SUPREME COURT OF WISCONSIN

Maya Elaine Smith

Plaintiff,

v.

Jeff Anderson, d/b/a Anderson Real Estate Services

Defendant, Third-Party Plaintiff,

v.

4th Dimension Design, Inc.

Third-Party Defendant,

R&B Construction, Inc.

Third-Party Defendant-Appellant-Petitioner,

West Bend Mutual Insurance Company

Intervenor-Respondent.

RESPONSE BRIEF OF INTERVENOR-RESPONDENT WEST BEND MUTUAL INSURANCE COMPANY

Court of Appeals District I
Appeal No. 2015AP000079
Milwaukee County Circuit Court Case No.: 13-CV-7085

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A. Summary.

This is, at root, a home sale misrepresentation case. The 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 to her. (R. 16-4, ¶¶4-8.) Smith alleged a leaky basement and plugged drain tiles, (R. 16-4, ¶5), causing her pecuniary damages. (R. 16-5, ¶18; R. 16-6, ¶23; R. 16-7, ¶29.)

Anderson filed a third-party complaint for contribution and indemnification against R&B Construction, Inc. ("R&B") and 4th Dimension Design, Inc., (R. 11), companies which had worked on the home's drain tile and leaks for Anderson prior to the sale. (R. 11-3, ¶3; R. 11-4, ¶4.) R&B tendered its defense to West Bend Mutual Insurance Company ("West Bend") seeking coverage under a Contractors Businessowners' Liability policy West Bend issued to R&B. West Bend agreed to defend R&B under a reservation of rights, and promptly moved the Circuit Court for a stay of proceedings on the merits of the claim and then for a declaration that West Bend has no duty to defend or indemnify R&B against this lawsuit. The Circuit Court granted West Bend's motion, declaring there was no duty to defend or

indemnify. The Court of Appeals, District I, affirmed in a unanimous, unpublished decision.

B. Facts.

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.) 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.)

The complaint[2] 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.) The complaint also 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.) Anderson's misrepresentations allegedly constituted breach of contract, and the complaint also alleged common law intentional misrepresentation, misrepresentation under Wis. Stat.

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[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 5/30/16).

[2] For purposes of brevity, West Bend's reference to "complaint" encompasses plaintiff's original and amended complaints.

§§895.446 and 943.20(1)(d); and misrepresentation under Wis. Stat. §100.18, (R. 16-4-7, ¶¶9-29), 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.)

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

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.)

Anderson filed a third-party complaint for contribution and indemnification against 4th Dimension Design, Inc. and R&B. (R. 11.) Anderson alleged he contracted with R&B to perform repairs to the

home's 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.) Anderson also alleged he contracted with R&B to address basement water seepage, (R. 11-4, ¶8), to install "a new drain tile system and sump crock and sump pump," (R. 11-5, ¶¶9-10), 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.) Anderson alleged that as a result of doing that work, R&B was 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.)

R&B tendered its defense to West Bend, which agreed to defend R&B under a reservation of rights to dispute coverage. (R. 33-2.) West Bend simultaneously intervened in the action and requested a bifurcation and stay, which was granted. (R. 21; R. 26.) West Bend's intervenor complaint alleged the lawsuit did not describe an "occurrence" causing "property damage," but rather misrepresentation causing pecuniary damages, (R. 23-2), which a long line of Wisconsin decisions hold is not an "occurrence" causing "property damage" within the meaning of a liability policy. *See, e.g., Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, ¶4, 311 Wis. 2d 492, 498-99, 753 N.W.2d 448, 451; *Everson v. Lorenz*, 2005 WI 51, ¶3, 280 Wis. 2d 1, 6,

695 N.W.2d 298, 300; *Smith v. Katz*, 226 Wis. 2d 798, 816-17, 595 N.W.2d 345, 354 (1999); *Qualman v. Bruckmoser,* 163 Wis. 2d 361, 366, 471 N.W.2d 282, 285 (1991).

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 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.)

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.)

West Bend's intervenor complaint also alleged that to the extent the complaints alleged "property damage" it was to the work and product of R&B and therefore plainly excluded from coverage. (R. 23-2.) R&B's work, as alleged, included reinforcing the basement walls, (R. 11-4, ¶7), installing drain tile, and installing a sump crock and sump pump. (R. 11-5, ¶9.)

C. Procedural History.

West Bend moved for summary judgment seeking a declaration that it has no duty to defend or indemnify R&B and dismissal from this lawsuit. (R. 32.) West Bend argued it did not have a duty to defend R&B, and therefore no duty to indemnify, because: 1) the complaints (the plaintiff's complaint and the third-party complaint) did not allege an "occurrence"; 2) the complaints did not allege "property damage" caused by an "occurrence"; 3) alternatively, the "damage to property" exclusion excluded coverage; and 4) alternatively, the "damage to your work" exclusion excluded coverage. (R. 33.)

The Circuit Court granted summary judgment to West Bend, declaring that West Bend has 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 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 properly. And that by itself doesn't constitute an occurrence.

(R. 64-23-24.)

After West Bend was granted summary judgment, R&B filed a motion for summary judgment contending 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 denied R&B's motion, finding there was a dispute of material fact. (R. 65-17-18.)

The Court of Appeals affirmed that West Bend has no duty to defend or indemnify R&B in a unanimous unpublished opinion. The Court of Appeals analyzed both the complaint and the third-party

complaint, concluding there was no liability alleged for property damage:

> The *Qualman* case is instructive here. Like in *Qualman*, the pleadings here do not allege property damage or loss of property use. The pleadings alleged "pecuniary damages" and requested "[recission of] the sale, return [of] all moneys paid by the plaintiff in purchasing and improving the property, plus moving costs and other expenses related to the purchase of the property." Like in *Qualman*, the underlying facts in the pleadings deal with defects in the property, but the nature of the claims are based in contract and misrepresentation. [The complaint] does not allege that the breach of contract or misrepresentations caused damage to the property, or a loss of property use. Smith claims she suffered economic losses because of the misrepresentation. Misrepresentations do not constitute property damage.
>
> Moreover, the third-party complaint states no theory of liability against R&B. It simply states that if Anderson is found liable to Smith, R&B should share liability. There is no contention that R&B's faulty workmanship caused the water exposure or the multiple issues that resulted therefrom. Indeed, the third-party complaint states that R&B's work was "performed in accord with the design drawings prepared by….4th Dimension Design, Inc.[,]' and was "properly installed." Neither complaint states a claim for which West Bend agreed to indemnify. Consequently, there is no duty to defend under the policy.
>
> For the foregoing reasons, we affirm the circuit court.

(Decision, ¶16-17.) The Court of Appeals flatly - - and correctly - - rejected R&B's argument that the Circuit Court inconsistently read the complaints when determining West Bend's duty to defend motion and R&B's subsequent motion for summary judgment:

> To the extent R&B argues that the circuit court erroneously denied its motion for summary judgment, we conclude that this issue is not before us.

(Decision ¶17, n. 2.)

II. ARGUMENT

R&B's entire premise for this appeal appears to be based on what it calls "inconsistent decisions" by the Circuit Court, (R&B Br. p. 21, 28, 31), when it first decided West Bend has no duty to defend R&B and then later, after West Bend was dismissed, when it decided there could be some facts that showed liability on the part of R&B that precluded dismissing R&B from this lawsuit. R&B forgets this is a review of a Court of Appeals' decision that conducted a *de novo* review of a Circuit Court summary judgment decision. The Circuit Court's analysis is immaterial. *Lamar Cent. Outdoor, LLC v. Wis. DOT,* 2008 WI App 187, ¶16, 315 Wis. 2d 190, 201, 762 N.W.2d 745, 750. Whether the Circuit Court's analysis was deficient or inconsistent makes no difference to the result. For this reason alone, this Court should reject R&B's argument and affirm.

Further, as is explained in detail below, the Circuit Court did not make inconsistent rulings and moreover, its decision and rationale to not dismiss R&B from this suit is not properly before this Court on appeal. Notably, the Circuit Court *did not* hold "there could be a negligence claim against R&B of the sort that ought to have been covered by R&B's policy with West Bend" as R&B misrepresents to this Court. (R&B Br. p. 28.)

Both the Circuit Court and the Court of Appeals scrutinized the complaint and the third-party complaint in determining there were no allegations of "property damage" caused by an "occurrence." Both Courts declared West Bend has no duty to defend or indemnify R&B in this lawsuit. Thus, R&B's first "issue" of whether a third-party complaint can state a claim invoking an insurance company's duty to defend when the complaint against the third-party plaintiff is for misrepresentation, is really not an issue present in this case at all but is more so a hypothetical.

R&B's second issue, whether it should be able to "introduce information not stated in the pleadings to show that there would be claims requiring his insurer to provide a defense," has already been adequately addressed by this Court in *Everson*, 2005 WI 51, ¶11, 280 Wis. 2d at 9, 695 N.W.2d at 302, when it said "we have held that an insurer's duty to defend its insured is triggered by comparing the allegations of the complaint to the terms of the insurance policy." This conclusion was based on decades of Wisconsin decisions, and they should not be disturbed. "[The complaint] 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. . . ." *Qualman*, 163 Wis. 2d at 364, 471 N.W.2d at

284, *quoting Grieb v. Citizens Casualty Co.*, 33 Wis. 2d 552, 557, 148 N.W.2d 103 (1967). "The duty to defend is triggered by the allegations contained within the four corners of the complaint." *Newhouse v. Citizens Sec. Mut. Ins. Co.*, 176 Wis. 2d 824, 835, 501 N.W.2d 1, 5 (1993).

The third issue proposed by R&B, "can a party denied a defense after his insurance company succeeds on a motion for summary judgment reassert a right to a defense if later developments in the case show that he is entitled to a defense," is answered by existing duty to defend law in Wisconsin. That is, the duty to defend is determined by comparing the complaint allegations to the policy, and therefore, if and only if the complaint allegations are amended in a way that invokes a duty to defend, then a party might successfully retender to its insurance company.

R&B takes what should be a straight-forward coverage analysis and twists it into something unnecessarily convoluted and complicated. Contrary to R&B's assertions, this case is neither challenging nor are the pleadings unclear. (R&B Br. p. 29.) In reality, the coverage analysis is quite simple - - West Bend owes no duty to defend R&B because there are no allegations anywhere in the complaint or third-party complaint of "property damage" caused by an "occurrence."

A. West Bend has no duty to defend or indemnify R&B because the third-party complaint for contribution and indemnification is derivative of the plaintiff's complaint, and merely passes through the allegations of liability asserted in the complaint, and the complaint does not allege "property damage" caused by an "occurrence."

R&B complains, (R&B Br. p. 30-31), that the Court of Appeals' decision implies that the complaint dictates whether a third-party complaint may state an insurable claim. This is actually correct when the third-party complaint, like the one here, merely passes along liability alleged in the complaint. This pass-along liability would be consistent with *Wis. Stat.* §803.05, the statute enabling third-party complaints.

The third-party complaint here is one for contribution and indemnification and is therefore derivative of the plaintiff's complaint, and seeks to pass through to R&B the liability asserted in the complaint. R&B concedes that the third-party complaint sought to pass on the damage liability asserted in the underlying complaint: "[b]y filing his third-party complaint, Anderson sought to recover the damages claimed by Smith from R&B and 4th Dimension." (R&B Br. p. 13.)

"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* Sheila M. Sullivan et al., *Anderson on Wisconsin Insurance Law* §7.29 (7th ed. 2015), *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.") Therefore, the third-party complaint can only pass on damage liability alleged in the complaint, and if there is no duty to defend the complaint then ordinarily there could be no duty to defend a third-party complaint alleging garden-variety contribution or indemnification.

Further, almost this exact issue has previously been addressed by this Court. In *Wausau Tile, Inc. v. County Concrete Corp.*, 226 Wis. 2d 235, 269, 593 N.W.2d 445, 460 (1999), this Court held that an insurance company that had no duty to defend the insured because the complaint did not allege "property damage" also had no duty to defend the contribution and indemnification claims arising out of the same complaint. Although the complaint in *Wausau Tile* was not for misrepresentation, it is a distinction without a difference because

regardless of what legal theories were alleged, neither the complaint in *Wausau Tile,* nor here, allege covered "property damage."

Moreover, both the Circuit Court and the Court of Appeals expressly reviewed the complaint and the third-party complaint and determined that neither triggered West Bend's duty to defend. Neither Court ignored the allegations of the third-party complaint just because the complaint did not allege liability for "property damage" caused by an "occurrence."

The Circuit Court expressly analyzed both the complaint and the third-party complaint in determining West Bend has no duty to defend or indemnify:

> 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 the 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 preformed all repairs and work properly. And that by itself doesn't constitute an occurrence.

(R. 64-23-24.)(bold added.)

The Court of Appeals also expressly reviewed the third-party complaint to determine whether any of the allegations asserted an "occurrence" causing "property damage":

> In examining the terms of the policy along with the allegations in the amended complaint and the third-party complaint, we

> conclude that none of the allegations can be construed as "occurrences" under the policy definition, even under the most liberal rules of pleading.
>
> …
>
> The allegations in the complaints at issue must state a claim for liability that West Bend insures against. *See Professional Office Bldgs.*, 145 Wis. 2d at 581-82. (Bold added.)
>
> …
>
> Like in *Qualman*, the pleadings here do not allege property damage or loss of property use.
>
> …
>
> Moreover, the third-party complaint states no theory of liability against R&B. It simply states that if Anderson is found liable to Smith, R&B should share liability. There is no contention that R&B's faulty workmanship caused the water exposure or the multiple issues that resulted therefrom. Indeed, the third-party complaint states that R&B's work was "performed in accord with the design drawings prepared by … 4th Dimension Design, Inc.[,]" and was "properly installed." Neither complaint states a claim for which West Bend agreed to indemnify. Consequently, there is no duty to defend under the policy.

(Decision, ¶13-17.) (bold added.)

Here, both courts held that the third-party complaint, when read alone, or in connection with the complaint, *did not* allege facts that triggered West Bend's duty to defend.

R&B misrepresents the Court of Appeals' decision by claiming the Court ignored the third-party complaint when determining West Bend has no duty to defend and instead focused only on the complaint and *Qualman*. (R&B Br. p. 29-30.) While the Court of Appeals did hold *Qualman* was dispositive, it undisputedly looked to both the complaint

and the third-party complaint's allegations when determining West Bend has no duty to defend.

Moreover, the Court of Appeals correctly held that the pleadings here, like those in *Qualman*, do not allege "property damage," defined to be "physically injured tangible property," nor did they allege loss of use of property. Here, the plaintiff alleged she would have to repair or replace drain tile because, she alleged, the seller had misrepresented its condition. (R. 16-4, ¶7.) This is not a description of physically injured tangible property caused by an accident. Instead, this is the classic formulation and description of misrepresentation damages.

R&B's attempts to distinguish *Qualman* are in vain. Contrary to R&B's argument that the cost of repairing damage was not implicated in *Qualman*, (R&B Br. p. 33-34), some repair of the defective kitchen pipes and cracked basement walls was necessary in *Qualman* to bring the home into the condition that had been promised. *Qualman*, 163 Wis. 2d at 363, 471 N.W.2d at 284. This was also the case in *Stuart v. Weisflog*, 2008 WI 86, ¶7, 311 Wis. 2d at 500, 753 N.W.2d at 451-52 where the plaintiff's home suffered from rotted wood, warped windows, mold and mildew, drainage problems, inadequate ventilation and improper clearance to floor joists - - all of which undoubtedly needed to be repaired. However, the need for repair in these cases did not convert

the complaint into one alleging accidentally caused property damage. "Simply because the underlying facts deal with defects in the property sold does not change the nature of the claim asserted by the [plaintiff] against the [defendant]. Nor does it change the risks the policy insured against." *Qualman*, 163 Wis. 2d at 367, 471 N.W.2d at 285.

This case is essentially "on all fours" with *Qualman* because the complaint allegations mimic the allegations of *Qualman*, and the third-party complaint only alleged a pass-through kind of a liability for indemnification. R&B wrongly argues, (R&B Br. p. 30), that *Qualman* is different because it was concerned with pecuniary loss, yet that is precisely what is repeatedly alleged here in the complaint. The plaintiff's complaint repeatedly uses the phrase "pecuniary damage" in paragraphs 18, 23, and 29. (R. 16-5-7.)

R&B quotes out of context the Court of Appeals' decision by stating "[t]he Court of Appeals stated, at ¶17, that the third-party complaint did not allege a theory of liability against R&B." (R&B Br. p. 31.) Although the Court of Appeals' decision does state that, it also goes on to say that the third-party complaint states "if Anderson is found liable to Smith, R&B should share liability." (Decision, ¶17.) That is the essence of a garden-variety contribution/indemnification cross-claim or third-party complaint that is dependent upon, or

derivative of, the complaint's allegations. It is a theory of liability based on alleged facts found in the complaint.

Both the Circuit Court and the Court of Appeals' decisions were consistent with established Wisconsin precedent that holds damages stemming from misrepresentations made by a seller concerning the condition of property to be sold do not constitute "occurrences" causing "property damage" within the meaning of a liability policy under Wisconsin law. *Qualman,* 163 Wis. 2d at 366, 471 N.W.2d at 285; *see also Stuart*, 2008 WI 86, ¶45, 311 Wis. 2d at 518, 753 N.W.2d at 461; *see also Everson*, 2005 WI 51, ¶3, 280 Wis. 2d at 6, 695 N.W.2d at 300.

R&B wrongly argues that "property damage was done to the drain tile of the house," (R&B Br. p. 40), when in fact the complaint alleged that the drain tiles were plugged - - not that they were damaged - - and that the basement leaked and that the defendant performed structural repair work without obtaining the required permit. (R. 16-4, ¶5.)

R&B wrongly complains that if it had been sued in a separate action for damaging the home's drainage system, West Bend would be required to defend but not here where it occurs by a third-party complaint. (R&B Br. p. 31.) The duty to defend analysis is an objective view of the complaint allegations to determine whether they state an

"occurrence" that caused "property damage." The analysis is no different if the allegations are made in a third-party complaint, such as here, or in a separate action against R&B.

If the third-party complaint allegations were identically made in a separate action, they would not invoke the duty to defend because when read on its own and in isolation from the complaint, the third-party complaint clearly does not contain allegations that trigger West Bend's duty to defend. The third-party complaint alleged R&B contracted with Anderson to perform foundation repairs. (R. 11-3, ¶3.) Specifically, Anderson alleged it hired R&B to reinforce the basement walls, (R. 11-4, ¶¶5-6), address basement water seepage, (R. 11-4, ¶8), install "a new drain tile system and sump crock and sump pump," (R. 11-5, ¶¶9-10), and make "certain that said system was in good working order and draining to the proper area of the property." (R. 11-5, ¶10.) Anderson alleged that R&B did its work "properly," (*Id.*), and 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.) Nothing in the third-party complaint allegations describe an accident or "occurrence" by which R&B caused "property damage."

R&B even admits that the third-party complaint alleged that R&B had "properly installed" the new drain tile system, sump crock and pump. (R&B Br. p. 15.) Consequently, the third-party complaint did not allege any accident or "property damage" for which R&B was liable. Instead, to the extent the third-party complaint posed any liability whatsoever on the part of R&B it was solely for indemnification and to be "held harmless." (R. 11-5, ¶12 .) This generic indemnification claim would effectively pass on any liability the plaintiff proved against defendant Anderson, which is exclusively misrepresentation damage to put the buyer in the position that she should have been in based upon seller's representations, just like in *Qualman*. So, therefore, the Court of Appeals was absolutely correct when it said "there is no contention that R&B's faulty workmanship caused the water exposure or the multiple issues that resulted therefrom." (Decision, ¶17.)

R&B cites to *American Girl, Kalchthaler, and Acuity v. Soc'y Ins.*, (R&B. Br. p. 36), to argue there is an "occurrence" here. However, in those decisions where the Court found claims of faulty workmanship constituted an "occurrence" causing "property damage" there were 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 *Acuity v. Soc'y Ins.*, soil erosion was alleged to have caused a partial collapse of an engine room. The Court found an "occurrence" - - the soil erosion - - causing "property damage": "[t]he damage to the engine room, the roof, and the resulting damage to the equipment is plainly "physical injury to tangible property"." *Acuity v. Soc'y Ins.*, 2012 WI App 13, ¶15, ¶24, 339 Wis. 2d 217, 227, 230, 810 N.W.2d 812, 817, 819.

Here, by contrast, analogous "property damage" appears nowhere in the allegations of the complaint or third-party complaint. The 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), but that if it is found to be faulty, R&B should indemnify Anderson, (R. 11-5, ¶12), and R&B should do any warranty work necessary to correct defects. (R. 11-6, ¶13.) There is no physical injury to property or loss of use of it described in these allegations. A defect, in itself, is not physically injured tangible property. This Court made that clear in *Wis. Label Corp. v. Northbrook Prop. & Cas. Ins. Co.*, 233 Wis. 2d 314, 332, 607 N.W.2d 276, 284 (2000) when it said "CGL policies do not provide coverage for the insured's liability for repairing or replacing the insured's defective work; they provide coverage for the insured's liability for physical injury to, or loss of use of, another's property."

R&B's reliance on *American Girl, Kalchthaler, and Acuity v. Soc'y Ins.*, is further misplaced because none of these decisions involved misrepresentation. Wisconsin Courts have consistently held that misrepresentation is a volitional, not accidental, act. *See*, *e.g.*, *Qualman, Everson, Stuart, supra*. Here, the 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.) Anderson could not have "mistakenly" or "accidentally" painted the basement to hide defects - - it was a volitional and

intentional act. Similarly, the third-party complaint describes purposeful conduct like "properly install[ing] the new drain tile system, sump crock and sump pump and [making] certain that said system was in good working order." (R. 11-5, ¶10.)

The complaints simply do not allege accidental conduct and Wisconsin law clearly holds that 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.

B. The Circuit Court's decision on R&B's subsequent motion for summary judgment is not properly before this Court and, therefore, has no bearing on determining West Bend's duty to defend R&B.

R&B argues 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 when the Court held that some of the work and design might have contributed to the faulty leaky basement and that there might be some negligence on the part of R&B. (R&B Br. 21-22, 28, 49-50.) This argument is a red herring and deserves no consideration for several reasons.

First, the Circuit Court's rational is irrelevant because the Court of Appeals reviews summary judgment *de novo*, and can affirm for reasons different than those cited by the Circuit Court. *Hansen v. Tex. Roadhouse, Inc.*, 2013 WI App 2, ¶32-33, 345 Wis. 2d 669, 693, 827 N.W.2d 99, 110. The Court of Appeals' decision is on review here, not the Circuit Court's decision. The petition for review sought review of the Court of Appeals' decision. *See Wis. Stat.* §808.10(1). When appellate review is *de novo* as it is here, how the Circuit Court viewed the motion can be immaterial. *See, e.g., Lamar Cent. Outdoor, LLC,* 2008 WI App 187, ¶16, 315 Wis. 2d at 201, 762 N.W.2d at 750. ("It is immaterial to our review that the circuit court viewed its ruling as one on a motion to dismiss rather than one for summary judgment.")

Second, the Circuit Court recognized there might be some potential negligence that would be pertinent to the indemnification claim alleged in the third-party complaint. The possibility of negligence, however, would not transform the third-party complaint allegations into facts that describe accidently caused physical injury to tangible property or loss of use *i.e.* "property damage." Rather, it would simply support an indemnification claim for the damages alleged in the complaint, which alleged misrepresentation damages not covered under *Everson* and *Stuart*.

Third, R&B's argument that in deciding R&B's motion for summary judgment, the Circuit Court interpreted the pleadings to state a claim against R&B for negligence, is exalting form over substance. (R&B Br. p. 32.) The Circuit Court's decision on R&B's summary judgment motion mentioned negligence because it would be pertinent to determining whether a contribution or indemnification claim could succeed, because negligence could play into whether the third-party defendant should in fairness bear proportion of or all of the burden imposed on the defendant by the plaintiff.

R&B made the same irrelevant argument to the Court of Appeals and the Court properly refused to entertain it:

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

(Decision, ¶17, n. 2.) The denial of R&B's summary judgment motion did not result in a final judgment that was appealable as of right. There was no acceptance of R&B's petition for permissive appeal. R&B's argument that somehow the summary judgment denial was before the Court of Appeals, (R&B Br. p. 25), flies in the face of long-

standing Court of Appeals' jurisdictional law. *Wis. Stat.* §808.03(1) & (2). The Court of Appeals' jurisdiction encompasses appeals from final judgments, and motion denials are typically not final. Heffernan, *Appellate Practice and Procedure in Wisconsin*, §4.9 (State Bar of Wisconsin 2014). Further, an appeal as of right allows review only of "prior nonfinal judgments . . . and rulings adverse to the appellant and favorable to the respondent. . . ." *Wis. Stat*. §809.10(4). The denial of R&B's summary judgment motion was not prior to West Bend's dismissal, nor favorable to it as it was no longer a party, having been dismissed. "An appeal from a final judgment does not include orders entered after the judgment." Heffernan, *Appellate Practice and Procedure in Wisconsin*, §4.21 (State Bar of Wisconsin 2014), *citing Chicago and N. W. R. R. v. LIRC,* 91 Wis. 2d 462, 473, 283 N. W. 2d 603, 608-09 (Ct. App. 1979), *aff'd,* 98 Wis. 2d 592, 297 N. W. 2d 819 (1980).

Furthermore, the Circuit Court did not make inconsistent rulings. West Bend's motion for summary judgment sought a declaration that it has 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 applied to the complaint allegations, which is a question of law. *Olson v. Farrar*, 2012 WI 3,

¶24, 338 Wis. 2d 215, 227, 809 N.W.2d 1, 7. In determining whether West Bend has a duty to defend 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.)

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.) In order for the Circuit Court to grant R&B's motion, the Court needed to find 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.)

The Circuit Court's inquiry on West Bend's duty to defend motion and R&B's motion for summary judgment was obviously different. A decision on one was not dispositive for the other. The decisions did not involve inconsistent readings of the complaints. Rather, the Circuit Court properly adhered to the appropriate standards that governed the Court's decisions.

R&B implies throughout its brief that an "arguable" claim of negligence against R&B *ipso facto* equals an "occurrence" thus triggering West Bend's duty to defend. (R&B Br. p. 5, 28, 35.) Neither the complaint nor the third-party complaint alleged negligence against R&B. In fact, the third-party complaint states R&B performed its work correctly. (R. 11-5, ¶10.) However, even if the complaints did allege negligence, this Court has held that the mere assertion of negligence does not invoke an insurer's duty to defend. *See, e.g.*, *Schinner v. Gundrum*, 2013 WI 71, ¶56, n.14, 349 Wis. 2d 529, 552, 833 N.W.2d 685, 696-97 ("an allegation of negligence is not the equivalent of an occurrence"); *see also Bankert v. Threshermen's Mut. Ins. Co.*, 110 Wis. 2d 469, 478, 329 N.W.2d 150, 154 (1983). (Rejecting negligence as an "occurrence," and noting that an insurance policy "does not insure

against theories of liability. It insures against 'occurrences' which cause injuries.")

R&B is confusing the question of whether its conduct, perhaps falling short of the ordinary care standard and thereby constituting negligence, could be factual basis for the defendant prevailing on its third-party claim against R&B for indemnification, a concept distinct from whether the third-party complaint alleged the elements of a negligence claim. Whether the third-party complaint sought contribution and indemnification exclusively, or whether it had alleged all the elements of a negligence claim (*e.g.* duty, breach, cause, damage), is immaterial because West Bend's policy does not cover theories of liability, but rather alleged facts. *See Am. Girl, Inc.*, 2004 WI 2, ¶45, 268 Wis. 2d at 42, 673 N.W.2d at 78; *Stuart*, 2008 WI 86, ¶36, 311 Wis. 2d at 514, 753 N.W.2d at 458-459; *Berg v. Schultz*, 190 Wis. 2d 170, 177, 526 N.W.2d 781, 783 (Ct. App. 1994). Here the facts alleged do not constitute an "occurrence" or accident causing physically injured tangible property.

In sum, whatever the Circuit Court said or decided in regards to R&B's subsequent motion for summary judgment is not germane to this appeal and should not be considered. R&B's constant reference to the "arguable" negligence claim the Circuit Court referred to when denying

R&B's motion for summary judgment, (R&B Br. p. 28, 30, 35, 37, 43, 44), should be disregarded.

C. There is no "arguable" or "fairly debatable" covered claim against R&B and the Circuit Court and the Court of Appeals applied the proper standards in determining West Bend has no duty to defend R&B.

There is no "arguable" or "fairly debatable" claim against R&B and the Circuit Court and the Court of Appeals applied the proper standards in determining West Bend has no duty to defend R&B.

1. There is no "arguable" or "fairly debatable" covered claim against R&B.

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, and the facts if proven would be covered, then there is a duty to defend. *Farrar*, 2012 WI 3, ¶41, 338 Wis. 2d at 232-233, 809 N.W.2d at 9. A mere "fairly debatable" claim, without allegations of "property damage" caused by an "occurrence," is not sufficient to trigger the duty to defend.

In fact, the leading Wisconsin treatise on insurance law cautions the phrase "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 v. Donahue,* 169 Wis. 2d 310. 485 N.W.2d 403 (1992) and *U.S. Fire Insurance Co. v. Good Humor Corp.*, 173 Wis. 2d 804, 496 N.W.2d 730 (Ct. App. 1993) 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. However, it is of little importance when determining the initial question of whether the insurer had a duty to defend.

Sheila M. Sullivan et al., *Anderson on Wisconsin Insurance Law* §7.33 (7th ed. 2015).

R&B cites to *Southeast Wis. Prof'l Baseball Park Dist.*, (R&B Br. p. 33), but it states 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. *Southeast Wis. Prof'l Baseball Park Dist.* also cites to *Newhouse* as authority for 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, 176 Wis. 2d at 834-835, 501 N.W.2d at 5, *quoting Elliott v. Donahue*, 169 Wis. 2d 310, 320-321, 485 N.W.2d 403, 407 (1992). (Internal citations omitted.)

Here, 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. "Arguable coverage" exists when the alleged facts, if true, describe a covered damage. *Radke v. Fireman's Fund Ins. Co.*, 217 Wis. 2d 39, 43-44, 577 N.W.2d 366, 369 (Ct. App. 1998). The only "argument" about coverage is whether the alleged facts are indeed true. 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.)

Moreover, and contrary to R&B's unsupported declaration otherwise, there is no "claim that R&B caused an "occurrence," and consequently, property damage." (R&B Br. p. 39.) R&B argues that the "occurrence" is the "continuous and repeated exposure to water leaking into the basement and sediment flowing into drain tile." (R&B Br. p. 39-40.) R&B fails to identify any allegation in Smith's complaint that allege these things because *nowhere* in Smith's complaint do these allegations appear.[3] Further, in *Everson*, the presence of the real estate in a flood plain perhaps could have been viewed 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.

R&B summarily states "[t]he property damage was done to the drain tile of the house." (R&B Br. p. 40.) R&B does not explain exactly what "property damage" the drain tiles sustained. Neither the complaint nor the third-party complaint say anything about physically

[3] The closest Smith's complaint alleged 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.)

injured drain tile. The mere presence of iron ochre in the 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.)

As is explained in detail above, neither the complaint nor the third-party complaint allege an accident causing "property damage." Instead, the complaint alleged intentional acts of misrepresentation and the third-party complaint implicitly reiterated them in its assertion of liability for contribution and indemnification.

2. The Circuit Court and the Court of Appeals applied the proper standards in determining West Bend has no duty to defend R&B.

R&B states the second issue it wants this Court to decide is "should a party looking to his insurance company to provide him with a defense be able to introduce information not stated in the pleadings to show that there could be claims requiring his insurer to provide a defense." (R&B Br. p. 1-2.) However, R&B's brief is devoid of any argument on this issue. On this basis alone the contention must be rejected. *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.)

Indeed, when R&B appealed to the Court of Appeals it focused solely on the allegations and completely ignored extrinsic evidence outside the pleadings. For example, in discussing the appropriate standard of review for the Court of Appeals to apply, R&B submitted the four-corners analysis was proper: "[t]he scope of the claim is determined from the face of the pleadings, not extrinsic evidence thereto." (R&B Appellate Br. p. 13.) Now R&B wants to argue differently, and rely on extrinsic evidence. It cannot now contradict itself. "Judicial estoppel is properly invoked to prevent a party from adopting inconsistent positions in legal proceedings." *Olson v. Darlington Mut. Ins. Co.*, 2006 WI App 204, ¶4, 296 Wis. 2d 716, 720-721, 723 N.W.2d 713, 716, *quoting State v. English-Lancaster*, 2002 WI App 74, ¶18, 252 Wis. 2d 388, 642 N.W.2d 627.

However, should the Court entertain this "issue," West Bend respectfully submits it has already been adequately addressed by this Court in *Everson*. In *Everson*, like here, the complaint alleged misrepresentation in the sale of real estate. *Id.* at ¶5, 280 Wis. 2d at 7, 695 N.W.2d at 301. Also, like here, in *Everson* the insurance company was defending the insured under a reservation of rights while disputing coverage. *Id.* at ¶6, 280 Wis. 2d at 7-8, 695 N.W.2d at 301. In determining the insurance company had no duty to defend or indemnify

the insured, this Court compared the allegations of the complaint to the insurance policy. *Id.* at ¶41, 280 Wis. 2d at 28, 695 N.W.2d at 311. Notably, *Everson* did not look at extrinsic evidence. *Everson* concluded that the plaintiff's claim of misrepresentation was not an "occurrence" within the meaning of the policy. *Everson* is on all fours with this case. As such, the issue presented by R&B has already been addressed by this Court.

Beyond *Everson*, considering extrinsic evidence outside the pleadings is not helpful here in determining West Bend's duty to defend, or reviewing the Court of Appeals' decision. Within its briefing to the Circuit Court, West Bend recognized that review of extrinsic evidence may be warranted in cases where the insurer is providing a defense to the insured such as West Bend was to R&B here. Indeed, both West Bend and R&B cited to extrinsic evidence in their briefing to the Circuit Court, but only to address the application of an exclusion. However, the Court of Appeals' decision does not address the exclusion or the extrinsic evidence because it did not need to in order to resolve the appeal. As it concluded:

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

(Decision, ¶17, n. 2.)

R&B now wants this appeal to address whether a party can introduce extrinsic evidence that "there *could* be claims requiring his insurer to provide a defense." (R&B Br. p. 2.) (emphasis added.) R&B is asking this Court to decide that claims that might have been alleged against R&B, but were not, invoked West Bend's duty to defend. This would be a duty to defend imagined claims, and would obviously have no sensible end point. This is completely improper, as was addressed in *Midway Motor Lodge v. Hartford Ins. Group*, 226 Wis. 2d 23, 35, 593 N.W.2d 852, 857 (Ct. App. 1999):

> [T]he complaint must give the defendant fair notice of not only the plaintiff's claim but "the grounds upon which it rests" as well. *See Hlavinka v. Blunt, Ellis & Loewi, Inc.*, 174 Wis. 2d 381, 403, 497 N.W.2d 756, 765 (Ct. App. 1993). "It is not enough to indicate merely that the plaintiff has a grievance, but sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some basis for recovery." *Hlavinka*, 174 Wis. 2d at 403-04, 497 N.W.2d at 765 (quoted source omitted). The objective of viewing a complaint in a liberal light cannot be used by a party to supply the missing or forgotten elements needed to trigger a particular insurance policy's coverage. *See Wilson v. Continental Ins. Cos.*, 87 Wis. 2d 310, 319, 274 N.W.2d 679, 684 (1979). (bold added.)

The Court in *Midway Motor Lodge* refused to hold that insurers must speculate beyond the written words of the complaint and imagine what kinds of claims the plaintiffs are actually making:

> Insurers are not mind readers; they are not able to determine all the potential issues that a plaintiff *could have sought* for every complaint filed against them.

Id. at 36, 593 N.W.2d at 857. *See also United Capitol Ins. Co. v. Bartolotta's Fireworks Co.*, 200 Wis. 2d 284, 298-99, 546 N.W.2d 198, 203-04 (Ct. App. 1996). ("A pleading must nonetheless present *some* factual basis supporting the stated claim" and not waste the court and parties' time and money "trying to chase down facts which the pleader could have easily provided.") Where the allegations, like those here, do not describe accidentally caused physically injured tangible property or loss of use, there is no "occurrence" causing "property damage." As there are no claims invoking West Bend's duty to defend, contemplating and conjecturing claims that "could" invoke West Bend's duty to defend is a wasteful exercise that would make uncertain every duty to defend decision. Requiring an insurer to defend any suit that might have been brought, but was not brought, would also be completely contrary to decades of well-reasoned duty to defend law.

D. Creating an exception to the four-corners rule by deferring ruling on an insurer's coverage motion, or creating a rule that judgments declaring no duty to defend are not final judgments, would disserve the interest of justice and would effectively abolish the four-corners rule and decades of Wisconsin insurance law.

R&B suggests this Court create an exception to the four-corners rule by requiring "that a circuit court defer consideration of an insurer's

motion for summary judgment declaring that there is no coverage until the court is satisfied there are not and will not be any claims that invoke the duty to defend." (R&B Br. p. 45.) However, there is no need to develop such an exception to the four-corners rule, and this case is certainly not a proper occasion for adopting such an exception.

The leading insurance law treatise in Wisconsin has addressed the four-corners analysis and rightly concluded carving exceptions to it would cause more problems than it would solve:

> Straying from the complaint test would probably cause more problems than it would solve. First, if a complaint does not allege a covered claim, the true facts will come out in discovery. Sooner or later those facts will be alleged in an amended complaint because the plaintiff will want coverage for the defendant-insured. When that happens, the duty to defend is triggered.
>
> …
>
> Second, abandoning the complaint test will not put an end to uncertainty. If not the complaint test, then what? An affidavit from a claims adjuster? If the insured disagrees with the "true facts" as presented by the insurance company, how does a court decide what are the "true facts," and is that really any different from a summary judgment motion?
>
> ...
>
> In the end, the complaint test has worked well for Wisconsin. The rules surrounding that test are well established and give both the insured and the insurer some certainty in determining the duty to defend early on in the litigation. …

Sheila M. Sullivan et al., *Anderson on Wisconsin Insurance Law* §7.27 (7th ed. 2015). This suggestion by R&B would bring chaos to duty to defend determinations, which would serve neither insurers or insureds.

This suggestion also would effectively negate the insurer's recognized right to have the court resolve insurance coverage issues. *See Estate of Sustache v. Am. Family Mut. Ins. Co.*, 2008 WI 87, ¶26, 311 Wis. 2d 548, 562, 751 N.W.2d 845, 852. ("Both the insurer and the insured have the right to have the court resolve the issue of coverage separate from any trial on liability.") In addition, this suggestion runs counter to this Court's stated preference for an insurer contesting coverage to promptly move for bifurcation of the coverage and liability issues, and for stay of proceedings in the liability action pending resolution of the coverage issue:

> To be entirely consistent with *Mowry*, the insurer should not only request a bifurcated trial on the issues of coverage and liability, but it should also move to stay any proceedings on liability until the issue of coverage is resolved.

Elliott v. Donahue, 169 Wis. 2d 310, 318, 485 N.W.2d 403, 406 (1992), *citing Mowry v. Badger State Mut. Cas. Co.*, 129 Wis. 2d 496, 385 N.W.2d 171 (1986). *See also Newhouse v. Citizens Security Mut. Ins. Co.*, 176 Wis. 2d at 836, 501 N.W.2d at 6 (1993).

R&B also requests this Court declare a new rule that "no duty to defend" summary judgments are non-final, (R&B Br. p. 47), a rule that would not serve the interests of justice, but would effectively abolish the four-corners rule and decades of Wisconsin insurance law. Creating a rule, such as R&B requests, would effectively require insurers to

defend every single case regardless of the allegations because there might at some point be claims that arose that could invoke the duty to defend. This would run counter to decades of Wisconsin law on duty to defend. It would also be wildly impractical and incredibly expensive for insurers. Insurers who have no duty to defend are entitled to such a ruling with finality. *Lambrecht v. Kaczmarczyk*, 2001 WI 25, ¶40, 241 Wis. 2d 804, 823, 623 N.W.2d 751, 762, *citing* 10A Charles A. Wright, Arthur L. Miller & Mary Kay Kane, *Federal Practice and Procedure*: Civil § 2713.1 at 242-43 (1998). (A litigant successful on summary judgment is "entitled to have a judgment on the merits entered in his or her favor as a matter of law.") *See also Witzko v. Koenig*, 224 Wis. 674, 676, 272 N.W. 864, 866 (1937). ("The summary-judgment statute, [], contemplates the entry of such judgment without delay when ordered by the court.") The "defer consideration" exception R&B argues for should be flatly rejected.

R&B's argument that it was somehow in a bind because in order to secure coverage it would have to argue it was liable is just simply false. (R&B Br. p. 47.) The focus for the duty to defend analysis is always on the complaint allegations and whether, *if proven*, the resulting judgment would be within the scope of indemnity of the policy. This requires no extraordinary advocacy. It simply requires the

insured's counsel argue that *if* the complaint allegations are proven, then the judgment would be covered. Sometimes insured's lawyers will drop a footnote in a brief that says "we dispute the allegations, obviously, but for purposes of determining duty to defend they are to be accepted as true and we do that here."

Nor is there any complication about a merits summary judgment motion occurring on the heels of a no duty to defend decision, contrary to R&B's argument. (R&B Br. p. 49.) First, R&B's counsel made his own problem, if it is a problem at all. R&B's counsel was the one who insisted on proceeding to summary judgment on the merits immediately on the heels of West Bend's successful motion for summary judgment on duty to defend.

Second, the predicament, if it is one, is no different than that feared by any party to a multi-defendant lawsuit. Where one defendant secures dismissal, any party aggrieved who wants to pursue claims against the dismissed party must appeal.

Treating a declaratory judgment of no duty to defend as a final judgment is a long-standing routine in the law and completely fair. Where an insurer has no duty to defend it is entitled to a Court declaration with finality. Without it, under concepts enunciated in *Newhouse*, 176 Wis. 2d 824, 501 N.W.2d 1 (1993), the insurer rightfully

seeks declaratory relief on duty to defend and would have to continue to defend, contrary to its determined duty, if the judgment were not accorded finality.

E. R&B's third argument, "can a party denied a defense after his insurance company succeeds on a motion for summary judgment reassert a right to a defense if later developments in the case show that he is entitled to a defense," is undeveloped but, moreover, the only "changed circumstances" or "later developments" that would make re-tendering defense appropriate are if the complaints were amended, and here they were not amended.

As with R&B's second issue, R&B's brief fails to address its third issue, stated by R&B as "can a party denied a defense after his insurance company succeeds on a motion for summary judgment reassert a right to defense if later developments in the case show that he is entitled to a defense." (R&B Br. p. 2.) On this basis alone R&B's contentions must be rejected. *See Shaffer*, 96 Wis. 2d at 545-46, 292 N.W.2d at 378. (Undeveloped or unsupported arguments must be ignored.)

Fundamentally, what the Circuit Court concluded, and even if it was contradictory, is now immaterial. The Court of Appeals' review is *de novo* and it can affirm for entirely different reasons if it chooses. *Hansen*, 2013 WI App 2, ¶32-33, 345 Wis. 2d at 693, 827 N.W.2d at 110. ("We affirm the trial court's grant of summary judgment, although

on different grounds. We review de novo an order for summary judgment, using the same methodology as the trial court.") The Court of Appeals' decision is on review here, not the Circuit Court's decision.

Further, R&B completely misstates the Circuit Court's holding by stating "[a]fter excusing West Bend from defending R&B on grounds that there was no claim against R&B arguably covered by its insurance, the Circuit Court denied R&B's own motion for summary judgment deciding that there could be such a claim." (R&B Br. p. 48.) The Circuit Court *did not* hold that there could be a claim against R&B that is covered by West Bend's policy. Instead, the Court found there were disputes of material fact that precluded the grant of summary judgment on liability for indemnification:

> [T]aking 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 this juncture nor do I have to decide.

(R. 65-17-18.) At most the Circuit Court said disputed material facts precluded summary judgment on R&B's liability, and the Court did not then need to decide how responsibility or liability might be allocated.

R&B's twisted interpretation of the Circuit Court's ruling on the merits motion for summary judgment also does not constitute "later development in the case show[ing] that [R&B] is entitled to a defense."

(R&B Br. p. 2.) The existence of disputed material fact on a contribution and indemnification claim does not constitute an "occurrence" causing "property damage." Wisconsin law is well-settled that the duty to defend analysis is performed by comparing the complaint allegations to the policy language. Therefore, the only "circumstances [that] changed," (R&B Br. p. 50), that would warrant re-tendering this matter to West Bend would be the filing of a newly amended complaint that alleged different facts that constituted an "occurrence" causing "property damage" that is not excluded. This was addressed in the *Anderson on Wisconsin Insurance Law* treatise:

> First, if a complaint does not allege a covered claim, the true facts will come out in discovery. Sooner or later those facts will be alleged in an amended complaint because the plaintiff will want coverage for the defendant-insured. When that happens, the duty to defend is triggered.

Sheila M. Sullivan et al., *Anderson on Wisconsin Insurance Law* §7.27 (7th ed. 2015).

Retenders of complaints are always possible when the allegations change. However, here the allegations did not change. There is no unfair consequence of the four corners rule because judgments can only be predicated on complaint allegations. *Acuity, A Mut. Ins. Co. v. Chartis Specialty Ins. Co.*, 2015 WI 28, ¶26, 361 Wis. 2d 396, 408-09, 861 N.W.2d 533, 539. The duty to defend is not predicated on

comments a judge might make at a summary judgment hearing. If it were, it would be impossible to determine duty to defend with certainty or finality. There was no changing of the Circuit Court's mind, contrary to R&B's argument otherwise. (R&B Br. p. 51.) As discussed above, the Circuit Court commented on negligence, or really, the conduct of R&B that might have fallen short of ordinary care, that would have supported the indemnification claim alleged in the third-party complaint. That did not change the nature of the complaint or the third-party complaint.

III. CONCLUSION

For the reasons set forth above, West Bend respectfully requests this Court affirm the Circuit Court and Court of Appeals' decisions that West Bend Mutual Insurance Company has no duty to defend or indemnify R&B Construction, Inc..

Dated this 31st day of May, 2016.

JEFFREY LEAVELL, S.C.

By: *<u>/s/ Danielle N. Rousset</u>*

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response brief conforms to the rules contained in Wis. Stat. §809.19 (8) (b) and (d) for a response brief produced using a proportional serif font. The length of this response brief is 10,665 words.

Dated this 31st day of May, 2016.

/s/ Danielle N. Rousset
Danielle N. Rousset

CERTIFICATE OF COMPLIANCE WITH
RULES 809.19(12) - (13)

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

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

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

Dated this 31st day of May, 2016.

/s/ Danielle N. Rousset
Danielle N. Rousset

CERTIFICATE OF MAILING

Pursuant to Wis. Stat. §809.80(3)(b), I hereby certify that on this 31st day of May, 2016, twenty-two (22) copies of the Response Brief of Intervenor-Respondent West Bend Mutual Insurance Company was deposited in the United States Mail for delivery to the Clerk of the Wisconsin Supreme Court by First Class Mail on May 31, 2016.

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

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

Dated this 31st day of May, 2016.

/s/ Danielle N. Rousset
Danielle N. Rousset