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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.

REPLY 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited **Page**

Statutes Cited

Other Authority

REPLY ARGUMENT

1. West Bend has a duty to defend R&B because there is an arguable and fairly debatable claim against it which if proven, would be covered by West Bend's policy.

The third-party defendant-appellant, R&B Construction Inc. ("R&B"), contends that because there is an "arguable" or "fairly debatable" claim covered by West Bend's policy, West Bend has a duty to defend R&B. When West Bend moved for summary judgment as to coverage, R&B asked the trial court to consider that there was an "arguable claim" that R&B accidentally caused the water leakage and the clogging of plaintiff's drain tile when R&B performed its work on the plaintiff's house.[1]

Although this arguable theory did not resonate with the trial court when West Bend moved for summary judgment on coverage, later, when R&B in turn moved for summary judgment and dismissal on the pleadings, the trial court decided that this same arguable claim precluded dismissing R&B. In denying R&B's motions the trial court stated: "I think there is a dispute of material fact and the allocation of responsibility within or – – negligence within which is allocated in the course of repairs on the plaintiff Smith's basement" and "I'm not sure what's causing the problem with the basement at least not from any of the filings"

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[1]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.

and "I wonder whether or not R&B shares responsibility." The trial court stated that it was uncertain whether the work performed by R&B "would contribute to the condition of this faulty leaky basement. But it is a disputed fact." [R.65,pp.16-19, App.,pp.44-47]

In its response, the intervenor-respondent West Bend Mutual Insurance Company ("West Bend") obscures the question of whether this "arguable" or "fairly debatable" claim against R&B requires West Bend to provide R&B with a defense.

2. R&B is not being sued for misrepresentation, and cases holding that there is no coverage for the misrepresentation claims do not establish that there is no insured claim against R&B.

West Bend states (at page 1) that "this appeal is governed by controlling precedent on duty to defend in property misrepresentation cases." West Bend cites *Qualman v. Bruckmoser,* 163 Wis. 2d 361, 471 N.W.2d 282 (Ct. App. 1991), *Everson v. Lorenz,* 2005 WI 51, 280 Wis. 2d 1, 695 N.W.2d 298, and *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, 311 Wis. 2d 492, 753 N.W.2d 448, to argue that West Bend has no duty to defend R&B against claims of misrepresentation. However, the "arguable" or "fairly debatable" claim at issue is not a claim for misrepresentation. The trial court kept R&B in this action because it perceived a claim that R&B committed some negligence which caused leakage and clogging of the drain tile when it straightened the basement walls per the engineering plans given to it. [R.65,pp.16-17, App.,pp.44-45]

West Bend contends (and suggests that R&B concedes) that the claim against R&B must be a misrepresentation claim. West Bend argues (at page 12) that R&B has "conceded" that "[o]nly the allegations in Smith's amended complaint need be considered when determining West Bend's duty to defend." This statement is not true, and odd, because West Bend then cites one of R&B's arguments to the effect that Smith's complaint and amended complaint against Anderson should be considered together with Anderson's third-party complaint against R&B.

West Bend then contends that because a third-party complaint "seeks to pass through to a third-party defendant the liability asserted in the complaint" the third-party complaint must be considered to be a claim of misrepresentation. West Bend and R&B debated this issue in their respective briefs to the trial court. After West Bend cited commentary on § 803.05(1), offering a restrictive view of what causes of action may be stated in a third-party complaint, R&B cited commentary, 3B Wis. Prac., Civil Rules Handbook § 803.05:2 (2013 ed.), offering a more expansive view of what causes of action may be stated. [R.37, p.11] There, R&B argued: "Although the pleadings are not a model of clarity, the gist of the action against R&B is that it is responsible for the water leaking into the basement and sediment causing the drain tile to plug, and not for making fraudulent representations to sell a house."

The trial court did not describe its own interpretation of § 803.05(1). However, it seems clear from the trial court's denial of R&B's motions to dismiss that the trial court believed that the third-party complaint was not restricted to claims of misrepresentation. R&B argued that as a matter of law, Anderson could not claim contribution or indemnity for Smith's claims of misrepresentation. [R.43, pp.5-7;R.54,pp.5-6] The trial court did not decide this issue, and instead determined that there was a claim that R&B did something to cause the basement to leak and the drain tile to clog.

3. The arguable claim against R&B has an "occurrence" and "property damage" as those terms have been defined by the courts.

West Bend's argument (at pages 15-18) that there was no "occurrence" under the policy is premised upon its argument that the claim against R&B must be considered to be a misrepresentation claim. West Bend addresses R&B's argument 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 clog by denying that this can be inferred from the complaint. However, both Smith's complaint and Smith's amended complaint allege that the basement leaks and the drains have become plugged with ochre, and that consequently the plaintiff Smith "will need to replace the drain tile and install drain tile." [R.1, ¶7, App.,p.59; R.16,¶7, App.,p.67] It seems clear that an occurrence has caused damage to the drain tile system in the basement.

West Bend argues (at page 21) that the third-party complaint does not allege an "occurrence" and that even if it did, the court should not consider that issue because it was not raised prior to this appeal. R&B has been consistent in its argument both to the trial court (on West Bend's motion for summary judgment) and on this appeal that the third-party complaint incorporated the complaint, and that it arguably stated a claim that "[s]omehow, something that R&B did caused all the drain tile to block up and the basement to leak." [Appellant's Brief, p.26-27; R.64,pp.17-18, App.,pp.19-20]

West Bend argues (at page 18) that "R&B never explains what 'property damage' those leaks and plugged drain tiles caused." R&B does not believe that its position is or has been unclear. The drain tile were clogged as a result of the occurrence and this is "property damage." West Bend argues (at page 19) that "a plugged drain tile is a condition of the house and does not constitute 'property damage.'" However, that depends on context. A broken window can be property damage or the condition of a house depending on context. Here the "arguable" claim against R&B, is that something that R&B did in the performance of its work caused leakage and the clogging of drain tile, and in this context damage to the drain tile is "property damage" under *American Family Mutual Ins. Co. v. American Girl, Inc*., 2004 WI 2, 268 Wis. 2d 16, 673 N.W.2d 65; *Kalchthaler v. Keller Const. Co.*, 224 Wis. 2d 387, 591 N.W.2d 169 (Ct. App. 1999); and *Acuity v. Society Insurance*, 2012 WI App 13, 339 Wis. 2d 217, 810 N.W.2d 812.

West Bend contends (at page 19) that *American Girl*, *Kalchthaler*, and *Acuity* do not apply because none of these cases involved misrepresentation. This is not a logical reason to dispense with a body of precedent holding that "property damage" as used in standard language in insurance policies includes damage to a house and/or part of a house. In *American Girl*, at 2004 WI 2, ¶ 33, the court decided:

> The policy defines "property damage" as "physical injury to tangible property, including all resulting loss of use of that property." The sinking, buckling, and cracking of the 94DC as a result of the soil settlement qualifies as "physical injury to tangible property."

In *Kalchthaler*, at 224 Wis. 2d 397, 591 N.W.2d 173 the court decided:

> Property damage, as defined by the policy, means physical injury to tangible property. Here, water entering leaky windows wrecked drapery and wallpaper. This is physical injury to tangible property.

In *Acuity*, at 2012 WI App 13, ¶ 15, the court decided:

> "Property damage" is defined within the policy as "physical injury to tangible property, including all resulting loss of use of that property." The damage to the engine room, the roof, and the resulting damage to the equipment is plainly "physical injury to tangible property."

These cases show that property damage can mean damage to a building or a component of a building (such as a drain tile system) as well as damage to personal property (such as the contents of a building).

West Bend argues (at page 22) that Smith's complaints do not allege "property damage", which is not the case. West Bend implies that there is some

significant difference between the complaint and amended complaint in this respect, and this also is not the case. In both the complaint and the 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, R.16,¶7, App.,p.67] Likewise, both the complaint and the amended complaint claim for "the cost of placing the property in the condition that it was represented to be in" and "the cost of all repairs" [R.1,p.5, App.,p.62; R.16,p.5, App.,p.70] West Bend's discussion of whether and when the allegations of a complaint are incorporated into an amended complaint are immaterial.

West Bend contends (at page 23) that a "complaint's *ad damnum* clause is not to be considered to supply facts that would give rise to coverage." In the case it cites, *Liebovich v. Minnesota Ins. Co.*, 2007 WI App 28, ¶ 17, 299 Wis. 2d 331, 345-46, 728 N.W.2d 357, 365 aff'd as modified, 2008 WI 75, ¶ 17, 310 Wis. 2d 751, 751 N.W.2d 764, the court determined that an insurance company had a duty to defend after considering both the fact allegations of the complaint and the *ad damnum* clause.[2] Here, both the body and *ad damnum* clauses of Smith's pleadings show that Smith seeks the cost of repairing damaged property and that Anderson in turn seeks to recover these damages from R&B.

[2]The court held: "If there is any doubt as to whether the complaint states facts that would give rise to liability under the policy, then the duty to defend exists." *Liebovich*, at 2007 WI App 28, ¶ 5

One argument which West Bend made to the trial court and repeats on this appeal (at pages 24-27) is that the plaintiff Smith has only claimed "economic damages". West Bend's object is to show that this case is like *Qualman v. Bruckmoser*, 163 Wis. 2d 361, 471 N.W.2d 282, (Ct. App. 1991) and *Smith v. Katz*, 226 Wis. 2d 798, 595 N.W.2d 345 (1999), where the claimants only sought diminished value as their damages. In *Qualman*, the only loss claimed was "the difference between the market value of the property [the house] at the time of purchase and the amount actually paid [for the house]." *Id.*, at 163 Wis. 2d 366, 471 N.W.2d 285. In *Smith*, the court inferred that the claimed loss was diminished value. *Id.*, at 226 Wis. 2d 812-18, 595 N.W.2d 352-54. These cases do not apply because here there is a claim for the cost of repair.

West Bend acknowledges (at page 28) that general liability policies cover "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). The trial court refused to dismiss R&B because it determined that the pleadings state a claim against R&B for causing a leak in the basement and for causing the drain tile to plug in the course of performing its work, namely, reinforcing the basement walls. [R.65, pp. 16-17, App.,pp.44-45]

4. The "business risk" exclusion does not eliminate coverage.

West Bend argues that the business risk exclusion applies because the property damage was part of R&B's work in the first place. "Exclusions are

narrowly or strictly construed against the insurer if their effect is uncertain." *American Girl*, at 2004 WI 2, ¶ 24, 268 Wis. 2d 32-33, 673 N.W.2d 73, citing *Cardinal v. Leader Nat'l Ins. Co.*, 166 Wis.2d 375, 382, 480 N.W.2d 1 (1992).

West Bend mistakenly asserts (at page 32) that "R&B's contract documents show it was hired ... to open the flooring and flush and assure drain tile function" referring to an R&B proposal reproduced at R.34,p.24. This is a new argument, which shows a lack of familiarity with the record.

Anderson never accepted the referenced proposal [R.34,p.24], not wanting to pay R&B to open the floor and work on the drain tile around the entire perimeter of the basement, and asked R&B to delete this work. R&B resubmitted a bid at a lower price for just reinforcing the basement walls and tuck pointing cracks which Anderson accepted and became the contract. This sequence of events is detailed in the affidavit of R&B's owner filed on December 24, 2014. [R.55,¶¶2-4]

In short, West Bend's argument that opening the floor and addressing the drain tile around the perimeter of the basement was part of R&B's work is based on a false premise. Likewise, West Bend's argument (at page 35) that "R&B's contract documents show its work encompassed flushing the entire drain tile system, inspecting it and assuring it functioned" is based upon a contract proposal that was never accepted.

West Bend refers to another document, which is a letter and not a contract [R.34.,p.28]. In the letter R&B's owner refers to the fact that a plumber (hired by Anderson) was called to free up a plugged sewer line, and at that point in time, water appeared to run through the palmer valve. All this seems to suggest is that the system was working at one point in time, but that later, something happened to clog it up.

R&B acknowledges that some time later, when Anderson decided to install a sump pump on the house, R&B installed the crock and replaced approximately four feet of interior drain tile along the east wall leading to the crock, while Anderson and others installing the sump pump and discharge. [R.38,¶3, App.,p.159] This does not mean that the scope of R&B's "particular" work expands to include all of the drain tile in the house. There are over 120 feet of drain tile in the house [R.38,¶6, App.,p.159], and the complaint (and amended complaint) alleges that to fix the current problem, "the plaintiff will need to replace the drain tile and install drain tile." [R.1, ¶7, App.,p.59; R.16,¶7, App.p.67]. West Bend has not established as a matter of law that this exclusion applies, and certainly has not demonstrated that the exclusion precludes an "arguable" or "fairly debatable" claim.

5. The "damage to your work" exclusion does not eliminate coverage.

West Bend argues that because the damage to the drain tile system made the subject of Smith's complaint was damage to R&B's work, its policy excludes

coverage. This argument is based upon the same mistaken premise described above. While R&B's first proposal to Anderson included work on the entire drain tile system [R.34,p.24], Anderson did not accept that proposal and R&B did not perform this work. Consequently, damage to the drain tile system is not damage to R&B's work. Furthermore, if something that R&B did in performing its work caused the basement to leak, that is not damage to R&B's work.

6. The applicable test is whether there is an arguable or fairly debatable claim against R&B.

West Bend contends (at page 41) that "R&B's argument that if there is any 'fairly debatable' claim against R&B, West Bend must defend, is completely unsupported by reference to any legal authority." R&B disagrees. At page 11 of its brief, R&B referred to *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, where 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

West Bend then rehashes it previous arguments and tries to reconcile the inconsistency between trial court's rulings on West Bend's motion and R&B's motions. West Bend theorizes how the rulings might be reconciled, but avoids addressing the specific remarks of the trial court. The trial court kept R&B in this

action because it believed that there was a claim that R&B's negligence caused the leakage and the clogging of the drain tile. If this claim were proven, it would be covered by West Bend's policy.

CONCLUSION

For these reasons, the appellant R&B Construction, Inc., again 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 14th day of July, 2015

Respectfully submitted,

MACHULAK, ROBERTSON & SODOS, S.C.

/s/ John E. Machulak
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CERTIFICATION

I certify that this reply 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 2,988 words.

Dated this 14th day of July, 2015.

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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 14th day of July, 2015.

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