

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 9, 1995

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2297

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**ALFRED RIVERIA,
and AUDREY RIVERIA,**

Plaintiffs,

v.

**LAWRENCE JOHNSON,
and THERESA JOHNSON,**

Defendants-Appellants,

PARTNERS MUTUAL INSURANCE COMPANY,

Defendant-Respondent.

APPEAL from an order of the circuit court for Dane County:
DANIEL R. MOESER, Judge. *Affirmed.*

Before Gartzke, P.J., Sundby and Vergeront, JJ.

PER CURIAM. Lawrence and Theresa Johnson appeal from an order granting summary judgment to Partners Mutual Insurance Company (Partners Mutual) on the grounds that Partners Mutual had no duty to defend or indemnify the Johnsons in an underlying action. The Johnsons raise two issues on appeal. First, they argue that Partners Mutual waived its right to contest coverage by failing to defend. Second, they argue that even if Partners Mutual did not waive its right to contest coverage, coverage existed under the policy. We do not reach the second issue because we conclude that Partners Mutual did not breach its duty to defend the Johnsons. We affirm.

The action against the Johnsons arose out of the sale of a residence by the Johnsons to Alfred and Audrey Riveria in 1992. During the spring of 1993, the Riverias experienced water infiltration problems in the basement of the residence. After the flooding, the Riverias had an inspection performed. The inspection indicated that the home had been plagued with water infiltration problems for a number of years. The Riverias sued the Johnsons in January 1994, alleging in their complaint that the Johnsons had warranted that they had no knowledge of any structural, mechanical or other defects of material significance affecting the homestead. The complaint asserts four claims: negligent misrepresentation, fraudulent misrepresentation, unjust enrichment and breach of duties under §§ 709.02 and 709.06, STATS.

Partners Mutual issued a homeowners insurance policy to Lawrence Johnson that was in effect during the relevant time period. Mr. Johnson contacted Partners Mutual immediately upon receiving the Riverias' complaint and requested that it tender a defense. Partners Mutual reserved its rights but did not answer the complaint or otherwise participate in a defense.¹

On June 3, 1994, Partners Mutual filed a motion for declaratory relief and summary judgment on the question of insurance coverage. It then moved to bifurcate the coverage issue from the liability and damages issues and to stay discovery on liability and damages until the coverage issue was resolved. On August 3, 1994, the trial court granted Partners Mutual's motion

¹ By stipulation of the parties, Partners Mutual intervened for the purpose of determining insurance coverage.

and dismissed the company from the case with prejudice. The proceeding on liability and damages has been stayed pending resolution of this appeal.

Because the facts are not disputed, the issue of whether Partners Mutual breached its duty to defend is a question of law that we review de novo. *Professional Office Bldgs., Inc. v. Royal Indem. Co.*, 145 Wis.2d 573, 580, 427 N.W.2d 427, 429 (Ct. App. 1988).

The Johnsons argue that Partners Mutual breached its duty to defend them by not immediately assuming their defense and, therefore, waived its right to contest coverage under the policy. An insurer which wrongfully refuses to defend its insured is estopped from denying coverage. *Professional Office Bldgs.*, 145 Wis.2d at 584, 427 N.W.2d at 431. An insurer can avoid this result by trying the coverage issue first, and if it is found to exist, the liability trial proceeds at a later date. *Id.* at 585, 427 N.W.2d at 431.

An insurer cannot breach a duty to defend if no such duty existed in the first place. An insurance company's duty to defend is determined by looking solely to the allegations of the complaint against the insured. *Professional Office Bldgs.*, 145 Wis.2d at 582, 427 N.W.2d at 430. An insurer has an obligation to defend if the complaint alleges facts which, if proven, would give rise to liability covered by the terms of the policy. *Id.* at 580, 427 N.W.2d at 429.

The policy issued by Partners Mutual to the Johnsons provides coverage for claims made or suits brought against an insured "for damages because of 'bodily injury' or 'property damage' caused by an 'occurrence' to which this coverage applies." "Property damage" is defined as "physical injury to, destruction of, or loss of use of tangible property." The Riverias' complaint against the Johnsons states damages of \$34,086 for repairs needed to prevent future water infiltration and \$6,691 for repair and restoration of basement improvements damaged by the flooding in the spring of 1993. Neither of these claims of damages constitutes damage to tangible property caused by the alleged misrepresentation.

In *Qualman v. Bruckmoser*, 163 Wis.2d 361, 471 N.W.2d 282 (Ct. App. 1991), we found that misrepresentation and breach of contract claims were not contemplated by the plain language of an insurance policy similar to the policy provision here. The court stated that, "[The plaintiffs'] claims ... do not expose the [defendants] to liability for any damage to tangible property. Any property damage that existed in the home existed before the making of the alleged misrepresentations which are the theory of recovery in the complaint." *Id.* at 367, 471 N.W.2d at 285. The same is true of the \$34,086 the Riverias allege as the cost of repairs to prevent future water infiltration. This is not a claim for damages to tangible property. It is a claim for an economic loss measured by the difference between the value of the property the Riverias thought they were buying, without the structural defects, and the value of the property as it exists, with the structural defects. Such damages are pecuniary in nature and do not constitute property damages. *Id.* at 366, 471 N.W.2d at 285.

The cost of repairs for damages caused by flooding after the Riverias bought the home presents a different question. This damage did not exist before the making of the alleged misrepresentation. However, these damages were not caused by the alleged misrepresentation; they were caused by the structural defects in the home. See *Benjamin v. Dohm*, 189 Wis.2d 352, 363, 525 N.W.2d 371, 375 (Ct. App. 1994).²

Because the complaint does not allege facts which, if proven, would give rise to liability covered by the terms of the policy, Partners Mutual had no duty to defend the Johnsons.³ The trial court properly granted Partners Mutual's motion for summary judgment.

² Because we find that the allegations in the Riverias' complaint do not include allegations of damage to tangible property caused by the Johnsons' alleged misrepresentation, we do not address whether or not the alleged misrepresentation was an "occurrence" within the scope of the policy.

³ In their reply brief, the Johnsons argue that Partners Mutual remains liable to them for attorney fees they incurred in defending themselves pending a resolution of the coverage issue. However, because Partners Mutual did not have a duty to defend the Johnsons, the Johnsons cannot recover any attorney fees from Partners Mutual.

By the Court. – Order affirmed.

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