

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 22, 2015**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2015AP79  
STATE OF WISCONSIN**

**Cir. Ct. No. 2013CV7085**

**IN COURT OF APPEALS  
DISTRICT I**

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**MAYA ELAINE SMITH,**

**PLAINTIFF,**

**V.**

**JEFF ANDERSON, D/B/A ANDERSON REAL ESTATE SERVICES,**

**DEFENDANT-THIRD-PARTY PLAINTIFF,**

**V.**

**4TH DIMENSION DESIGN, INC.,**

**THIRD-PARTY DEFENDANT,**

**R & B CONSTRUCTION, INC.,**

**THIRD-PARTY DEFENDANT-APPELLANT,**

**WEST BEND MUTUAL INSURANCE COMPANY,**

**INTERVENOR-RESPONDENT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
PEDRO COLON, Judge. *Affirmed.*

Before Curley, P.J., Kessler, J., and Daniel L. LaRocque, Reserve  
Judge.

¶1 KESSLER, J. R&B Construction Inc. (“R&B”) appeals an order of the circuit court granting summary judgment in favor of West Bend Mutual Insurance Company (“West Bend”). R&B contends that the circuit court erroneously found that West Bend did not have a duty to defend R&B against a third-party complaint filed against R&B by Jeff Anderson. We affirm.

### **BACKGROUND**

¶2 In the lawsuit underlying this appeal, Maya Smith filed a complaint against Jeff Anderson, d/b/a Anderson Real Estate Services, alleging that Anderson misrepresented the condition of the home Anderson sold Smith. Smith alleged that after purchasing the home, she discovered multiple defects, including, but not limited to, plugged drain tiles and a leaky basement. An amended complaint alleged that Anderson painted and cleaned the basement to cover up apparent defects and failed to obtain proper permits prior to having structural repair work performed on the house. Based on these facts, Smith alleged: (1) breach of contract; (2) intentional misrepresentation; (3) misrepresentation, in violation of WIS. STAT. §§ 895.446 and 943.20(1)(d) (2013-14);<sup>1</sup> and (4) misrepresentation in violation of WIS. STAT. § 100.18. Smith alleged that she suffered pecuniary damages as a result of Anderson’s alleged misrepresentations

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

and asked the circuit court to “rescind the sale, return all moneys paid by the plaintiff in purchasing and improving the property, plus moving costs and other expenses related to the purchase of the property.” Smith’s complaint did not make allegations against R&B.

¶3 Anderson, in turn, filed a third-party complaint against R&B and 4th Dimension Design, Inc., stating “[i]n the event that [Anderson] is found obligated to the plaintiff in any respect then [Anderson] demands that [Anderson] be made whole for any amounts [Anderson] may be obligated to pay to the plaintiff from the third party defendants.” Anderson’s third-party complaint alleged that he hired 4th Dimension to inspect the basement and prepare an engineering report for suggested repairs to the basement walls and foundation. The third-party complaint alleged that Anderson hired R&B to perform the work recommended by the 4th Dimension report. The third-party complaint also stated that Anderson hired R&B to address potential water seepage along one of the basement walls. The third-party complaint stated that R&B performed the needed repairs, including repairs to the foundation of the property, and installation of a new drain tile system, a sump crock and a sump pump. Anderson sought contribution and/or indemnification from R&B and 4th Dimension in the event Anderson is found liable to Smith. The third-party complaint made no allegations of liability against R&B.

¶4 R&B tendered its defense to West Bend. West Bend agreed to defend R&B under a reservation of rights to dispute coverage. West Bend then filed a motion to bifurcate and stay the proceedings, which the circuit court granted. West Bend moved for summary judgment, arguing that it did not have a duty to defend R&B under R&B’s Contractors Business Owners liability policy because neither the amended complaint nor the third-party complaint alleged covered “occurrences” within the meaning of the policy. As relevant to this

appeal, the West Bend policy generally provided liability coverage for property damage caused by an “occurrence”:

This insurance applies to ... “property damage” only if: ... “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;

....

“Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

....

“Property damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

(Some formatting altered.)

¶5 West Bend argued that it did not have a duty to defend R&B stating, “[t]he policy does not provide coverage in the first instance” because “the amended complaint does not allege ... property damage caused by an ‘occurrence’ as those terms are defined in the policy.” (Capitalization and bolding omitted.) In other words, Smith’s allegations focused on Anderson’s intentional conduct, not on property damage caused by an accident. West Bend alleged that if Anderson provided misleading information about the house, his conduct constituted an “action,” not an “accident.” West Bend also argued that Anderson’s third-party complaint made no allegations of property damage, instead seeking contribution

and indemnification; thus, the third-party complaint did not allege any conduct by R&B covered in the policy.

¶6 R&B opposed the motion, arguing that the “continuous and repeated exposure to water leaking into the basement and sediment plugging the drain tile” was an occurrence which caused property damage within the meaning of the West Bend policy. R&B argued that because Smith’s complaint asked for repair costs, Smith, in essence, alleged property damage.

¶7 The circuit court granted West Bend’s motion, stating:

I’m going to grant the summary judgment on the issue of coverage. I just don’t see what the occurrence is based on my review of all of the allegations in the complaint and the amended complaint and the third party complaint. Additionally, ... the third party complaint does not include any requests for property repairs or property damage. [The] [t]hird party complaint ... doesn’t describe any occurrence as it is defined in the policy and it just seeks to affirmatively require that R&B performed all repairs and work properly. And that by itself doesn’t constitute an occurrence.

....

I can’t get over the fact that there isn’t a theory for liability that affirmatively engages the policy to an extent that they would have a duty to defend.

¶8 This appeal follows.

## DISCUSSION

¶9 On appeal, R&B contends that the West Bend policy provides a duty to defend R&B against property damage claims. R&B contends that “there is a claim against R&B [that] property damage [was] caused by an ‘occurrence,’ here the ‘occurrence’ is the continuous and repeated exposure to water leaking into the

basement and sediment flowing into the drain tile causing the drain tile to plug.” We disagree.

### **Standard of Review.**

¶10 We review summary judgments *de novo*, using the same methodology as the circuit court. See *Machotka v. Village of West Salem*, 2000 WI App 43, ¶4, 233 Wis. 2d 106, 607 N.W.2d 319. We first examine the complaint to determine whether it states a claim, and then the answer to determine whether it presents a material issue of fact. See *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). If they do, we then examine the moving party’s affidavits to determine whether a *prima facie* case has been made. See *id.* If it has, we then look to the opposing party’s affidavits to determine whether there are any material facts in dispute which would entitle the opposing party to a trial. See *id.* at 372-73.

¶11 The interpretation of an insurance contract is a question of law which we review independently of the circuit court. See *Katze v. Randolph & Scott Mut. Fire Ins. Co.*, 116 Wis. 2d 206, 212, 341 N.W.2d 689 (1984). Whether a duty to defend exists is a question of law. See *Professional Office Bldgs., Inc. v. Royal Indem. Co.*, 145 Wis. 2d 573, 580, 427 N.W.2d 427 (Ct. App. 1988). An insurer’s duty to defend is “determined by comparing the allegations of the complaint to the terms of the insurance policy.” *Smith v. Katz*, 226 Wis. 2d 798, 806, 595 N.W.2d 345 (1999). The duty to defend is predicated on allegations in a complaint which, if proven true, would give rise to the possibility of recovery that falls under the terms and conditions of the policy. *Fireman’s Fund Ins. Co. of Wis. v. Bradley Corp.*, 2003 WI 33, ¶19, 261 Wis. 2d 4, 660 N.W.2d 666. The duty to defend is based solely on the allegations within the complaint’s four

corners without resorting to extrinsic facts or evidence, and focuses only on the nature of the claim, not its merits. *Smith*, 226 Wis. 2d at 806. “The insurer’s duty arises when the allegations in the complaint coincide with the coverage provided by the policy.” *Id.* at 807.

¶12 We construe the complaint liberally. See *Fireman’s Fund Ins.*, 261 Wis. 2d 4, ¶20. “The duty to defend is necessarily broader than the duty to indemnify because the duty to defend is triggered by arguable, as opposed to actual, coverage.” *Id.* Thus, we will “assume all reasonable inferences” in the complaint’s allegations and resolve any doubts regarding the duty to defend in favor of the insured. See *id.* (citation omitted).

### **Duty to Defend.**

¶13 In examining the terms of the policy along with the allegations in the amended complaint and the third-party complaint, we conclude that none of the allegations can be construed as “occurrences” under the policy definition, even under the most liberal rules of pleading.

¶14 R&B contends that the complaint and third-party complaint allege a claim that falls within the scope of coverage of the West Bend policy. According to R&B, the misrepresentation allegations stem from continuous water exposure which led to property damage. West Bend’s policy provides coverage for:

damages because of “bodily injury” or “property damage”  
to which this insurance applies.

....

This insurance applies to ... “property damage” only if: ...  
The ... “property damage” is caused by an “occurrence”  
that takes place in the “coverage territory”;

....

“Property damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

....

“Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

(Some formatting altered.) The allegations in the complaints at issue must state a claim for liability that West Bend insures against. *See Professional Office Bldgs.*, 145 Wis. 2d at 581-82. Our review of Smith’s complaint shows that the causes of action are for various forms of misrepresentation that allegedly occurred when Anderson sold the property to Smith. The misrepresentations concern physical defects with the home; however, the damages alleged are “pecuniary in nature and do not constitute property damage.” *See Qualman v. Bruckmoser*, 163 Wis. 2d 361, 366, 471 N.W.2d 282 (Ct. App. 1991).

¶15 We addressed a similar issue in *Qualman*. In that case, Ludwig and Annie M. Bruckmoser sold their home to the Qualmans. *Id.* at 363. The Qualmans sued the Bruckmosers, alleging: (1) breach of contract; (2) intentional misrepresentation; (3) misrepresentation—strict responsibility; and (4) negligent misrepresentation. *Id.* at 363, 365. The Qualmans alleged that the Bruckmosers knew the home had structural defects, namely, cracked basement walls and defective kitchen pipes, when they sold the home to the Qualmans. *Id.* at 363. The Bruckmosers tendered their defense to their insurers, American Family. *Id.* American Family refused to defend the Bruckmosers. *Id.* We concluded that



American Family did not have a duty to defend the Bruckmosers because the American Family policy, like the policy at issue here, provided coverage for property damage, not for misrepresentations. *See id.* at 366. We stated that “[t]he causes of action ... relate to breach of contract and misrepresentation of significant structural defects. The damages for such claims, if proven, would be the difference between the market value of the property at the time of purchase and the amount actually paid.” *Id.* We concluded that the damages alleged by the Qualmans were pecuniary in nature and did not constitute property damage as defined by the insurance policy. *Id.* Because property damage within the meaning of the policy was not alleged, there was no coverage under the policy for the Qualmans’ pecuniary loss. *Id.* Thus, there was no duty to defend. *Id.*

¶16 The *Qualman* case is instructive here. Like in *Qualman*, the pleadings here do not allege property damage or loss of property use. The pleadings alleged “pecuniary damages” and requested “[rescission of] the sale, return [of] all moneys paid by the plaintiff in purchasing and improving the property, plus moving costs and other expenses related to the purchase of the property.” Like in *Qualman*, the underlying facts in the pleadings deal with defects in the property, but the nature of the claims are based in contract and misrepresentation. Smith does not allege that the breach of contract or misrepresentations caused damage to the property, or a loss of property use. Smith claims she suffered economic losses because of the misrepresentation. Misrepresentations do not constitute property damage.

¶17 Moreover, the third-party complaint states no theory of liability against R&B. It simply states that if Anderson is found liable to Smith, R&B should share liability. There is no contention that R&B’s faulty workmanship caused the water exposure or the multiple issues that resulted therefrom. Indeed,

the third-party complaint states that R&B’s work was “performed in accord with the design drawings prepared by ... 4<sup>th</sup> Dimension Design, Inc.[,]” and was “properly installed.” Neither complaint states a claim for which West Bend agreed to indemnify. Consequently, there is no duty to defend under the policy.<sup>2</sup>

¶18 For the foregoing reasons, we affirm the circuit court.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports

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<sup>2</sup> After the circuit court determined that West Bend did not have a duty to defend R&B, R&B filed a motion for summary judgment seeking dismissal of the third-party complaint. The circuit court denied that motion. To the extent R&B argues that the circuit court erroneously denied its motion for summary judgment, we conclude that this issue is not before us. The Notice of Appeal indicates that R&B is appealing from the circuit court’s order dated November 25, 2014. The November 25, 2014 order is the order dismissing West Bend, stating that West Bend has no duty to defend or indemnify R&B.

We also do not reach West Bend’s argument that certain policy exclusions preclude a duty to defend because we have already concluded that the pleadings do not support such a duty. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (“[C]ases should be decided on the narrowest possible ground....”).

