STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

MAYA ELAINE SMITH

Plaintiff,

vs.

Appeal No. 2015AP000079

JEFF ANDERSON, d/b/a
ANDERSON REAL ESTATE SERVICES

Defendant, Third-Party Plaintiff,

vs.

4TH DIMENSION DESIGN, INC.

Third-Party Defendant,

R&B CONSTRUCTION, INC.

Third-Party Defendant-Appellant,

WEST BEND MUTUAL INSURANCE COMPANY

Intervenor-Respondent.

APPELLANT'S BRIEF OF THIRD-PARTY DEFENDANT R&B CONSTRUCTION, INC.

Appeal from the Circuit Court of Milwaukee County
The Honorable Pedro A. Colon Presiding
Circuit Court Case No. 2013CV007085

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SUMMARY

The third-party defendant-appellant, R&B Construction Inc. ("R&B"), appeals from the judgment of the Circuit Court for Milwaukee County, Judge Pedro A. Colon presiding, dismissing R&B's insurer, the intervenor-respondent West Bend Mutual Insurance Company ("West Bend"). R&B had been served with a third party complaint in this action and tendered the defense to West Bend. West Bend intervened and moved for summary judgment declaring that West Bend has no duty to defend R&B. The trial court granted West Bend's motion.

STATEMENT OF THE ISSUES

Did West Bend have a duty to defend its insured, R&B, against a third party complaint alleging that R&B was responsible for water leakage and clogging of the drain tile system in the plaintiff's house?

Answered by the trial court: No.

Does the insurance policy at issue provide R&B with coverage for a claim that R&B's work in straightening the basement walls caused water leakage and clogging of the drain tile system in the plaintiff's house?

Answered by the trial court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The third party defendant-appellant R&B does not request oral argument, but requests publication. The defendant-appellant does not request oral argument,

because the issues can be adequately addressed by written briefs. The defendant-appellant requests publication because the issues involved in this case are of general importance to developing the law relating to an insurance company's duty to defend.

STATEMENT OF THE CASE

Procedural history. The defendant and third-party plaintiff Jeff Anderson d/b/a Anderson Real Estate Services ("Anderson") sold the plaintiff Maya Elaine Smith ("Smith") a house located at 3034 North 91st Street, Milwaukee, Wisconsin (the "house"). On August 2, 2013, Smith sued Anderson for misrepresenting the condition of the house. [R.1, App., pp.56-63[1]] Smith alleged that after buying the house, she discovered that the drain tiles were plugged with iron ochre and the basement leaked. [R.1,¶5, App., p.59]

Smith did not file any claims against R&B in either her Complaint or Amended Complaint[2], and has nowhere claimed that R&B made any misrepresentations or that R&B's work (described below) was defective.

On January 2, 2014, the defendant Anderson filed a third party complaint against 4th Dimension Design, Inc. ("4th Dimension"), an engineering firm, and

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[1]The complaint is attached to the third party summons and complaint, served on R&B [R.11,App., pp.56-63].

[2] Smith filed an amended complaint on January 27, 2014. [R.16, App., pp.64-71] Anderson filed an answer to the amended complaint on February 13, 2014. [R.20]

R&B, alleging that Anderson was entitled to indemnification and contribution. [R.11, App., pp.49-63]

R&B tendered the third party complaint to its insurer, West Bend. West Bend engaged counsel and answered the third party complaint for R&B on February 17, 2014. [R.20] On February 21, 2014, West Bend filed a motion to intervene and to bifurcate and stay the proceedings. [R.21] With its motion it filed a proposed intervenor complaint seeking a declaratory judgment that there was no coverage under its policy and that it had no duty to defend R&B. [R.23] The trial court granted West Bend's motions for intervention and a stay on April 28, 2014. A written order was entered on May 27, 2014. [R.26]

R&B retained separate counsel and on June 18, 2014, filed an answer and counterclaim contesting West Bend's intervenor complaint. [R.30, App., pp.127-129] West Bend answered R&B's counterclaim on July 3, 2014. [R.31]

On August 6, 2014, West Bend moved for summary judgment against R&B, filing a motion, brief, and affidavit. [R.32; R.33; R.34, App.,pp.130-157] West Bend sought a declaratory judgment that its policy did not provide coverage and that it had no duty to defend R&B. R&B responded with a brief and affidavit on September 26, 2014. [R.37; R.38, App., pp.158-160] West Bend filed a reply brief on October 20, 2014. [R.40] On November 4, 2014, the trial court heard oral argument and granted West Bend's motion in a ruling from the bench. The trial court's decision was as follows:

> 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 the allegations in the complaint and the amended complaint and third party complaint. Additionally, you know, the third party complaint does not include any requests for property repairs or property damage. Third party complaint simply 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.
>
> In addition, there's that exclusion. And it's the insurance policy does not apply, quote, if the property damage – – that particular part of the real property which you or any contractors or subcontractors working directly or indirectly on your behalf are performing the operations if the, quote, property damage arises out of the operations or in that particular part of the property that must be restored, repaired, or replaced because of, quote, your work was performed – – incorrectly performed on it. End of quote.
>
> I just don't – – 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. Now I know this is – – And I understand your point and I'm not glossing over it. I understand that this is sort of like the chicken and the egg argument or as I stated before, facts chasing the theory. And I can see your point, but I just don't think that's enough to overcome what the pleadings indicate. That is – – And as you indicated, maybe this question is right for a summary judgment motion. This is obviously not the appropriate time to review that, but I don't know. I think at some point all of the parties will have to get together and affirmative – – direct this court as to what the theory of liability is and then we can get to that point but I just don't think today I can get to that.

[R.64, pp.23-25, App.,pp.25-27]

In view of the trial court's decision, on November 13, 2014, R&B filed a motion for summary judgment and/or judgment on the pleadings seeking dismissal of the third party complaint against it and a motion for an order staying entry of

the judgment in favor of West Bend pending the trial court's decision on R&B's own motion for dismissal. [R.42; R.43; R.44]

On November 11, 2014, two days before R&B filed its motion, counsel for West Bend had filed a proposed final judgment in favor of West Bend under the five-day rule. [R.41] The trial court mistakenly signed the proposed judgment the day it was filed, but on November 13, 2014, vacated the order and directed West Bend to resubmit a proposed order.

R&B's motions for a stay and for summary judgment on liability were scheduled to be heard on January 5, 2015. [R.42] However, before the hearing date, the trial court entered final judgment in favor of West Bend. On November 14, 2014, West Bend re-submitted a proposed order for final judgment in its favor. [R.46] On November 21, 2014, R&B filed a letter confirming that its pending motion asked the Court to stay entry of this judgment. [R.47] Notwithstanding R&B's pending motion, on November 25, 2014, the trial court signed and filed the final judgment submitted by West Bend. [R.48] West Bend filed a notice of entry of judgment on December 8, 2014. [R.49]

At the trial court's request, R&B's motions scheduled to be heard on January 5, 2015, were rescheduled to January 8, 2015. [R.53, R.56] By that time, R&B's motion to stay entry of the judgment had been *de facto* denied by the trial court's entry of judgment in favor of West Bend, and the trial court only

considered R&B's motion for summary judgment as to liability. The trial court decided R&B's motion for summary judgment from the bench as follows:

> So with the evidence before the court, there's – – and taking all inferences in favor of the defendant, I can't find that there's not a dispute of material fact. I think there is a dispute of material fact and the allocation of responsibility within or – – negligence within which is allocated, I am not sure about at this juncture nor do I have to decide.
>
> I'm not – – I'm not sure what's causing the problem with the basement at least not from any of the filings. Clearly, there's moisture down there I think everybody agrees....
>
> Based on that, I'm going to deny the motion for summary judgment...

[R.65,pp.17-18, App.,pp.45-46] The trial court then entered a written order denying R&B's motion for summary judgment on January 27, 2015. [R 61]

On January 8, 2015, R&B filed its Notice of Appeal as to the final judgment entered in favor of West Bend. [R.62] R&B filed a petition for review of the trial court's denial of its motion for summary judgment on February 10, 2015. Its petition was denied on March 12, 2015 (in Case No. 2015AP276-LV).

Statement of Facts. According to her complaint, after buying the house Smith discovered that the drain tiles were plugged with iron ochre and the basement leaked. [R.1, ¶5, App.,p.59] Smith alleged that in order to repair or correct the condition of the property she will need to replace the drain tile and install drain tile. [R.1, ¶7, App.,p.59] (The Amended Complaint added the allegation, at ¶5, that Anderson performed structural repair work without obtaining

the required permits, and, at ¶7, that to repair or correct the condition of the property, Smith will need to obtain the proper permits. [R.16,p.2, App.,p.67])

In her complaint against Anderson, Smith pled causes of action for intentional misrepresentation, violation of §§ 895.446 and 943.20(1)(d) Stats. (by false representations) and violation of §100.18 (by untrue, deceptive and misleading representations). Smith asserted a cause of action for breach of contract, where the claimed breach is that Anderson failed to disclose adverse conditions affecting the house in his real estate condition report.

Smith did not file any claims against R&B in either her Complaint or Amended Complaint, and has nowhere claimed that R&B made any misrepresentations or that R&B's work was defective.

Anderson denied Smith's complaint and filed a third party complaint against 4th Dimension Design, Inc. ("4th Dimension") and R&B. In this third party complaint, Anderson alleged that he hired an engineer, 4th Dimension, to inspect and make recommendations as to any repairs and reinforcement, if any, that may be required to repair any defects, if any, that existed in the basement walls and foundation of the house. [R.11,p.2,¶4, App.,p.52] 4th Dimension inspected the house, prepared a report and provided a detailed plan for reinforcing the basement walls. [R.11,p.2,¶5, App.,p.52] Anderson then directed R&B to perform repairs in accord with the report and drawings provided by 4th Dimension, and R&B did so "in accord with the design drawings." [R.11,p.2,¶¶6-7, App.,p.52]

Anderson alleges that "in addition thereto" he hired R&B, to address potential water seepage along the east wall of the basement. Anderson alleges that R&B did an inspection and observed that the east wall of the basement was subject to a descending grade and was subject to potential water run-off draining in the direction of the east wall of the property. [R.11,p.2,¶8, App.,p.52] Anderson also alleged that at R&B's recommendation, he directed R&B to install drain tiles along the base of the east wall in the basement floor and a sump crock and sump pump in the northeast corner. [R.11,p.2,¶9, App.,p.53] Anderson then alleges that R&B "properly installed" the new drain tile system, sump crock and sump pump and made certain that said system was in good working order and draining to the proper area of the property.[R.11,p.2,¶10, App.,p.53]

Anderson claimed that 4th Dimension and R&B were liable to him for indemnification and contribution. R&B denied all liability in its answer and sought dismissal of the third party complaint. [R.20]

When West Bend moved for summary judgment, the owner of R&B, Bruce Klamrowski ("Klamrowski") submitted an affidavit in which he agreed that per Anderson's instructions, R&B performed structural reinforcement of the basement walls of the house following the plans provided by 4th Dimension, the engineer hired by Anderson. [R.38,p.2 ¶3, App.,p.159] Klamrowski also stated that at Anderson's instructions, R&B installed a sump crock, and replaced approximately four feet of interior drain tile along the east wall leading to the sump crock. There

was over 120 feet of drain tile in the house that R&B had nothing to do with. [R.38,p.2,¶5, App.,p.159] Klamrowski also stated that other people hired by Anderson worked on the house, including the basement and foundation, and that Anderson, or others working at his direction, installed the sump pump itself,[3] installed the piping which directed water from the sump pump crock to the exterior of the house, performed work on the sewer laterals leading to the house, did grading work around the foundation, and as well as other work. [R.38,p.2,¶4, App.,p.159]

In his affidavit, Klamrowski stated that the water coming into the basement and the clogging of the drain tiles was not the result of R&B's performing defective work: "R&B properly performed all its work as directed and as per the plans prepared by 4th Dimension. All of R&B's work was done in a professional manner, and there were no defects in the work furnished by R&B." [R.38,p.2,¶7, App.,p.159] Anderson did not allege that R&B's work was defective; in his third party complaint Anderson alleged that R&B's work was performed properly. [R.11,pp.2-3,¶¶7,10, App.,pp.52-53]

Both the pleadings and Klamrowski's affidavit left an unresolved issue of fact as to who and what caused water leakage into the basement and the clogging

[3]Although the third party complaint alleges that R&B installed the sump pump, in an affidavit filed in connection with R&B's summary judgment motion, Anderson agreed that R&B did not perform this work. [R.51,p.4,¶11]

of the drain tiles. When West Bend moved for summary judgment, the trial court saw no insurable claim. However, when the matter was later before the trial court on R&B's motion for summary judgment, the trial court stated that the pleadings raised an issue as to whether the work performed by R&B, although not defective in itself, might have been a cause of the leakage into the basement.

The trial court first stated [R.65,pp.16-17, App.,pp.44-45]:

> You know, there's -- I've reviewed -- If you look at Jendusa and his report, there appears to be -- assuming that the standards are those of Wisconsin Association of Foundation Repair Professionals. According to him, there's some deviations which are significant in the design by 4-D of the basement walls. Now I'm not concluding that that is in fact the standard or that in fact their deviation, if there is one, would contribute to the condition of this faulty leaky basement. But it is a disputed fact.

The trial court then suggested [R.65,pp.18-19, App.,pp.46-47] that even though R&B followed the exact specifications prepared by the engineering firm and furnished to him by Anderson, there could be an issue as to whether R&B would share responsibility for the damages:

> Now I understand that you're hanging your hat on these other receipts that say that is in a workmanlike fashion, but it seems to me that if in fact they were installed to the specifications that he warranted for and in fact he referred to them throughout the warranty. That is, he was going to place the beams consistent with 4-D's specifications throughout all of it. I don't know that we have the facts today. But I wonder whether or not R&B shares responsibility, but we'll find that out through discovery I suspect.

When the trial court denied R&B's motion for summary judgment, it had before it the same pleadings it considered when it dismissed West Bend.

ARGUMENT

1. The Court of Appeals reviews the summary judgment *de novo*.

The Court of Appeals reviews a summary judgment applying the same standards and methods used by the circuit court. *Frost ex rel. Anderson v. Whitbeck*, 2002 WI 129, ¶ 4, 257 Wis. 2d 80, 84, 654 N.W.2d 225, 227. Cases involving the interpretation of an insurance contract present a question of law which the court reviews *de novo*. *Am. Family Mut. Ins. Co. v. Am. Girl, Inc*., 2004 WI 2, ¶ 23, 268 Wis. 2d 16, 32, 673 N.W.2d 65, 73 *("American Girl").*

2. If any one claim arguably falls within the policy coverage, regardless of the merits of the claim, West Bend has a duty to defend R&B.

The focus of this case is on West Bend's duty to defend R&B. In *Se. Wisconsin Prof'l Baseball Park Dist. v. Mitsubishi Heavy Indus. Am., Inc*., 2007 WI App 185, ¶¶ 41-42, 304 Wis. 2d 637, 675-676, 738 N.W.2d 87, 106-107, this Court determined:

> The duty to defend exists if any one claim arguably falls within the policy coverage. *Grube,* 173 Wis.2d at 72, 496 N.W.2d 106. The coverage need only be arguable or fairly debatable. *Radke*, 217 Wis.2d at 44, 577 N.W.2d 366; *Newhouse*, 176 Wis.2d at 835, 501 N.W.2d 1

As to the methodology of determining coverage, the court stated in *American Girl*, at 2004 WI 2, ¶ 24, 268 Wis. 2d 32-33, 673 N.W.2d 73:

> Our procedure follows three steps. First, we examine the facts of the insured's claim to determine whether the policy's insuring agreement makes an initial grant of coverage. If it is clear that the policy was

> not intended to cover the claim asserted, the analysis ends there. If the claim triggers the initial grant of coverage in the insuring agreement, we next examine the various exclusions to see whether any of them preclude coverage of the present claim. Exclusions are narrowly or strictly construed against the insurer if their effect is uncertain. *Cardinal v. Leader Nat'l Ins. Co.*, 166 Wis.2d 375, 382, 480 N.W.2d 1 (1992).

See also *Acuity v. Soc'y Ins*., 2012 WI App 13, ¶ 14, 339 Wis. 2d 217, 226, 810 N.W.2d 812, 817.

R&B denies that it is liable to any party in these proceedings under any theory of liability. However, for 26 years R&B has paid West Bend for insurance that obliges West Bend to defend R&B against claims made against it, regardless of the merits of such claims. [R.38,p.3 ¶9, App.,p.160]

The insurance policy that West Bend sold to R&B provides for a duty to defend R&B against any suit that seeks bodily injury or property damage from R&B, as stated in Section 1 of the policy:

> 1. Insuring Agreement
>
> a. 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. We will have the right and *duty to defend the insured against any suit seeking those damages*. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" for "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:
>
> (1) The amount people pay for damages is limited as described in Section III – Limits of Insurance; and

> (2) Our right and duty to defend ends when we have used up the applicable limit of insurance...

[emphasis added] This Court has interpreted this language such that the duty to defend is significantly more broad than the duty to indemnify.

In *Se. Wisconsin Prof'l Baseball Park Dist. v. Mitsubishi Heavy Indus. Am.*, *Inc*., 2007 WI App 185, 304 Wis. 2d 637, 675, 738 N.W.2d 87, 106, the court stated:

> The duty to defend an insured is based on the language in the insurance contract. *Radke v. Fireman's Fund Ins. Co.*, 217 Wis.2d 39, 43, 577 N.W.2d 366 (Ct.App.1998). "If coverage is fairly debatable, the insurer is estopped from arguing coverage defenses." Id. at 47, 577 N.W.2d 366 (citing *United States Fire Ins. Co. v. Good Humor Corp.*, 173 Wis.2d 804, 818–19, 496 N.W.2d 730 (Ct.App.1993)). "The duty to defend is broader than the separate duty to indemnify because the duty to defend is triggered by arguable, as opposed to actual, coverage." *Id.* at 44, 577 N.W.2d 366; see also *Newhouse v. Citizens Sec. Mut. Ins. Co.*, 176 Wis.2d 824, 834–35, 501 N.W.2d 1 (1993). The scope of the claim is determined from the face of the pleadings, not from evidence extrinsic thereto. *Radke*, 217 Wis.2d at 43, 577 N.W.2d 366; *Newhouse*, 176 Wis.2d at 834–35, 501 N.W.2d 1; see also *Grube v. Daun*, 173 Wis.2d 30, 72, 496 N.W.2d 106 (Ct.App.1992).

The court elaborated on how the scope of the claim is determined from the face of the pleadings in footnote 19:

> "It is the nature of the claim alleged against the insured which is controlling even though the suit may be groundless, false or fraudulent." *Sustache*, No. 06AP939, slip op. ¶ 10[4] (citing *Grieb v.*

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[4]*Estate of Sustache v. Am. Family Mut. Ins. Co.*, 2008 WI 87, ¶ 20, 311 Wis. 2d 548, 560, 751 N.W.2d 845, 851

> *Citizens Cas. Co. of N.Y.*, 33 Wis.2d 552, 558, 148 N.W.2d 103 (1967)).

The court continued:

> The duty to defend exists if any one claim arguably falls within the policy coverage. *Grube*, 173 Wis.2d at 72, 496 N.W.2d 106. The coverage need only be arguable or fairly debatable. *Radke*, 217 Wis.2d at 44, 577 N.W.2d 366; *Newhouse*, 176 Wis.2d at 835, 501 N.W.2d 1

Under these standards, even though the claims made against R&B are disputed and groundless, West Bend has a duty to defend under its policy.

3. The trial court erred by determining as a matter of law that there was no occurrence or request for property repairs stated in the pleadings.

The trial court granted summary judgment to West Bend because it decided that the pleadings did not allege an occurrence. The trial court's explanation was as follows:

> I just don't see what the occurrence is based on my review of all the allegations in the complaint and the amended complaint and third party complaint. Additionally, you know, the third party complaint does not include any requests for property repairs or property damage. Third party complaint simply 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.

[R.64, pp.23-25, App.,pp.25-27]

The trial court erred by refusing to consider that someone's work on the basement caused a situation where seepage clogged the drain tile system, necessitating repairs. A "continuous or repeated exposure to substantially the same

general harmful conditions" is an "occurrence"; it does not have to be as dramatic as the collapse of wall. In *American Girl, supra,* the occurrence was the settlement of a house resulting from poor soil compaction. In *Kalchthaler v. Keller Const. Co.*, 224 Wis. 2d 387, 397, 591 N.W.2d 169, 173 (Ct. App. 1999), the court recognized that there was insurance coverage for damages caused by water leaking through windows. In *Acuity v. Soc'y Ins*., 2012 WI App 13, ¶ 17, 339 Wis. 2d 217, 228, 810 N.W.2d 812, 818, the court recognized that soil erosion was an occurrence.

R&B's policy states that West Bend has a duty to defend R&B against any suit seeking to recover money from R&B for "property damage", except for "property damage" to which this insurance does not apply. R&B's policy is not unique. It uses standard language which has been addressed by the court in *American Girl*.

In *American Girl* an owner sued a contractor for damages resulting from the settlement of a house. The contractor had followed the recommendations of a soils engineer in preparing the building site, and the advice given by the engineer was bad. In addressing the dispute over insurance coverage, the Wisconsin Supreme Court stated at 2004 WI 2, ¶ 27, 268 Wis. 2d 34, 673 N.W.2d 74:

> Standard CGL policies, including those at issue in this case, now cover "sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' ... caused by an 'occurrence' that takes place in the 'coverage territory.'"

The court went on to state that whether the insuring agreement provides coverage depends upon whether there has been "property damage" resulting from an "occurrence" within the meaning of the CGL policy language. In deciding this question, the court stated at 2004 WI 2, ¶37, 268 Wis. 2d 38-39, 673 N.W.2d 75-76:

> ...."Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The term "accident" is not defined in the policy. The dictionary definition of "accident" is: "an event or condition occurring by chance or arising from unknown or remote causes." Webster's Third New International Dictionary of the English Language 11 (2002). Black's Law Dictionary defines "accident" as follows: "The word'accident,' in accident policies, means an event which takes place without one's foresight or expectation. A result, though unexpected, is not an accident; the means or cause must be accidental." Black's Law Dictionary 15 (7th ed.1999).
>
> No one seriously contends that the property damage to the 94DC was anything but accidental (it was clearly not intentional), nor does anyone argue that it was anticipated by the parties. The damage to the 94DC occurred as a result of the continuous, substantial, and harmful settlement of the soil underneath the building. Lawson's inadequate site-preparation advice was a cause of this exposure to harm. Neither the cause nor the harm was intended, anticipated, or expected. We conclude that the circumstances of this claim fall within the policy's definition of "occurrence."

The insurance policy which West Bend issued to R&B has the same definition of "occurrence" which includes "continuous or repeated exposure to substantially the same general harmful conditions." In short, there is a claim against R&B property damage 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. R&B has been brought into this action because Anderson asserts that R&B should pay for the damages caused by this occurrence.

The initial analyses of whether R&B's insurance policy, barring an exclusion, covers the unintended event that is now causing Smith's drain tile to clog up with red ochre does not hinge on whether the occurrence is caused by defective workmanship. The court in *American Girl* asked the rhetorical question: "Why would the insurance industry exclude damage to the insured's own work or product if the damage could never be considered to have arisen from a covered 'occurrence' in the first place?" *Am. Family Mut. Ins. Co. v. Am. Girl, Inc*., at 2004 WI 2, 268 Wis. 2d 43, 673 N.W.2d 78. As the court stated in *Acuity v. Soc'y Ins.*, 2012 WI App 13, ¶ 24, 339 Wis. 2d 217, 230, 810 N.W.2d 812, 819:

> The lessons of *American Girl*, *Glendenning's*, and *Kalchthaler* are that while faulty workmanship is not an "occurrence," faulty workmanship may cause an "occurrence." That is, faulty workmanship may cause an unintended event, such as soil settling in *American Girl*, the leaking windows in *Kalchthaler*, or, in this case, the soil erosion, and that event—the "occurrence"—may result in harm to other property.

The trial court did not elaborate why it saw no occurrence in the pleadings, but its decision delivered from the bench generally tracked the arguments made by West Bend at the hearing. Counsel for West Bend argued that there was no "occurrence" because Smith's complaint claimed intentional misrepresentation, and intention misrepresentation cannot be an "occurrence" as a matter of law.

[R.64,pp.5-6, App.,pp.7-8] West Bend argued that *Everson v. Lorenz,* 2005 WI 51, 280 Wis. 2d 1, 695 N.W.2d 298, where the court decided that a misrepresentation was not an insured occurrence, was controlling precedent.[5] R&B argued that R&B was not being sued for misrepresentation, and that consequently *Everson* was not controlling authority. [R.64,p.10,App.12; R.37,p.12] The trial court may have been persuaded that *Everson* was controlling.

The trial court stated that the third party complaint "does not include any request for property repairs or property damage." Again, the trial court did not elaborate. However, here again the trial court appeared to adopt West Bend's argument. Counsel for West Bend had suggested that the only alleged damage was the difference between the market value of the property and the amount actually paid for it [R.64,pp.6-7, App., pp.8-9; R.33,pp.12-13] and that under *Qualman v. Bruckmoser*, 163 Wis. 2d 361, 366, 471 N.W.2d 282, 285 (Ct. App. 1991), this did not constitute property damage.

R&B responded by demonstrating that West Bend's description of the pleadings was not correct. [R.64,pp.12-14, App.,pp.14-16; R.37,pp.13-14] The *ad*

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[5]At page 10 of it summary judgment brief [R.33], West Bend, had cited *Everson v. Lorenz*, 2005 WI 51, 280 Wis. 2d 1, 695 N.W.2d 298, and argued: "Misrepresentations made by a seller concerning the condition of property to be sold do not constitute occurrences giving rise to property damage under Wisconsin law." West Bend also cites *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, 311 Wis. 2d 492, 753 N.W.2d 448 for the same proposition that misrepresentations do not constitute occurrences.

damnum clause of both Smith's complaint [App.,p.62] and amended complaint [App.,p.70] sought alternative remedies against Anderson, and among them are "the cost of placing the property in the condition that it was represented to be in" and "the cost of all repairs". In the body of the complaint and amended complaint, Smith alleged that in order to repair or correct the condition of the property she will need to replace the drain tile and install drain tile. [R.1, ¶7, App.,p.59]

To be precise, the trial court stated that the "third party complaint" does not include any requests for property repairs or property damage. However, the third party complaint seeks indemnification and contribution, and it logically follows that one must consider the complaint (and amended complaint) to arrive at what type of damages are being claimed against R&B. The nature of a claim for contribution or indemnification suggests that one should look to the original claim to determine the damages being claimed. Furthermore, Anderson's third party complaint attaches Smith's complaint and specifically claims that Anderson "be made whole for any amounts this defendant may be obligated to pay the plaintiff." [R.11,pp.1,4,¶1,¶15, Exhibit A, App.,pp.51,54,56-63]

When the damages being claimed include, as an alternative, a claim for property damage (as is the case here), the insurance company is required to provide a defense. The duty to defend exists if any one claim arguably falls within the policy coverage. *Se. Wisconsin Prof'l Baseball Park Dist.*, *supra*, at 2007 WI App 185, ¶ 42, 304 Wis. 2d 676, 738 N.W.2d 107.

4. The trial court erred by determining as a matter of law that certain of the property damage exclusions of the policy apply.

In addition to finding no occurrence or property damage, the trial court decided that certain of the property damage exclusions of the policy applies:

> In addition, there's that exclusion. And it's the insurance policy does not apply, quote, if the property damage – – that particular part of the real property which you or any contractors or subcontractors working directly or indirectly on your behalf are performing the operations if the, quote, property damage arises out of the operations or in that particular part of the property that must be restored, repaired, or replaced because of, quote, your work was performed – – incorrectly performed on it. End of quote.

[R.64,p.24, App.,p.26] The trial court did not elaborate and probably just adopted West Bend's argument.

In this part of its decision from the bench, the trial court referred to the following section of R&B's policy (found in R.23, Exhibit 1, at page 5 of 16, App.,p.94):

> This insurance does not apply to:...
>
> j. Damage to Property
>
> "Property damage" to:
> .....
>
> (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
>
> (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrect incorrectly performed on it.

This language is sometimes referred to as the "business risk exclusion" although that is not a caption used in the policy.

The exact language of this exclusion was addressed by the court in *Acuity v. Soc'y Ins*., 2012 WI App 13, ¶¶ 32-48, 339 Wis. 2d 217, 234-42, 810 N.W.2d 812, 821-25, where the court found that a contractor was covered by his insurance policy, despite the insurance company's argument that these exclusions precluded coverage. In that case, the contractor was engaged to remove a concrete wall in the basement of a commercial building, and in the course of doing the work, undermined the adjacent area and caused substantial property damage.

The court rejected the insurance company's argument that this was not an occurrence under the policy stating: "The lessons of *American Girl*, *Glendenning's*, and *Kalchthaler* are that while faulty workmanship is not an 'occurrence,' faulty workmanship may cause an 'occurrence.'" *Acuity v. Soc'y Ins.*, 2012 WI App 13, ¶ 24, 339 Wis. 2d 217, 230, 810 N.W.2d 812, 819. The court then addressed the language of the exclusions, focused on what constitutes "[t]hat particular part" of the property on which work was being performed, and ultimately determined that neither of the exclusions applied. *Acuity v. Soc'y Ins*., 2012 WI App 13, ¶ 34, 339 Wis. 2d 217, 235, 810 N.W.2d 812, 821. The Court cited a number of cases from other jurisdictions and determined:

> We are persuaded that the phrase "that particular part" in the k. (5) and k.(6) exclusions applies only to those parts of a building on which the defective work was performed, which is determined based

> on the scope of the construction agreement. Our reading of "that particular part" is consistent with the unambiguous language of the policy and cases from other jurisdictions construing similar exclusions in other CGL policies. [footnote omitted]

Acuity v. Soc'y Ins., 2012 WI App 13, ¶ 40, 339 Wis. 2d 217, 237, 810 N.W.2d 812, 823. The court rejected arguments that a contract to remove and replace the south wall of the engine room, made the words "that particular part" apply to the entire engine room, which was involved in the collapse.

Here, neither the Complaint nor the Amended Complaint alleges that the damage is limited to "that particular part of real property" where R&B performed its work. The Complaint states that something is causing seepage and that the drain tile of the house are clogged with red ochre. The allegations do not confine the damage to "that particular part" of the property where R&B performed work, which is mainly, the basement walls. R&B did install four feet of drain tile when it installed a sump pump crock, but the Complaint does not limit the damage to the four feet of drain tile installed by R&B. There are over 120 feet of drain tile in the house, and the Complaint alleges that to fix the problem, "the plaintiff will need to replace the drain tile and install drain tile." [R.1, ¶7, App.,p.59].

The third-party complaint alleges that responsibility for the seepage and clogging of the drain tile should lie with R&B and 4th Dimension, the engineering firm that defined the work to be done by R&B to straighten and reinforce sections of the basement wall. The basement walls are not "that particular part of real

property" (the drain tiles) where the property damage is alleged to have occurred. The third-party complaint arguably states a claim that the work performed by R&B and 4th Dimension caused damage to adjacent property, which is similar to the facts addressed by the court in *Acuity v. Soc'y Ins.* There, the insured's work on removing a basement wall caused erosion in an adjacent area, and consequently, damages covered, and not excluded, by this policy language.

There is nothing in the pleading that limits the alleged property damage to "that particular part" of the property where R&B did its work, and the trial court erred by applying the exclusion.

5. The trial court erred by not following the rule that if there is any "arguable" or "fairly debatable" claim against R&B, West Bend is obligated to defend it.

The trial court demonstrably erred by not construing the pleadings in the light most favorable to R&B when it dismissed West Bend and declared that it had no duty to defend. When it dismissed West Bend, the trial court read the pleadings restrictively. Two months later, when R&B moved for summary judgment on the same pleadings, the trial court gave the pleadings a liberal construction, demonstrating that there had been an "arguable" or "fairly debatable" claim against R&B when the trial court granted West Bend's motion for summary judgment.

In its November 4, 2014, bench decision on West Bend's motion for summary judgment, the trial court stated:

> I just don't – – I can't get over the fact that there isn't a theory of liability that affirmatively engages the policy to an extent that they would have a duty to defend. Now I know this is – – and I understand your point and I'm not glossing over it. I understand that this is sort of like the chicken and the egg argument or as I stated before, facts chasing theory. And I can see your point, but I just don't think that's enough to overcome what the pleadings indicate. That is – – and as you indicated, maybe this question is right for a summary judgment motion. This is obviously not the appropriate time to review that, but I don't know. I think at some point all of the parties will have to get together and affirmative – – direct this court as to what the theory of liability is and then we can get to that point but I just don't think today I can get to that.

[R.64, pp.24-25, App.,pp.26-27]

Given the trial court's indication that the pleadings did not state a claim against R&B, R&B promptly moved for summary judgment and judgment on the pleadings, asking the trial court to dismiss it from the action. [R.42,R.43,R.44] In response to R&B's motions, Anderson asserted that Smith was claiming that the correction of the basement walls had not been properly engineered, and that even though R&B exactly followed the specifications provided by Anderson's engineer, R&B should share responsibility if the basement wall repair created problems. [R.50]

The trial court denied R&B's motion for summary judgment on liability, delivering a bench decision that was not consistent with the decision it made when it dismissed West Bend. The trial court first stated that there was an issue as to whether the work on the basement walls was a cause of the "faulty leaky basement":

> You know, there's -- I've reviewed --if you look at Jendusa and his report, there appears to be -- assuming that the standards are those of Wisconsin Association of Foundation Repair Professionals. According to him, there's some deviations which are significant in the design by 4-D of the basement walls. *Now I'm not concluding that that is in fact the standard or that in fact their deviation, if there is one, would contribute to the condition of this faulty leaky basement. But it is a disputed fact.* [emphasis added]

[R.65, pp. 16-17, App.,pp.44-45] The trial court then determined that there was an issue as to whether R&B was liable for this damage, even though it exactly followed the job specifications prepared by the engineer:

> Now I understand that you're hanging your hat on these other receipts that say that is in a workmanlike fashion, but it seems to me that if in fact they were installed to the specifications that he warranted for and in fact he referred to them throughout the warranty. *That is, he was going to place the beams consistent with 4-D's specifications throughout all of it. I don't know that we have the facts today. But I wonder whether or not R&B shares responsibility, but we'll find that out through discovery I suspect.*

[R.65,pp.18-19, App.,pp.46-47] Had the trial court so liberally construed the pleadings two months earlier and followed established precedent, West Bend would not have been dismissed from the case.

Two months earlier, when the trial court heard West Bend's motion for summary judgment, R&B argued that the pleadings arguably claimed that R&B's work on the basement walls caused the drain tiles to plug. R&B asked the trial court to consider the following [R.64,pp.17-18, App.,pp.19-20]:

> MR. MACHULAK: And if you've got a claim for contribution against R&B, doesn't take much to argue that they're saying that R&B's contribution is the negligence claim. It's a contributory

> negligence claim. Somehow, something that R&B did caused all the drain tile to block up and the basement to leak....
>
> Again, I'm arguing against myself. What I think should happen here is that West Bend should make a motion to dismiss R&B on the thing, but I'm dealing with right now on this coverage.

When it granted West Bend's motion for summary judgment, the trial court stated: "I can't surmise the claim. The claim has to be pled." [R.64,p.17, App.,p.19]

The record shows that the pleadings did not change between the time the trial court declared that West Bend did not have a duty to defend and R&B's motion for summary judgment. The theory that the trial court stated was an impediment to summary judgment is the same "arguable" theory[6] that the trial court refused to consider at the November 4, 2014 hearing when it dismissed West Bend.

6. R&B has a reasonable expectation of coverage for its defense costs.

R&B is and has been in the unenviable position of having to cogently describe the claim made against it in pleadings that it did not draft and in a case which it believes to be utterly without merit. When the trial court refused R&B summary judgment dismissing the claims against it, the trial court stated that there was an issue whether the work performed by R&B on the basement walls of the

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[6]The duty to defend is broader than the separate duty to indemnify because the duty to defend is triggered by arguable, as opposed to actual, coverage. *Se. Wisconsin Prof'l Baseball Park Dist. v. Mitsubishi Heavy Indus. Am., Inc.*, 2007 WI App 185, ¶ 41, 304 Wis. 2d 637, 675, 738 N.W.2d 87, 106; *Radke v. Fireman's Fund Ins. Co.*, 217 Wis. 2d 39, 44, 577 N.W.2d 366, 369 (Ct. App. 1998)

plaintiff's house, caused water leakage and caused the drain tile system to clog. R&B does not believe this to be the case, but the existence of that claim requires West Bend to defend R&B in this action.

A contractor who purchases a CGL policy expects his insurer to protect him from unexpected claims, including claims that are devoid of merit. Established case authority comes to the aid of the insured contractor. To show his right to a defense he need only show that a single "arguable" or "fairly debatable" claim has been made against him. He does not have to establish or concede that the claim made against him has merit to show his entitlement to a defense.

Because there is an "arguable" or "fairly debatable" claim covered by West Bend's policy, West Bend has a duty to defend R&B.

CONCLUSION

For these reasons, the appellant R&B Construction, Inc., asks the Court of Appeals to reverse the decision of the trial court granting summary judgment to the intervenor-respondent West Bend Mutual Insurance Company and to remand this matter for further proceedings.

Dated this 26th day of May, 2015

Respectfully submitted,

MACHULAK, ROBERTSON & SODOS, S.C.

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CERTIFICATION

I certify that plaintiff-respondent's brief conforms to the rules contained in sec. 809.19(8)(b) and 809.62(4), Stats. For a brief produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch, 12 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 7,447 words.

Dated this 26th day of May, 2015.

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CERTIFICATION OF ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §809.19(12)

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This electronic filing is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate is being served on all opposing parties. Paper copies of this brief have been filed with the Court and served on all opposing parties.

Dated this 26th day of May, 2015.

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