediation of this apartment, or they wouldn't have
19 said so.

20 MR. MASCIA: Well, that would have been
21 their position, but what the county feels is
22 appropriate - - -

23 CHIEF JUDGE LIPPMAN: Doesn't that matter,
24 that the official - - - that the county, the
25 government says you have a clean bill of health?

1 That doesn't matter?

2 MR. MASCIA: Your Honor, the way the policy
3 reads, and in the context of this case - - - let me
4 give you an example to show how - - - to show how
5 artificial - - -

6 CHIEF JUDGE LIPPMAN: And a policy - - -

7 MR. MASCIA: - - - this distinction is.

8 CHIEF JUDGE LIPPMAN: Could the policy ever
9 mean that the apartment is total - - - let's assume
10 that the county's clean bill of health is total and
11 complete. Could the policy ever say that it doesn't
12 matter that the government regulator says the
13 apartment is fine now? Could that ever mean that
14 that's insignificant?

15 MR. MASCIA: All the county is saying, Your
16 Honor - - - and I want to make sure that we're clear
17 - - - all the county is saying by virtue of the
18 inspection that it's done is that there has been a
19 temporary remediation of the condition that was
20 identified. This - - -

21 JUDGE PIGOTT: Well, they say there's been
22 a remediation.

23 MR. MASCIA: No - - - well, but the
24 difference is is that the statute provides for two
25 types of remediation. There's a temporary

1 remediation where you can - - - you can sand and you
2 can paint, okay, in the particular area in which
3 there is identified, and then you have a full
4 remediation, which is an abatement. Full remediation
5 contemplates removal - - -

6 JUDGE SMITH: Let's see if we can make it
7 simple. Let's suppose the condition is a hole in the
8 floor and somebody falls in the hole in the floor.
9 And the regulator says, fix the hole in the floor.
10 And he puts a board over the hole in the floor and
11 the county comes and looks at it, says, okay, it's
12 now fixed. And then - - - but it turns out that the
13 covering he put is too thin and the guy falls in - -
14 - and somebody else falls in. Is that the same
15 condition or not, that - - -

16 MR. MASCIA: I would say that is the same
17 condition. The fact that that was a failed
18 remediation or an inadequate remediation didn't
19 remove the condition. And that's the key here, if we
20 - - -

21 JUDGE GRAFFEO: So it sounds - - - it
22 sounds like you should never rent an older apartment
23 unless it's at the beginning of the policy period,
24 because - - -

25 MR. MASCIA: No.

1 JUDGE GRAFFEO: - - - no matter what your
2 injury is or the culpability for it, the non-
3 cumulation clause may mean you get zero because the
4 earlier tenants, if they recover the policy limits,
5 you're out.

6 MR. MASCIA: But Your Honor, the insurance
7 company underwrites the risk based - - -

8 JUDGE PIGOTT: Well, let's look at it this
9 way, then. 1995, when you offered the other 150 on
10 this, has Mr. Wilson been uninsured with respect to
11 lead paint poisoning on any tenants after 1995, even
12 though he's paying the same premium for the same
13 policy that he paid in 1991?

14 MR. MASCIA: If he had continued - - -

15 JUDGE PIGOTT: Is that a yes?

16 MR. MASCIA: If was continued to be insured
17 by Allstate after that, we would not afford any
18 additional coverage to him. But that - - -

19 JUDGE PIGOTT: So you're telling me, even
20 though he's got 300,000 on a policy, there's no
21 exclusion for lead paint poisoning in your policy,
22 but you're saying unbeknownst to him, because two
23 kids earlier sucked up all of his money, he has no
24 insurance - - -

25 MR. MASCIA: He - - -

1 JUDGE PIGOTT: - - - he has no insurance on
2 this house, and the next kid that sues can take the
3 deed.

4 MR. MASCIA: Look, he wouldn't know that,
5 first of all, Your Honor, because most of these
6 claims arise four, five, six, ten years after the
7 fact. Okay? So he wouldn't know at the time that he
8 buys the insurance.

9 JUDGE PIGOTT: Would or would not? Would
10 or would not?

11 MR. MASCIA: He would not.

12 JUDGE PIGOTT: All right.

13 MR. MASCIA: He would not know that.

14 JUDGE PIGOTT: So the fact is that in 1995,
15 he's no longer insured for lead paint.

16 MR. MASCIA: He has no limit of coverage
17 available for lead paint - - -

18 JUDGE PIGOTT: Did he know that?

19 MR. MASCIA: - - - as of that time.

20 JUDGE PIGOTT: Did he know that?

21 MR. MASCIA: He wouldn't know that, and
22 Allstate wouldn't know that, Your Honor, for one very
23 simple reason. These claims don't arise until four
24 years after the fact.

25 JUDGE PIGOTT: No, you would know that.

1 You would - - - you would go to bed at night knowing
2 that no matter what happens at that house, whether
3 there's one kid or fifteen kids, you're at 300,000
4 and that's it. Or 500.

5 MR. MASCIA: I know that my risk, Your
6 Honor, as the insurance - - -

7 JUDGE SMITH: Your position is that he
8 knows that if he read the policy - - -

9 MR. MASCIA: If he reads that policy - - -
10 and I want to go back to something that was raised -
11 - -

12 JUDGE READ: Well, he has his premium. The
13 premium would be different, too - - -

14 MR. MASCIA: The premium is 350 dollars for
15 this policy on an annual basis.

16 JUDGE PIGOTT: But it doesn't go down.

17 MR. MASCIA: It certainly was level for all
18 three years. If you look at the - - -

19 JUDGE PIGOTT: It didn't go down after the
20 - - - after he had exhausted his coverage for lead
21 paint.

22 MR. MASCIA: But we wouldn't have known
23 that his policy limits were exhausted until 2010,
24 when Allstate paid the 350 and then later paid the
25 150 to the Nesmith claims. We wouldn't know the

1 coverage was exhausted.

2 JUDGE SMITH: It is an oddity, isn't it - -
3 - I guess we wrote about this in Hiraldo - - - if he
4 - - - if he would just switch insurers every year,
5 then he gets a full new limit every year.

6 MR. MASCIA: Well, that assumes that
7 there's coverage available, Your Honor. I mean, for
8 over fifteen years, the majority of insurers - - -

9 JUDGE SMITH: But on that assumption, it's
10 true.

11 MR. MASCIA: On that assumption, he would
12 get a new limit of coverage, but again, we're writing
13 a risk in an insured premises for a specific
14 condition, and this whole idea of lead hazard is
15 really an artificial distinction.

16 The plaintiff wants - - - the appellant
17 wants to rewrite the policy, not to say "same general
18 conditions"; they want to talk about - - - to your
19 point, Your Honor - - - a specific condition. They
20 want the policy to read that it only applies with
21 respect to a specific condition, and as Your Honor
22 pointed out, back in Appalachian, and even in the - -
23 - in the case that the court wrote about last year in
24 the Diocese case, you talk about these kinds of
25 clauses. They are intended to make sure that an

1 insurer can limit its risk so that it can offer the
2 coverage in a jurisdiction. Otherwise, they're left
3 with no choice but to write no coverage.

4 JUDGE PIGOTT: Well, let's look at it from
5 the point of view of the insured, then. He - - - he
6 has 300,000 dollars' worth of coverage, and he knows
7 that and he's - - - and he's renting an older house
8 that has kids, so he knows there's a risk - - - could
9 be a risk. Finds out there is indeed a risk. Now he
10 fixes it. All right? The county comes in, points
11 where he's got to repair it, and he repairs it.

12 Another kid comes in and gets lead - - -
13 doesn't he think at the time that it's been
14 remediated that now he has coverage for - - - for
15 lead paint in the event that somebody else gets lead
16 paint poisoning?

17 MR. MASCIA: I don't think he could
18 reasonably believe that reading the policy, Your
19 Honor. And I'll give you a hypothetical that's even
20 - - -

21 JUDGE PIGOTT: Then why would he do it? I
22 mean, why wouldn't he then go - - -

23 MR. MASCIA: Because the county requires
24 him to do it in order to be able to rent the - - -

25 JUDGE PIGOTT: No, well, I mean - - - well,

1 you've got - - - you've got mortgagees on your
2 policy, too; they'd be very interested to know that
3 there's no coverage for - - - for certain accidents
4 within the policy period.

5 MR. MASCIA: But the answer is is that it's
6 not a question of whether or not there's no coverage;
7 it's a question of whether or not - - - what the
8 limit of coverage is. A mortgagee will write a
9 policy on - - - on a landlord property that has an
10 exclusion for lead. They do it every day of the
11 week.

12 JUDGE PIGOTT: Right.

13 MR. MASCIA: The fact that there's a
14 mortgagee on the policy is - - - is just a
15 circumstance of the landlord needing financing. But
16 the point of it is - - - I'll give you this example,
17 Your Honor, if I may just finish, because I see my
18 time's up.

19 CHIEF JUDGE LIPPMAN: Finish your thought.
20 Go ahead, counselor.

21 MR. MASCIA: Let's say, for example, it
22 wasn't these unknown issues, but let's assume that
23 the lead exposure in - - - with regard to the first
24 plaintiffs - - - and I'll give you an example. Day
25 1, you have plaintiffs who - - - who are exposed by -

1 - - the only condition right here is I've got a
2 deteriorating lead paint issue on one windowsill.
3 The county comes in and says, fix that. Okay?

4 And then six months later, whether it's
5 that plaintiff - - - because under the plaintiff's
6 theory - - - appellant's theory - - - it doesn't
7 matter how many plaintiffs. It could be the same
8 plaintiff. Six months later, I have a condition
9 that's a foot-and-a-half away in which the paint has
10 deteriorated. Was the same paint. Now I have an
11 exposed condition; there's an ingestion of that
12 paint. Are we going to say that that is two
13 occurrences under the policy?

14 JUDGE PIGOTT: No, we took care of that in
15 Hiraldo.

16 MR. MASCIA: But we really - - -

17 JUDGE PIGOTT: That's - - - that's one
18 claimant. But when you've got not only not two
19 claimants, brothers and sisters or something, but
20 when you've got two strangers who go into a different
21 - - - a different apartment - - -

22 MR. MASCIA: But even - - - Your Honor,
23 even if those were two separate people, the fact that
24 you have one plaintiff is irrelevant when you look at
25 the language in the policy that says, "regardless of

1 the number of injured persons or claimants". That
2 part of the policy takes care of whether you have one
3 injured person, two injured persons, or fifteen
4 injured persons.

5 Then, when you talk about the part of the
6 policy which discusses the cumulation part, if we had
7 that instance, even if we had two plaintiffs in that
8 case and they were unrelated tenancies, the fact that
9 there's a deteriorating condition a foot away from
10 where the original condition existed - - - it's the
11 same general conditions. It's lead paint.

12 CHIEF JUDGE LIPPMAN: Okay, counselor. We
13 got to - - -

14 MR. MASCIA: Thank you, Your Honors.
15 Appreciate your time.

16 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

17 MR. RICHTER: Thank you, Judge.

18 Let's just turn this around. Let's say you
19 have a hazard in 1993 in apartment 1, and the
20 landlord remediates that condition. And then twenty-
21 two years later there is a hazard found in apartment
22 number 4, in the back apartment. According to them,
23 it's the same general condition. So long as there's
24 an ounce of lead that remains in that apartment, that
25 insurance is never going to paid any further benefits

1 to that policy holder.

2 JUDGE SMITH: You don't see a distinction
3 between the same apartment and a different apartment?

4 MR. RICHTER: In terms of what, Judge?

5 JUDGE SMITH: Well, you - - - I guess
6 everyone would agree that at some point, it's not the
7 same condition; if it's a hundred miles down the
8 road, it's not the same condition. What's wrong with
9 drawing the line between different dwellings,
10 different residences?

11 I mean, it seems to me - - - yeah. I - - -
12 I get uncomfortable with the idea that it's a
13 different condition - - - that the lead paint in the
14 living room is different from the lead paint in the
15 bedroom, especially because how are you ever going to
16 know which the kid was exposed to? On the other
17 hand, if they're in two different apartments, I can
18 see how you can make - - - draw the distinction.

19 MR. RICHTER: Right. But it's - - - where
20 do you draw the line? I mean, it's - - -

21 JUDGE PIGOTT: Well, in this case, how many
22 apartments are in this building?

23 MR. RICHTER: This was a multiple
24 residence. There were two apartments, Judge.

25 JUDGE PIGOTT: Two. And the argument is

1 that the non-cumulation clause applies to both, so
2 whether there's lead in one or the other, they're
3 both covered by the 500,000, and that's the end of
4 it.

5 MR. RICHTER: That's what Allstate's
6 saying. And they're saying that because they want
7 this court to define a term that they don't define in
8 their contract as - - -

9 CHIEF JUDGE LIPPMAN: Counselor, what does
10 the policy mean? What does the policy language mean
11 in its simplest meaning? Is it ambiguous at all?

12 MR. RICHTER: It is, Judge.

13 CHIEF JUDGE LIPPMAN: In what sense is it
14 ambiguous?

15 MR. RICHTER: When a policyholder - - - and
16 this court - - - the test, by the way, to determine
17 if a policy is ambiguous, is to look at an average
18 insured and what his or her reasonable expectations
19 are.

20 CHIEF JUDGE LIPPMAN: What does an average
21 insured think of this particular situation?

22 MR. RICHTER: Same means identical,
23 exactly.

24 JUDGE READ: But general means - - -
25 general means general. I mean, isn't there a - - -

1 MR. RICHTER: But that's like an oxymoron,
2 Judge. "Same general"?

3 JUDGE READ: Isn't there a difference
4 between ambiguous and broad?

5 MR. RICHTER: Well, I argue - - - we argue,
6 Your Honor, that this goes beyond a broader
7 definition. This is ambiguous. No reasonable
8 policyholder reading this policy, who pays premiums
9 year after year after year, who spends the time,
10 money and resources to eradicate, eliminate and
11 discontinue a lead hazard, is going to believe that
12 when he strokes that check and sends it to that
13 company, that six years from now, if another child is
14 poisoned, he has no coverage.

15 CHIEF JUDGE LIPPMAN: Okay, counselor.

16 MR. RICHTER: That's not reasonable.

17 CHIEF JUDGE LIPPMAN: Thanks. Thank you
18 both. Appreciate it.

19 (Court is adjourned)

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C E R T I F I C A T I O N

I, Janice Brea, certify that the foregoing transcript of proceedings in the Court of Appeals of Nesmith v. Allstate Insurance Company, No. 187 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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