STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Maya Elaine Smith,

Plaintiff,

v.

Appeal No.: 2015AP000079

Circuit Court Case No. 2013CV7085

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.

Appeal from Circuit Court for Milwaukee County,
The Honorable Pedro A. Colon, Presiding.

BRIEF AND SUPPLEMENTAL APPENDIX OF INTERVENOR-RESPONDENT WEST BEND MUTUAL INSURANCE COMPANY

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June 29, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin Decisions

Wisconsin Statutes

Other Decisions

Treatises

I. STATEMENT OF THE ISSUES

Does West Bend Mutual Insurance Company have a duty to defend and indemnify R&B Construction, Inc. for plaintiff's amended complaint alleging misrepresentation or the third-party complaint for indemnification and contribution?

Answered by the Circuit Court: No.

II. ORAL ARGUMENT AND PUBLICATION

Oral argument should be unnecessary, as the appeal is governed by controlling precedent on duty to defend in property misrepresentation cases like *Everson v. Lorenz*, 2005 WI 51, 280 Wis. 2d 1, 695 N.W.2d 298, S*tuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, 311 Wis. 2d 492, 753 N.W.2d 448, and *Qualman v. Bruckmoser*, 163 Wis. 2d 361, 471 N.W.2d 282 (Ct. App. 1991).

The Court's decision in this matter need not be published because it involves the application of well-settled law and plain insurance policy language.

III. STATEMENT OF THE CASE AND FACTS

This case involves an insurance coverage dispute. In this lawsuit plaintiff, Maya Elaine Smith ("Smith"), alleged defendant, Jeff Anderson d/b/a Anderson Real Estate Services ("Anderson"), misrepresented a home's defects when selling it. (R. 16-4, ¶¶4-8; Supp.

A. 5.) Anderson filed a third-party complaint for contribution and indemnification against R&B Construction, Inc. ("R&B") and 4th Dimension Design, Inc., (R. 11; Supp. A. 10), which companies had worked on the home for Anderson prior to the sale. (R. 11-3, ¶3; R. 11-4, ¶4; Supp. A. 10-11.)

The Circuit Court declared West Bend Mutual Insurance Company ("West Bend") had no duty to defend or indemnify R&B under the Contractors Businessowners' Liability policy West Bend issued to R&B and dismissed West Bend from the lawsuit. The undisputed facts are based on the allegations of the amended complaint, the allegations of the third-party complaint, R&B's discovery responses, and the plain language of West Bend's insurance policy.

A. The Amended Complaint's Allegations.

Smith and Anderson entered into a contract for the purchase of a home located at 3034 N. 91st Street, Milwaukee, Wisconsin. (R. 16-3, ¶3; Supp. A. 4.) After closing, Smith allegedly discovered numerous defects with the basement, such as drain tiles plugged with iron ochre[1], a leaky basement, and that Anderson had performed structural repair work without obtaining required permits. (R. 16-4, ¶5; Supp. A. 5.)

[1] Iron ochre is created as a waste byproduct of iron bacteria and occurs naturally in the environment. http://www.basementsystemsusa.com/basement-waterproofing/french-drain/iron-bacteria.html. (last accessed 6/28/15).

The amended complaint alleged that prior to selling the home, Anderson painted and cleaned the basement so it appeared to be free from any defects. (R. 16-4, ¶4; Supp. A. 5.) The amended complaint alleged Anderson represented and warranted in the purchase contract that he had no notice or knowledge of any conditions affecting the home, when in fact Anderson was aware of conditions affecting it, such as the leaky basement. (R. 16-4, ¶¶10-11; R. 16-5, ¶¶12-13; Supp. A. 5-6.) Anderson's misrepresentations constituted breach of contract, (*Id.*), and the amended complaint also alleged common law intentional misrepresentation, misrepresentation under Wis. Stat. §§895.446 and 943.20(1)(d); and misrepresentation under Wis. Stat. §100.18, (R. 16-4-7, ¶¶10-29; Supp. A. 5-8), stating, for example:

> 20. That the seller falsely represented in the purchase contract that he had no notice or knowledge of any conditions affecting the property, failed to disclose that the basement leaked, and concealed leaky basement walls with paint.
>
> 21. That the seller made these false representations with the intent to deceive and defraud the plaintiff, and indeed these false representations did deceive and defraud the plaintiff.
>
> 22. That the false representations made by the seller are in violation of Wis. Stat. §895.446 and §943.20(1)(d), entitling the plaintiff to treble damages, attorney fees, and all costs.
>
> 23. That as a direct and proximate result of the false representations made by the seller, the plaintiff suffered pecuniary damages.

(R. 16-6, ¶¶20-23; Supp. A. 7.)

Smith alleged the misrepresentations of the home condition caused her to "incur substantial monetary damages," (R. 16-5, ¶13; Supp. A. 6), and that she suffered "pecuniary damages" because of these misrepresentations. (R. 16-5, ¶18; R. 16-6, ¶23; R. 16-7, ¶29; Supp. A. 6-8.)

Smith also sought rescission of the contract "as a result of the misrepresentations and failure to disclose material defects by the seller." (R. 16-7, ¶¶31-32; Supp. A. 8.)

B. The Third-Party Complaint's Allegations.

Anderson filed a third-party complaint for contribution and indemnification against 4th Dimension Design, Inc. and R&B. (R. 11; Supp. A. 10.) Anderson alleged he contracted with R&B to perform repairs to the home foundation as recommended in the engineering report and drawings of 4th Dimension Design, Inc. specifically for reinforcement of basement walls. (R. 11-4, ¶¶5-6; Supp. A. 11.) Anderson also alleged he contracted with R&B to address basement water seepage, (R. 11-4, ¶8; Supp. A. 11), to install "a new drain tile system and sump crock and sump pump," (R. 11-5, ¶¶9-10; Supp. A. 12), and to "make certain that said system was in good working order and draining to the proper area of the property." (R. 11-5, ¶10; Supp. A. 12.) Anderson alleged that as a result of doing that work, R&B is

obliged to hold harmless defendant Anderson for the claims of Smith by way of indemnification and contribution. (R. 11-5, ¶12; R. 11-6, ¶15; Supp. A. 12-13.)

C. R&B's Discovery Responses.

R&B's contract documents show it was hired to reinforce all four foundation walls of the basement and warranted them for five years, (R. 34-23), and to open the flooring and flush and assure drain tile function. (R. 34-24.)

In response to document requests, R&B produced a letter it authored regarding its work to ensure the entire drainage system was functioning properly:

> …. The floor was opened up and the drain tile exposed in the area on the East wall where the seepage was seen. The drain tile was then flushed to see if water would flow through to the floor drain palmer valve. Water was run, and seen flowing through the palmer valve and out of the system through the cleanout on the West wall. In my opinion it appears that the system is working properly. …

(R. 34-28.)

In response to an interrogatory, R&B confirmed it "performed structural reinforcement of the Residence's basement walls" and later "installed a sump crock, and replaced approximately four feet of interior drain tile along the east wall leading to the sump crock." (R. 34-16, Response to Interrogatory No. 4; Supp. A. 16.) R&B further

stated it later "opened, cleaned and flushed certain of the drain tile." (*Id.*) The invoices in the exhibit attached to R&B's responses support its interrogatory answer as to the scope of its work. (R. 34-23; R. 34-25-26.)

D. West Bend's Defense of R&B Construction Under a Reservation of Rights.

R&B tendered defense of this lawsuit to West Bend, which agreed to defend R&B under a reservation of rights to dispute coverage. (R. 33-2.) Following the Wisconsin Supreme Court's instructions in *Mowry v. Badger State Mut. Cas. Co.*, 129 Wis. 2d 496, 385 N.W.2d 171 (1986), regarding the procedures an insurer should follow when disputing coverage, West Bend intervened in the action and requested a bifurcation and stay, which was granted. (R. 21; R. 26.)

E. West Bend Mutual Insurance Company's Policy.

West Bend issued a Contractors Businessowners' Liability policy to R&B Construction, Inc. in effect at the time of R&B's work and the subsequent sale of the home. (R. 23-5.) The policy generally provides liability coverage for property damage caused by an occurrence:

> This insurance applies to "bodily injury" and "property damage" only if:
>
> . . . . "property damage" is caused by an "occurrence" . . .

(R. 23-19; Supp. A. 20.)

The policy defines "occurrence" to mean an accident, and "property damage" to mean physically injured tangible property or loss of use of tangible property:

> "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.

(R. 23-32; R. 23-33; Supp. A. 23-24.)

Further, the policy excludes certain types of damages including:

> 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; . . .
>
> l. Damage To Your Work
>
> "Property damage" to "your work" arising out of it or any part of it and included in the "products completed operations hazard." . . .

(R. 23-22-23; Supp. A. 21-22.) "Your Work" is defined as:

> "Your Work":

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and

(2) The providing of or failure to provide warnings or instructions.

(R. 23-34; Supp. A. 25.)

F. West Bend's Motion for Summary Judgment and the Circuit Court's Decision.

West Bend moved for summary judgment, seeking a declaration that it had no duty to defend or indemnify R&B and then dismissal from this lawsuit. (R. 32.) West Bend argued it did not have a duty to defend or indemnify R&B because: 1) the complaints did not allege an "occurrence"; 2) the complaints did not allege "property damage"; 3) the "damage to property" exclusion precluded coverage; and 4) the "damage to your work" exclusion precluded coverage. (R. 33.)

The Circuit Court granted summary judgment to West Bend, declared West Bend had no duty to defend or indemnify R&B, and dismissed West Bend from the lawsuit with prejudice. (R. 48.)

The Circuit Court agreed with West Bend's arguments that the complaints did not allege an "occurrence" or "property damage":

> All right. I just don't see it. 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 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 that it just seeks to affirmatively require that R&B performed all repairs and work property. And that by itself doesn't constitute an occurrence.

(R. 64-23-24; Supp. A. 1-2.) The Circuit Court also agreed with West Bend that "damage to property" exclusion precluded coverage:

> 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 contractor 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. 64-24; Supp. A. 2.)

G. Standard of Review.

Appellate courts review summary judgment decisions *de novo*, applying the standards set forth in Wis. Stat. §802.08(2) in the same manner as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816, 820 (1987). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Wis. Stat. 802.08(2).*

Likewise, the meaning and interpretation of an insurance policy is a question of law reviewed *de novo* on appeal. *Nischke v. Aetna Health Plans*, 2008 WI App 190, ¶4, 314 Wis. 2d 774, 777, 763 N.W.2d 554, 555.

In interpreting an insurance policy, the Court must first look to the plain language of the policy to determine its meaning. *Budget Rent-A-Car Sys. v. Shelby Ins. Group*, 197 Wis. 2d 663, 669, 541 N.W.2d 178, 180 (Ct. App. 1995). The words of the policy are to be given their plain and ordinary meaning. *Bank One N.A. v. Breakers Dev., Inc.,* 208 Wis. 2d 230, 233, 559 N.W.2d 911, 912 (Ct. App. 1997). "When the terms of a policy are plain on their face, the policy should not be rewritten by construction to bind the insurer to a risk it was unwilling to cover, and for which the insured did not pay." *Mattheis v. Heritage Mut. Ins. Co.*, 169 Wis. 2d 716, 724, 487 N.W.2d 52, 55 (Ct. App. 1992), *citing Garriguenc v. Love*, 67 Wis. 2d 130, 135, 226 N.W.2d 414, 417 (1975).

The complaint allegations are initially determinative for duty to defend. *See, e.g.*, *Elliott v. Donahue*, 169 Wis. 2d 310, 320-21, 485 N.W.2d 403, 407 (1992) (the duty to defend "is predicated on allegations in a complaint which, if proved, would give rise to recovery under the terms and conditions of the insurance policy"). "An insurer's duty to

defend its insured is triggered by comparing the allegations of the complaint to the terms of the insurance policy." *Everson v. Lorenz*, 2005 WI 51, ¶11, 280 Wis. 2d 1, 9, 695 N.W.2d 298, 302, *citing Smith v. Katz*, 226 Wis. 2d 798, 806, 595 N.W.2d 345 (1999). "'These allegations must state or claim a cause of action for the liability insured against or for which indemnity is paid in order for the suit to come within any defense coverage of the policy…'" *Id.*, *quoting Qualman v. Bruckmoser*, 163 Wis. 2d 361, 364, 471 N.W.2d 282, 284 (Ct. App. 1991)). "Thus, for there to be a duty to defend, there must be allegations in the complaint which would fall within coverage afforded under the policy." *Qualman*, 163 Wis. 2d at 365, 471 N.W.2d at 284.

Discovery can also be relevant to determining duty to defend in limited circumstances such as those present here, when the insurer has provided a defense to its insured and relevant evidence is available and shows there is no coverage ultimately owed. *Estate of Sustache v. Am. Family Mut. Ins. Co.*, 2008 WI 87, ¶¶28-29, 311 Wis. 2d 548, 563-64, 751 N.W.2d 845, 852.

IV. ARGUMENT

A. WEST BEND HAS NO DUTY TO DEFEND OR INDEMNIFY R&B CONSTRUCTION, INC. FOR THE ALLEGATIONS OF THE COMPLAINT OR THE THIRD-PARTY COMPLAINT.

1. The allegations of the amended complaint are determinative of West Bend's duty to defend R&B against the third-party complaint because the third-party complaint is based on contribution and indemnification.

Only the allegations in Smith's amended complaint need be considered when determining West Bend's duty to defend. R&B's brief concedes as much when it says: "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." (R&B Br. 19.) Nonetheless, and despite this concession, R&B mistakenly argues that the Court should look at the third-party complaint's allegations when determining West Bend's duty to defend. (R&B Br. p. 16 -18, 23.)

A third-party complaint is derivative of the plaintiff's complaint, and seeks to pass through to a third-party defendant the liability asserted in the complaint. Wis. Stat. §803.05, related to third-party practice, states in part:

> (1) At any time after commencement of the action, a defending party, as a 3rd-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the

> defending party for all or part of the plaintiff's claim against the defending party. . . .

(Bold added). When Wisconsin's Rules of Civil Procedure underwent major revision in the late 1970's, Marquette's Law Review explained the newly revised Wis. Stat. §803.05:

> Section 803.05 provides the procedure by which a party against whom a claim is asserted may join a person not a party to the action who actually or potentially shares in the substantive liabilities asserted by the original claimant against the defending party.

Charles D. Clausen and David P. Lowe, *The New Wisconsin Rules of Civil Procedure: Chapters 801 to 803*, 59 MARQ. L. REV. 1, 97 (1976) (bold added). Treatises confirm the third-party complaint passes on the liability originally asserted in the plaintiff's complaint: "[a] defending party may use impleader only to shift liability to the impleaded party, …" Cynthia L. Buchko, et al., *Wisconsin Civil Procedure Before Trial*, §4.36 (State Bar of Wisconsin 3d ed. 2007). "Contribution claims are dependent and stem from the original action; without it they would not exist at all." *Whirlpool Corp. v. Ziebert*, 197 Wis. 2d 144, 155, 539 N.W.2d 883, 887 (1995). *See also* Arnold P. Anderson, *Wisconsin Insurance Law* §7.27 (State Bar of Wisconsin 5th ed. 2004), *citing Wausau Tile, Inc. v. County Concrete Corp.*, 226 Wis. 2d 235, 269, 593 N.W.2d 445, 460 (1999) ("An insurance company that had no duty to defend the insured because the complaint did not allege 'bodily injury'

or 'property damage' also had no duty to defend contribution and indemnification claims arising out of the same complaint.")

Anderson's third-party complaint against R&B is undisputedly grounded in theories of contribution and indemnification for the damages asserted by Smith in the amended complaint:

> 12. Without admitting that any of the work performed by third party defendant, R & B Construction, Inc., and/or third party defendant, 4th Dimension Design, Inc., was faulty, negligent or defective this defendant alleges that if this defendant is liable that he is entitled to be indemnified and held harmless from any and all liabilities this defendant may have to the plaintiff in the event that the plaintiff succeeds in obtaining a recovery against this defendant. In addition thereto, this defendant requests that the third party defendants contribute their respective share of liability and a claim for contribution is hereby asserted against said third party defendants.
>
> . . .
>
> 15. In the event that this defendant is found obligated to the plaintiff in any respect then this defendant demands that this defendant be made whole for any amounts this defendant may be obligated to pay to the plaintiff from the third party defendants 4th Dimension Design, Inc. and R & B Construction, Inc. by way of indemnification and contribution.

(R. 11-5, ¶12; R. 11-6, ¶15; Supp. A. 12-13.) (Bold added.) Consequently, only the damages Smith alleged are controlling, because contribution or indemnification liability can only be for the damages Smith alleged in the amended complaint based on misrepresentation. The third-party complaint can only pass on damage liability alleged in the amended complaint.

As set forth in detail below, the amended complaint's allegations do not describe "property damage" caused by an "occurrence." Therefore, West Bend has no duty to defend or indemnify R&B for contribution or indemnification for Smith's claims, as alleged by Anderson in the third-party complaint.

2. West Bend has no duty to defend or indemnify R&B because the complaints do not allege an "occurrence," a prerequisite to coverage.

i. The amended complaint does not allege an "occurrence."

Under West Bend's policy, liability for "property damage" is covered only if it resulted from an "occurrence." (R. 23-19; Supp. A. 20.) West Bend's policy defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (R. 23-32; Supp. A. 23.) Smith's amended complaint only alleged real estate misrepresentations and each of the four causes of action arise out of Anderson's alleged real estate misrepresentations. (R. 16; Supp. A. 4.) The amended complaint alleged the intentional and not accidental nature of the misrepresentations. It alleged Anderson purposefully concealed basement leaks by painting over them, (R. 16-4, ¶4; Supp. A. 5), and that Anderson knew of the leaks but falsely represented he had no notion of them. (R. 16-4, ¶¶10-11; R. 16-5, ¶15; R. 16-6, ¶20; Supp. A 5-

7.) Misrepresentations made by a seller concerning the condition of property to be sold do not constitute "occurrences" within the meaning of a liability policy under Wisconsin law. *Everson v. Lorenz*, 2005 WI 51, ¶3, 280 Wis. 2d 1, 6, 695 N.W.2d 298, 300.

In *Everson*, plaintiff bought land from the defendant for the purpose of constructing a home on it. *Id.* ¶4, 280 Wis. 2d at 6, 695 N.W.2d at 300. The defendant had represented in a Real Estate Condition Report that no portion of the parcel of land was within a 100-year flood plain. *Id.* ¶5, 280 Wis. 2d at 6-7, 695 N.W.2d at 301. The plaintiff soon discovered that his parcel of land was located within a 100-year flood plain and filed a complaint alleging negligent misrepresentation, strict responsibility misrepresentation, intentional misrepresentation, and breach of contract. *Id.* Pekin Insurance Company had issued a liability policy to the defendant.[2] Pekin sought summary judgment on insurance coverage, in part arguing there was no "occurrence" within the meaning of the policy.

The Wisconsin Supreme Court agreed with Pekin and held there was no "occurrence" within the meaning of the policy. *Id.* ¶41, 280 Wis. 2d at 28, 695 N.W.2d at 311. The Court rejected the defendant's

[2] Pekin's policy defines "occurrence" in identical language to that of West Bend. *Id.* ¶12, 280 Wis. 2d at 10, 695 N.W.2d at 302.

argument that the misrepresentation was an "accident" and thus would fit within the definition of "occurrence." *Id.* ¶18, 280 Wis. 2d at 14, 695 N.W.2d at 304. The Supreme Court reasoned that the plaintiff giving the defendant the misleading information was an "'action' not an 'accident.' ... Even if there was a mistake made in filling out the Real Estate Condition Report, and that mistake induced reliance, the decision to give Everson the report is not an 'accident' within the meaning of the policy." *Id.* ¶22, 280 Wis. 2d at 16, 695 N.W.2d at 305. Accordingly, the Supreme Court held that Pekin had no duty to defend or indemnify the defendant.

Everson was applied by the Wisconsin Supreme Court in *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, ¶¶26-27, 311 Wis. 2d 492, 510, 753 N.W.2d 448, 457. In *Stuart*, the Court similarly held that misrepresentations to homeowners concerning the condition and quality of real estate are not accidents, and therefore not covered as an "occurrence" under a liability insurance policy. *Id.* ¶45, 311 Wis. 2d at 518, 753 N.W.2d at 461.

The same must hold true here. Just as in *Everson*, here Smith alleged Anderson misrepresented a condition of the property, thus breaching the sales contract. These allegations of misrepresentation and related breach of contract concerning the condition of the property

do not constitute an "occurrence" under the plain language of the West Bend policy because they were not an "accident." As the Supreme Court held in *Everson,* providing a seller with misleading information about a property to be sold is an "action," not an "accident." *Everson,* 2005 WI 51, ¶22, 280 Wis. 2d at 16, 695 N.W.2d at 305. Therefore, on this basis alone West Bend has no duty to defend or indemnify R&B.

R&B argues that "the 'occurrence' is the continuous and repeated exposure to water leaking into the basement and sediment flowing into drain tile causing the drain tile to plug." (R&B Br 16-17.) R&B fails to identify any allegation in Smith's amended complaint that allege these things because *nowhere* in Smith's amended complaint do these allegations appear.[3] Further, in *Everson*, the presence of the real estate in a flood plain would have qualified as "continuous and repeated exposure" to flooding but the Supreme Court held no "occurrence" because the act of misrepresenting is what caused the alleged injury, just as is the case here. Smith alleged her injuries stem from misrepresentations.

Moreover, R&B never explains what "property damage" those leaks and plugged drain tiles caused, if they are, in fact, "occurrences."

[3] The closest Smith's amended complaint alleges is "drain tiles are plugged with iron ochre, the basement leaked, and that the defendant performed structural repair work without obtaining the required permits." (R. 16-4, ¶5.)

A leak or a plugged drain tile is a condition of the house and does not constitute "property damage," defined by the policy as "physical injury to tangible property, including all resulting loss of use of that property. . ." or "[l]oss of use of tangible property that is not physically injured. . ." (R. 23-33; Supp. A. 24.)

R&B's reliance on *American Girl, Kalchthaler, and Acuity v. Soc'y Ins.*, (R&B Br. 15-16), is misplaced because none of these cases involved misrepresentation. This is an important distinction as the Court in *Acuity v. Soc'y Ins* explained:

> Neither *Stuart* nor *Sustache* support Society's argument. Both cases addressed intentional acts: in *Stuart*, a volitional misrepresentation made to induce another to enter into a contract; and in *Sustache*, an assault intended to cause bodily harm. In both cases, the court concluded that these intentional acts did not constitute occurrences within the meaning of the insurance policies because they were not accidents, that is, they did not occur by chance.

Acuity v. Soc'y Ins., 2012 WI App 13, ¶26, 339 Wis. 2d 217, 232, 810 N.W.2d 812, 819-820. (internal citations omitted.) Here, Smith's amended complaint focuses on the intentional nature of Anderson's conduct, a volitional misrepresentation made to induce Smith to enter into a contract. Smith alleged Anderson painted the basement to hide its defects. (R. 16-4, ¶4; Supp. A. 5.) Anderson could not have "mistakenly" or "accidentally" painted the basement to hide defects - - it was a volitional and intentional act.

In fact, each of the amended complaint's causes of action contains "intent" as an element. For example, Smith alleged intentional misrepresentation, the elements of which are: "the defendant made the representation with the *intent* to deceive the plaintiff in order to induce the plaintiff to act on it to plaintiff's pecuniary damage… ." *Malzewski v. Rapkin*, 2006 WI App 183, ¶17, 296 Wis. 2d 98, 111, 723 N.W.2d 156, 162. (emphasis added.) As further example, Smith alleged violation of Wis. Stat. §895.446, which states "[a]ny person who suffers damage or loss by reason of *intentional conduct* … has a cause of action against the person who caused the damage or loss." (emphasis added.) As further example, Smith alleged violation of Wis. Stat. §943.20(1)(d), which states whoever "[o]btains title to property of another person by *intentionally* deceiving the person with a false representation which is known to be false, made with *intent* to defraud, and which does defraud the person to whom it is made" may be penalized. (emphasis added.)

The amended complaint simply does not allege accidental conduct and Wisconsin law clearly holds that Anderson's misrepresentations regarding the condition of the property are not "occurrences." *Everson*, 2005 WI 51, ¶3, 280 Wis. 2d at 6, 695 N.W.2d at 300. On this basis alone, this Court should affirm the Circuit Court.

ii. The third-party complaint, if considered, also does not allege an "occurrence."

R&B does not contend the third-party complaint alleged an "occurrence." R&B has waived its ability to argue the third-party complaint alleged an "occurrence." *See In re Estate of Bilsie*, 100 Wis. 2d 342, 346, n. 2, 302 N.W.2d 508, 512 (Ct. App. 1981)(Appellate court will not consider arguments raised for the first time in a reply brief.) Indeed, R&B cannot make that argument because the third-party complaint is based upon contribution and indemnification, and it alleged nothing about "property damage" caused by an "occurrence."

However, even if the third-party complaint is considered, it does not, on its face, allege an "occurrence." The third-party complaint alleged R&B contracted with Anderson to perform foundation repairs. (R. 11-3, ¶3; Supp. A. 10.) Specifically, Anderson alleged it hired R&B to reinforce the basement walls, (R. 11-4, ¶¶5-6; Supp. A. 11), address basement water seepage, (R. 11-4, ¶8; Supp. A. 11), to install "a new drain tile system and sump crock and sump pump," (R. 11-5, ¶¶9-10; Supp. A. 12), and to "make certain that said system was in good working order and draining to the proper area of the property." (R. 11-5, ¶10; Supp. A. 12.) Anderson alleged that as a result of that work, R&B is obliged to hold harmless defendant Anderson for Smith's claims

of pecuniary damage by way of indemnification and contribution. (R. 11-5, ¶12; R. 11-6, ¶15; Supp. A. 12-13.) Nothing in the third-party complaint allegations describe an accident or "occurrence."

3. Alternatively, and as an entirely separate basis why West Bend has no duty to defend or indemnify R&B, the complaints do not allege "property damage" as defined by the policy.[4]

    i. The amended complaint does not allege "property damage."

R&B points to the original complaint's *ad damnum* clause for evidence of "property damage." (R&B Br. 18-19.) However, the original complaint was completely replaced by the amended complaint, as the amended complaint made no reference to nor incorporated the original complaint, and so the amended complaint is the only operative complaint. *Holman v. Family Health Plan*, 227 Wis. 2d 478, 487, 596 N.W.2d 358, 362 (1999). ("An amended complaint supplants the original complaint when the amended complaint makes no reference to the original complaint and incorporates by reference no part of the original complaint.") The original complaint's allegations are irrelevant to this duty to defend analysis.

[4] Affirmance based on this argument, or any argument in this brief, is entirely proper even if the argument was not adopted by the Circuit Court. *See B & D Contrs., Inc. v. Arwin Window Sys.*, 2006 WI App 123, ¶4, n. 3, 294 Wis. 2d 378, 384, 718 N.W.2d 256, 259. (An Appellate Court may affirm on any ground, whether argued successfully or not at the Circuit Court.)

R&B also argues the amended complaint's *ad damnum* clause alleged "property damage" such as "the cost of placing the property in the condition that it was represented to be in" and "the cost of repairs." (R&B Br. 19.) A complaint's *ad damnum* clause is not to be considered to supply facts that would give rise to coverage:

> In *Midway*, the underlying complaint was for an improperly installed sewer system. *Midway*, 226 Wis. 2d at 27. The body of the complaint failed to allege that the faulty sewer caused damage to tangible property, which was what the policy covered, during the time period that the policy covered. *Id.* at 33-34. We refused to resort to the ad damnum clause to supply the *facts* that would give rise to coverage because the ad damnum clause "is not a substantive part of the complaint" and is instead "nothing more than an 'asking price.'" *Id.* at 35-36 (citations omitted). It was not that the complaint failed to ask for *damages*, but that it failed to say that anything had been *damaged*, that foreclosed any duty to defend. Indeed, if AIG's reading of *Midway* were correct, there could never be a duty to defend in this state; for where but the ad damnum clause would a court look to see whether damages were requested? Here, the complaint is clear as to what Liebovich allegedly did wrong and how it harmed his neighbors. The question we must answer is not whether the complaint asks for damages as relief, but whether the facts pled could give rise to damages falling within the policy.

Liebovich v. Minn. Ins. Co., 2007 WI App 28, ¶10, 299 Wis. 2d 331, 341-342, 728 N.W.2d 357, 362-363. Likewise here, the amended complaint's body does not allege "property damage" and so R&B cannot look to the *ad damnum* clause to conjure up coverage. Even when liberally construing a complaint, the insurance company is not required to assume allegations, causal connections, or guess that facts exist when determining whether the duty to defend was invoked. *Midway Motor*

Lodge v. Hartford Ins. Group, 226 Wis. 2d 23, 36, 593 N.W.2d 852, 857 (Ct. App. 1999).

While the amended complaint asserts that Smith sustained pecuniary damages because of Anderson's alleged misrepresentations, it does not allege "bodily injury" or "property damage." Rather, Smith asserts she has incurred "monetary damages," (R. 16-5, ¶13; Supp. A. 6), and has suffered "pecuniary damages." (R. 16-5, ¶18; R. 16-6, ¶23; R. 16-7, ¶29; Supp. A. 6-8.) It is well-settled that economic damages "are pecuniary in nature and do not constitute property damage as defined by the insurance policy." *Qualman,* 163 Wis. 2d at 366, 471 N.W.2d at 285.

In *Qualman*, the Court examined American Family Insurance Company's duty to defend its insured, Bruckmoser, against claims related to misrepresentations in the sale of a house. The plaintiffs alleged negligent and intentional misrepresentation and breach of contract. Specifically, the plaintiffs alleged that the house had cracked basement walls and defective kitchen pipes, and that the defendants misrepresented those known conditions and breached the contract. *Id.* at 363, 471 N.W.2d at 283-84. Construing policy language substantially similar to the West Bend policy here, the Court concluded as follows:

> The causes of action against the Bruckmosers 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. See Wis. JI - Civil 2405, 2406. Therefore, the damages alleged by the Qualmans are pecuniary in nature and do not constitute property damage as defined by the insurance policy. Property damage within the meaning of the policy is not alleged. There is no coverage in the policy for the pecuniary loss the Qualmans do allege. Thus, American Family has no duty to defend.

Id. at 366, 471 N.W.2d at 285.

Like the plaintiff in *Qualman*, in this case Smith alleged that Anderson's misrepresentations regarding structural defects of the home caused her to suffer pecuniary damage. (R. 16-5, ¶18; R. 16-6, ¶23; R. 16-7, ¶29; Supp. A. 6-8.) The West Bend policy defines "property damage" in nearly identical terms as the American Family policy at issue in *Qualman.*[5] *Qualman* is controlling here, as the damages alleged by Smith are pecuniary in nature and do not constitute "property damage" as defined by West Bend's policy. Moreover, the defects that existed in the home when Smith bought it do not constitute "property damage" as explained by *Qualman*:

> [T]he Qualmans' claims in this case do not expose the Bruckmosers to liability for any damage to tangible property.

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[5] West Bend's policy defines "property damage" as "physical injury to tangible property, including all resulting loss of use of that property. . ." or "[l]oss of use of tangible property that is not physically injured. . ." (R. 23-33; Supp. A. 24.) The American Family policy at issue in *Qualman* defined "property damage" as "injury to or destruction of tangible property, including the loss of its use." *Qualman*, 163 Wis. 2d at 366, 471 N.W.2d at 285.

> 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. Simply because the underlying facts deal with defects in the property sold does not change the nature of the claim asserted by the Qualmans against the Bruckmosers. Nor does it change the risks the policy insured against.

Qualman, 163 Wis. 2d at 367, 471 N.W.2d at 285.

Smith has not alleged "property damage" within the meaning the policy. West Bend has no duty to defend R&B against the allegations in this lawsuit.

Similarly, in *Smith v. Katz*, 226 Wis. 2d 798, 595 N.W.2d 345 (1999), the Wisconsin Supreme Court examined a West Bend liability policy containing virtually identical language to the policy at issue in this case. In *Smith,* the plaintiffs bought a vacant lot from Philip Guiffre. Approximately two years later, underground springs were discovered during construction of the Smiths' house. *Id.* at 801, 595 N.W.2d at 347-48. The Smiths filed suit against Guiffre, alleging breach of warranty, intentional misrepresentation, strict responsibility misrepresentation, and negligent misrepresentation. *Id.* at 801, 595 N.W.2d at 347. West Bend had issued a general liability policy to Guiffre and sought a declaration that it had no duty to defend or indemnify Guiffre under the policy. *Id.* at 802, 595 N.W.2d at 348. The Wisconsin Supreme Court agreed with West Bend and held that the

Smiths' complaint did not constitute claims for "property damage" caused by an "occurrence." *Id.* at 800, 595 N.W.2d at 347. The Court stated the "Smiths' complaint did not invoke a duty to defend because it did not explicitly or implicitly allege that Guiffre's purported misrepresentations caused 'property damage' within the meaning of the policies." *Id.* at 817, 595 N.W.2d at 354.

Similarly in this case, Smith does not allege "property damage" within the meaning of the policy. The West Bend policy provides coverage for claims of "property damage" caused by an "occurrence." The policy defines "property damage" as "physical injury to tangible property, including all resulting loss of use of that property. . ." or "[l]oss of use of tangible property that is not physically injured. . ." (R. 23-33; Supp. A. 24.) Smith alleged breach of contract and misrepresentations of structural defects by Anderson that resulted in her suffering pecuniary damages and monetary loss. (R. 16-5, ¶13; R. 16-5, ¶18; R. 16-6, ¶23; R. 16-7, ¶29; Supp. A. 6-8.) These allegations do not describe physical injury to, or loss of use of tangible property.

ii. The third-party complaint, if considered, also does not allege "property damage."

R&B does not contend the third-party complaint alleged "property damage." In fact, R&B says that "one must consider the

complaint (and amended complaint) to arrive at what type of damages are being claimed against R&B. (R&B Br. 19.) R&B has waived its ability to argue the third-party complaint alleged "property damage." *See In re Estate of Bilsie*, 100 Wis. 2d at 346, n. 2, 302 N.W.2d at 512.

However, the third-party complaint, should this Court deem its allegations be considered, does not allege R&B caused any "property damage." Even if the faulty workmanship of R&B were alleged, it is well-established that general liability policies do "not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident" resulting in property damage. *Bulen v. West Bend Mut. Ins. Co.*, 125 Wis. 2d 259, 265, 371 N.W.2d 392, 395 (Ct. App. 1985).

In cases where the Court has found that claims of faulty workmanship allege "property damage" caused by an "occurrence," there have been clear allegations of physical injury to tangible property. In *Kalchthaler*, leaky windows were alleged to have wrecked drapery and wallpaper. *Kalchthaler v. Keller Constr. Co.*, 224 Wis. 2d 387, 397, 591 N.W.2d 169, 173 (Ct. App. 1999). *Kalchthaler* held the physically injured drapery and wallpaper were the property damage: "[h]ere, water entering leaky windows wrecked drapery and wallpaper. This is physical injury to tangible property." *Id.* Similarly, in *American Girl*, an occurrence – the settling building – caused

warehouse walls to buckle and crack. *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 2004 WI 2, ¶5, 268 Wis. 2d 16, 26, 673 N.W.2d 65, 70. *American Girl* held the cracked walls were physically injured tangible property: "[t]he sinking, buckling, and cracking of the warehouse was plainly 'physical injury to tangible property.'" *Id.* In *Glendenning's*, the pleading alleged a metal scraper had damaged rubber mats in the barn stalls. The scraper had been designed to clean the mats. *Glendenning's Limestone & Ready-Mix Co. v. Reimer*, 2006 WI App 161, ¶42, 295 Wis. 2d 556, 582-83, 721 N.W.2d 704, 717. *Glendenning* held "[t]he damage to the mats is 'physical damage to tangible property.'" *Id.*

Here, by contrast, analogous "property damage" appears nowhere in the allegations of the amended complaint or third-party complaint, even if its allegations are considered. The amended complaint alleged pecuniary and monetary damages that are not "property damage" under the plain language of the policy. The third-party complaint alleged R&B did its work "properly," (R. 11-5, ¶10; Supp. A. 12), but that if it is found to be faulty, R&B should indemnify Anderson, (R. 11-5, ¶12; Supp. A. 12), and R&B should do any work necessary to correct defects. (R. 11-6, ¶13; Supp. A. 13.) There is no physical injury to property or loss of use of it described in these allegations.

4. Alternatively, if this Court were to determine that allegations of "property damage" caused by an "occurrence" exist, then coverage would be excluded by the business risk exclusions.

It is well-established that general liability policies do "not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident" that results in "property damage." *Bulen,* 125 Wis. 2d at 265, 371 N.W.2d at 395. Liability policies do not act like a warranty to guarantee products or services perform as warranted. *Id.* Here, Smith wants her purchase money returned from Anderson, "the difference in value between the property as represented and its actual value," or repair costs, (R. 16-7, *ad damnum* clause; Supp. A. 8), and Anderson asserts indemnification or contribution for it if R&B's work was "defective." (R. 11-5, ¶12; Supp. A. 12.)

If that is deemed to be "property damage" caused by an "occurrence," it is excluded by the two following business risk exclusions:

> 2. Exclusions
>
> 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;

> l. Damage To Your Work
>
> "Property Damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

(R. 23-22-23; Supp. A. 21-22.)

i. The "damage to property" exclusion excludes coverage.

West Bend does not have a duty to defend or indemnify R&B for "property damage" to any particular point of real property on which R&B performed operations, as long as the damages stem from the operations.

By its plain language, the "damage to property" exclusion precludes coverage for "property damage" to the part of real property R&B performed operations on. *Id.* The amended complaint seeks the cost of repairs to that particular part of property that R&B contracted with Anderson to work on and repair - - the basement, foundation and drain tile. Smith alleged that "to repair or correct the condition of the property" she will need "to obtain the proper permits, install and replace drain tile, and correct the defendant's structural repair work." (R. 16-4, ¶7; Supp. A. 5.) The drain tile and structural repair work were R&B's work. The third-party complaint alleged R&B "performed

the reinforcement of the basement walls," (R. 11-4, ¶7; Supp. A. 11), and "installed the new drain tile system," and ensured the entire drain system was functioning:

> 10. Upon information and belief, R&B Construction, Inc., 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. 11-5; ¶10; Supp. A. 12) R&B's contract documents show it was hired to reinforce all four foundation walls of the basement and warranted them for five years, (R. 34-23), and to open the flooring and flush and assure drain tile function. (R. 34-24, 28.) R&B admits it "performed structural reinforcement of the Residence's basement walls" and later "installed a sump crock, and replaced approximately four feet of interior drain tile along the east wall leading to the sump crock." (R. 34-16, Response to Interrogatory No. 4; Supp. A. 16.) It further says that it later "opened, cleaned and flushed certain of the drain tile." (*Id.*) As R&B's work was to the exact same "particular part" of property for which Smith alleged "damage," coverage is precluded by the "damage to property" exclusion.

In *Vogel v. Russo*, the Court interpreted a similar "business risk" exclusion that excluded coverage to "that particular part of any property" needing repair or replacement due to the insured's faulty workmanship. The Court held that "[t]he business liability or 'business

risk' exclusion excludes coverage for repair or replacement damages associated with the insured's faulty workmanship or property damage to the insured's own work or product." 2000 WI 85, ¶¶18-19, 236 Wis. 2d 504, 514, 613 N.W.2d 177,183, *overruled in part on other grounds in Ins. Co. of N. Am. v. Cease Elec. Inc.*, 2004 WI 139, 276 Wis. 2d 361, 688 N.W.2d 462. The Court further held a liability policy is not a performance bond for the insured's work:

> As we have noted, the parties agree (as do we) that the replacement and repair of Limbach's masonry product is economic loss to the Jacobs based on Limbach's contractual liability and is not covered under the West Bend CGL policy. Were it otherwise, West Bend's CGL policy would truly have been converted to a performance bond contrary to *Bulen*.

Id. ¶20, 236 Wis. 2d at 515, 613 N.W.2d at 183. West Bend did not issue a performance bond to R&B. Repair or replacement of R&B's alleged faulty or damaged work, if the amended complaint or third-party complaint, should it be considered, is somehow construed to allege deficient work that must be repaired or replaced, is simply not covered by West Bend's policy.

Acuity v. Soc'y Ins., 2012 WI App 13, 339 Wis. 2d 217, 810 N.W.2d 812, upon which R&B relies to argue the "damage to property" exclusion does not apply, (R&B Br. 21-22), is distinguishable, and not applicable to the facts here. In *Acuity v. Soc'y Ins.,* the insured had

contracted to remove and replace the south wall of an engine room. *Id.* ¶3, 339 Wis. 2d at 221, 810 N.W.2d at 815. As the insured was performing its work, soil eroded from under the engine room's concrete slab, causing the slab to crack, and damage to the second floor, roof and related structures and mechanicals. *Id.* ¶4, 339 Wis. 2d at 222, 810 N.W.2d at 815. Society argued all the damage was excluded pursuant to a business risk exclusion that precluded coverage for that particular part of real property on which the contractor was working. *Id.* ¶9, 339 Wis. 2d at 224, 810 N.W.2d at 816. The Court held that application of the business risk exclusion did not apply to preclude coverage for all the damage because the insured's work was the south wall, not to other parts of the building like the slab or the equipment in the building that was damaged. *Id.* ¶42, 339 Wis. 2d at 238-39, 810 N.W.2d at 823.

The Court endorsed the view of the phrase "particular part" to mean "those parts of a building on which the defective work was performed" *Id.* ¶40, 339 Wis. 2d at 237, 810 N.W.2d at 823. The Court quoted a Federal Sixth Circuit decision holding that the exclusion applies to the component parts worked on, and not to an entire building where the insured worked on just one component part:

> . . . the exclusion applies only to building parts on which defective work was performed, and not to the building generally. And we also agree that "part," as used in this exclusion, means the "distinct component parts" of a building—

> things like the "interior drywall, stud framing, electrical wiring," or, as here, the foundation.

Id. ¶38, 339 Wis. 2d at 237, 810 N.W.2d at 822, *quoting Fortney & Weygandt, Inc. v. American Manufacturers Mutual Insurance Co.,* 595 F.3d 308, 311 (6th Cir. 2010) (applying Ohio law). Here, two of the building's component parts, its drain tile, and its basement walls, were the express subject of R&B's work. The exclusion is not being applied to component parts beyond R&B's work. R&B wrongly argues the exclusion does not apply because R&B only worked on a portion of the drain tile while the amended complaint generally alleged "drain tile." (R&B Br. 22.) R&B's effort to narrow the exclusion's scope to the molecular level of work, e.g., the specific feet of drain tile it replaced, is contrary to the plain language of the exclusion, the Wisconsin and other decisions it cites, and undisputed fact. The drain tile system is one component part of the home. R&B's contract documents show its work encompassed flushing the entire drain tile system, inspecting it and assuring it functioned, and also reinforcing all four walls of the basement. (R. 11-3 ¶3; R. 11-4, ¶7; R. 11-5, ¶9; Supp. A. 10-12.)

Acuity v. Soc'y Ins. also discussed *Acuity v. Burd & Smith Construction, Inc.*, 2006 ND 187, 721 N.W.2d 33, a case interpreting the same business risk exclusion. The *Burd &*

Smith Court held any damage to the interior of the building, when the insured had only contracted to perform work on the roof, was not included in that "particular part" of the insured's work and therefore not excluded by the business risk exclusion. *Acuity v. Soc'y Ins.*, 2012 WI App 13, ¶¶36-37, 339 Wis. 2d at 235-36, 810 N.W.2d at 822. The damages alleged in *Acuity v. Soc'y Ins*. and *Acuity v. Burd & Smith Construction, Inc*. were to parts of the properties well beyond those the insureds had worked on.

By contrast, here, the amended complaint alleged repairs need to be made to "that particular part of real property" R&B worked on. The amended complaint alleged Smith needs to "repair or correct the condition of the property," (R. 16-4, ¶7; Supp. A. 5), related to the foundation and basement area because "the drain tiles are plugged with iron ochre, the basement leaked, and that the defendant performed structural repair work without obtaining the required permits." (R. 16-4, ¶5; Supp. A. 5.) R&B's work at the property consisted of structural reinforcement of all four basement foundation walls, (R. 11-4, ¶¶5-6; Supp. A. 11), addressing basement water seepage, (R. 11-4, ¶8; Supp. A. 11), installing "a new drain tile system and sump crock and sump pump," (R. 11-5, ¶¶9-10; Supp. A. 12), and assuring the entire drainage system functioned properly. (R. 11-5, ¶10;

Supp. A. 12.) The repairs Smith alleged must be done are to the exact parts of property R&B worked on. Further, the factual predicate for the third-party complaint's assertion of contribution/indemnification liability is synonymous with the extent of R&B's work. If the work were "faulty, negligent or defective" then contribution or indemnification is sought for plaintiff's damages, (R. 11-5, ¶12; Supp. A. 12), and R&B, per its warranty "is required to correct any defects, deficiencies or conditions" of its work. (R. 11-6, ¶13; Supp. A. 13.) Consequently, the "damage to property" business risk exclusion precludes coverage.

In sum, if "property damage" caused by an "occurrence" has been alleged, it is clearly excluded pursuant to the "damage to property" exclusion, and the West Bend policy does not provide coverage for any damages to R&B's repair work at the property.

ii. Alternatively, the "damage to your work" exclusion excludes coverage.

The policy's business risk exclusions also expressly state that West Bend does not have a duty to defend or indemnify R&B for "property damage" to R&B's "work," arising from that work.

The policy defines "your work" as "work or operations performed by you or on your behalf" and includes "materials, parts or equipment

furnished in connection with such work or operations." (*Id.*) This exclusion only pertains to work included in the "products-completed operations hazard" which is defined as:

> a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
>
> (1) Products that are still in your physical possession; or
>
> (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
>
> (a) When all of the work called for in your contract has been completed.
>
> (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
>
> (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.
>
> Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.
>
> …

(R. 23-33; Supp. A. 24.) The "products-completed operations hazard" encompasses property damage arising out of work that has been

completed at the time of the damage. *See Stuart*, ¶63, 311 Wis. 2d at 526, 753 N.W.2d at 464.

If the amended complaint alleged "property damage" to R&B's work, then it could only have occurred after R&B's original work was completed, in January and March of 2011. (R. 34-25, 26, Response to Request for Production of Documents, R&B Invoices.) Thus, damage to R&B's work is included in the "products-completed operations hazard" and the "damage to your work" exclusion applies, because R&B's work, if "defective" is what gives rise to the alleged contribution and indemnification claims in the third-party complaint.

Similar to the present case, in *Bulen v. West Bend Mut. Ins. Co.*, the property owner sued the contractor's liability insurer for the collapse of a basement wall the contractor built. 125 Wis. 2d at 260-261, 371 N.W.2d at 392-393. The West Bend policy issued to the contractor in *Bulen* contained a similar "damage to your work" exclusion as the one here. *Id.* at 261, 371 N.W.2d at 393. *Bulen* held West Bend's policy business risk exclusions precluded coverage, stating "[t]he so-called "business risk" refers to the expenses of repair or replacement incurred by the contractor in the event his work does not live up to its warranties." *Id.* at 261-62, 371 N.W.2d at 393. The Court concluded "[t]he policy in question does not cover an accident of faulty

workmanship but rather faulty workmanship which causes an accident." *Id.* at 265, 371 N.W.2d at 395.

Similarly here, R&B's work is at issue, and is alleged to need repair or replacement. The amended complaint clearly alleged the need for repair and replacement of R&B's work: "to repair or correct the condition of the property" plaintiff will need "to obtain the proper permits, install and replace drain tile, and correct the defendant's structural repair work." (R. 16-4, ¶7; Supp. A. 5.) The third-party complaint alleged contribution/indemnification liability of R&B only if its work is found to be "faulty, negligent or defective" (R. 11-5, ¶12; Supp. A. 12.)

Any attempt by R&B to escape the "damage to your work" exclusion by claiming that the subcontractor exception[6] to the "damage to your work" exclusion applies must be rejected. The exception does not apply because there is no allegation that R&B subcontracted its work to anyone. In fact, R&B was specifically asked in interrogatory for the name and address of each subcontractor it hired to work on the property and R&B responded "none."[7] (R. 34-17, Response to Interrog.

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[6] The subcontractor exception to the "your work" exclusion states "this exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." (R. 23-23; Supp. A. 22.)

[7] Any argument by R&B that 4th Dimension was a subcontractor of Anderson somehow negates the "your work exclusion" must also be rejected. 4th Dimension

No. 7; Supp. A. 17.) R&B's owner even averred that he personally performed the work at issue in the lawsuit. (R. 38-1, ¶1.) Thus, the subcontractor exception to the "damage to your work" exclusion does not apply.

Thus, if this Court concludes that "property damage" caused by an "occurrence" within West Bend's policy has been alleged, coverage is excluded by the "damage to your work" business risk exclusion.

5. There is no "arguable" or "fairly debatable" claim against R&B and the Circuit Court correctly held West Bend has no duty to defend or indemnify R&B.

R&B's argument that if there is any "fairly debatable" claim against R&B, West Bend must defend, (R&B Br. 23), is completely unsupported by reference to any legal authority. (R&B Br. 23-26.) On this basis alone the entire argument must be ignored. *See State v. Shaffer*, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980) (Undeveloped or unsupported arguments must be ignored.) Wisconsin law is clear that the duty to defend is determined by the allegations of facts, compared to the policy terms. *Everson*, 2005 WI 51 ¶11, 280 Wis. 2d at 9, 695 N.W.2d at 302. If the allegations of fact describe "property damage" caused by an "occurrence," and the damage is not excluded,

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worked on behalf of Anderson, not R&B, (R. 11-4, ¶4; Supp. A. 11), and the subcontractor exception requires the subcontractor be working on behalf of the named insured, here R&B.

and the facts if proven would be covered, then there is a duty to defend. *Olson v. Farrar*, 2012 WI 3, ¶41, 338 Wis. 2d 215, 232-233, 809 N.W.2d 1, 9. A mere "fairly debatable" claim is not sufficient to trigger the duty to defend.[8]

R&B cites *Southeast Wis. Prof'l Baseball Park Dist.* and *Radke,* in a footnote (R&B Br. 26), but both state a different general rule that "the duty to defend is triggered by arguable, as opposed to actual, coverage" in that the facts alleged are assumed true for duty to defend, whereas actual coverage - - indemnity - - rests on proof of the facts. *Southeast Wis. 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

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[8] In fact, the leading Wisconsin treatise on insurance law cautions the term "fairly debatable" is not applicable in a duty to defend analysis:

> The term fairly debatable should not apply when determining whether a complaint triggers coverage. The rules that control the issue (complaint test, complaint liberally construed, etc.) are well defined. The reference to "fairly debatable" in *Elliott* and *Good Humor Corp.* has no real application in determining if an insurance company has a duty to defend. The complaint, broadly construed, either triggers the obligation to defend or it does not. If the coverage issue is "fairly debatable," it may save a company from a first-party bad faith claim or, in the right circumstances, a breach-of-contract claim. But it is of little importance when determine the initial question of whether the insurer had a duty to defend.

Arnold P. Anderson, *Wisconsin Insurance Law* §7.31 (State Bar of Wisconsin 5th ed. 2004.)

366, 369 (Ct. App. 1998). Both cases also cite to *Newhouse* for authority of this general rule. *Newhouse* explains that coverage is "arguable" if the allegations against the insured would, if proven, be covered by the policy, without regard to the merits of the allegations:

> An insurance carrier's duty to defend [sic] insured in a third-party suit is broader than its duty of indemnification and is predicated on allegations in a complaint which, if proved, would give rise to recovery under the terms and conditions of the insurance policy. The duty of defense depends on the nature of the claim and has nothing to do with the merits of the claim. If there is any doubt about the duty to defend, it must be resolved in favor of the insured. If the insurance company refuses to defend it does so at its own peril. Indemnification and defense for claims falling within the parameters of the insurance policy are the two primary benefits received by the insured from a contract of insurance.

Newhouse v. Citizens Sec. Mut. Ins. Co., 176 Wis. 2d 824, 834-835, 501 N.W.2d 1, 5 (1993). (Internal citations omitted.)

Here, and for all of the reasons set forth in this brief *supra*, there is no arguable coverage for R&B under West Bend's policy. The mere fact that R&B is arguing for coverage does not create arguable coverage under the policy. Wisconsin law clearly and unarguably holds West Bend does not have a duty to defend or indemnify R&B against the allegations in this lawsuit. *See, e.g., Everson*, 2005 WI 51, ¶3, 280 Wis. 2d at 6, 695 N.W.2d at 300. (Misrepresentations made by a seller concerning the condition of property to be sold do not constitute "occurrences" under Wisconsin law and are not covered by liability

policies.); *Qualman*, 163 Wis. 2d at 366, 471 N.W.2d at 285 (Pecuniary damages are not "property damage" under liability policies.)

In addition, R&B's argument that the Circuit Court inconsistently read the complaints when issuing its rulings, first on West Bend's motion for summary judgment on insurance coverage and then months later on R&B's motion for summary judgment/dismissal on the pleadings is meritless. (R&B Br. 23-26.) First, the Circuit Court never held that "the pleadings did not state a claim against R&B." (R&B Br. 24.) Instead, the Circuit Court held there was no claim that triggered West Bend's duty to defend: "I can't get over the fact that there isn't a theory of liability that affirmatively engages the policy. …" (R. 64-24; Supp. A. 2.) (bold added)

West Bend's motion for summary judgment sought a declaration that it had no duty to defend or indemnify R&B. (R. 32.) The Circuit Court's grant of West Bend's motion turned upon its interpretation of an insurance policy, which is a question of law. *Olson*, 2012 WI 3, ¶24, 338 Wis. 2d at 227, 809 N.W.2d at 7. Determining whether West Bend had a duty to defend R&B required the Court compare the allegations of the amended complaint to the insurance policy's language. *Everson*, 2005 WI 51 ¶11, 280 Wis. 2d at 9, 695 N.W.2d at 302. In determining whether West Bend had a duty to defend and indemnify R&B, the

Circuit Court properly compared the allegations of the complaints to the plain language of the policy and held that the allegations did not state a claim that triggered West Bend's policy. (R. 64-24; Supp. A. 2.)

By contrast, R&B's motion for summary judgment/dismissal on the pleadings asked the Circuit Court to hold that R&B was entitled to summary judgment: 1) on the breach of warranty claim because there was no warranted work that was alleged defective, nor any claim that R&B was asked to repair defects and failed to do so; and 2) on the contribution/indemnification claim because Smith's claims were for intentional misrepresentation and strict liability and Wisconsin law holds Anderson could not "claim contribution or indemnity for these claims of misrepresentation, because misrepresentation is an intentional tort." (R. 42; R. 43-5-6.) The Circuit Court's grant of R&B's motion depended on the Court finding there were no disputes of material fact and that R&B was entitled to judgment as a matter of law. Wis. Stat. §802.08(2). In ruling on R&B's motion for summary judgment on the merits of the contribution and indemnification claim against R&B, the Court found there were disputes of material fact that precluded the grant of summary judgment: "taking all inferences in favor of the defendant, I can't find that there's not a dispute of material fact." (R. 65-17-18; Supp. A. 26-27.)

The Circuit Court's rulings on West Bend and R&B's motions for summary judgment did not involve inconsistent readings of the complaints. Rather, the Circuit Court properly adhered to the appropriate standards that governed the Court's decisions.

Furthermore, in opposing R&B's motion for summary judgment, Anderson argued the amended complaint asserted a claim for negligent misrepresentation and breach of warranty,(R. 50-10), and the Circuit Court may have been swayed by this argument. While West Bend does not agree that the amended complaint asserts claims for negligent misrepresentation and breach of warranty, even if it did they would not be covered by West Bend's policy. *Everson* specifically held that negligent misrepresentation claims are not covered by liability policies. *Everson*, 2005 WI 51, ¶41, 280 Wis. 2d at 28, 695 N.W.2d at 311. A breach of warranty claim, without allegations of "property damage" caused by an "occurrence," is not covered by liability policies. *See Wausau Tile, Inc.*, 226 Wis. 2d at 269, 593 N.W.2d at 460 (Insurer had no duty to defend breach of warranty claims because there were no allegations of "property damage" caused by an "occurrence".) Here, the complaints do not allege "property damage" caused by an "occurrence," s*ee supra*, so any breach of warranty claim against R&B would not be covered. The Circuit Court's holding should be affirmed.

6. R&B's purported reasonable expectations of coverage are not relevant where the policy language is unambiguous, such as West Bend's here, and R&B's asserted expectations are unreasonable anyway.

The reasonable expectations of an insured, argued by R&B, (R&B Br. 26-27), are only relevant if the policy language is ambiguous and no one claims West Bend's policy is ambiguous. *See Badger Mut. Ins. Co. v. Schmitz*, 2002 WI 98, ¶51, 255 Wis. 2d 61, 83, 647 N.W.2d 223, 234. ("We are conscious that our interpretation of ambiguous language in an insurance policy should advance the insured's reasonable expectations of coverage.")

Further, R&B's expectation of a defense from West Bend for a claim not covered by the policy is not reasonable and is contrary to the policy language. "An insured's reasonable expectations of coverage … may not be satisfied in contradiction of the policy's plain language." *State v. City of Rhinelander*, 2003 WI App 87, ¶15, 263 Wis. 2d 311, 319, 661 N.W.2d 509, 513. The wild argument that a "contractor who purchases a CGL policy expects his insurer to protect him from unexpected claims," (R&B Br. 27), flies in the face of the policy language, reason, has no cited legal authority, and consequently should be rejected. No reasonable insured could expect to be defended by a liability insurer against every claim that was unexpected.

V. CONCLUSION

West Bend has no duty to defend or indemnify R&B Construction, Inc. against the allegations in this lawsuit. West Bend respectfully requests the Court affirm the grant of summary judgment to West Bend.

Dated this 29th day of June, 2015.

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,898 words.

/s/ Danielle N. Rousset
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CERTIFICATION REGARDING ELECTRONIC BRIEF PURSUANT TO WIS. STAT. §809.19(12)-(13), STATS.

I hereby certify that I have submitted an electronic copy of this brief and supplemental appendix, which complies with the requirements of Wis. Stat. §809.19(12)-(13).

I further certify that this electronic brief and supplemental appendix is identical in content and format to the printed form of the brief and supplemental appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this brief and appendix filed with the court and served on all opposing parties.

/s/ Danielle N. Rousset
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CERTIFICATION OF MAILING

Pursuant to Wis. Stat. §809.80(3)(b), I hereby certify that on this 29th day of June, 2015, ten (10) copies of the Brief of Defendant-Respondent West Bend Mutual Insurance Company with supplemental appendix was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on June 29, 2015.

I further certify that the brief was correctly addressed and postage was prepaid.

I further certified that three (3) copies of the Brief of Defendant-Respondent West Bend Mutual Insurance Company with supplemental appendix was served this same date by first-class United States mail, postage pre-paid on each party.

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