SUPREME COURT OF WISCONSIN

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MAYA ELAINE SMITH

Plaintiff,

vs.

**Appeal No. 2015AP000079**
Circuit Court Case No. 2013CV007085

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-Petitioner,

WEST BEND MUTUAL INSURANCE COMPANY

Intervenor-Respondent.

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ON APPEAL FROM A DECEMBER 22, 2015, DECISION OF
THE COURT OF APPEALS DISTRICT I, AFFIRMING A SUMMARY
JUDGMENT OF THE MILWAUKEE COUNTY CIRCUIT COURT
THE HONORABLE PEDRO A. COLON PRESIDING

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# REPLY BRIEF OF THIRD-PARTY DEFENDANT-APPELLANT-PETITIONER R&B CONSTRUCTION, INC.

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## REPLY ARGUMENT

The third-party defendant-appellant-petitioner, R&B Construction Inc. ("R&B") has asked the Supreme Court to reverse the Court of Appeals and Circuit Court because properly applying the "four corners" rule, the pleadings do assert an "arguable" and "fairly debatable" claim that would be covered by the insurance policy issued by intervenor-respondent West Bend Mutual Insurance Company ("West Bend"). Secondarily, R&B has asked the Court to rule that a summary judgment declaring that there is no duty to defend is not *res judicata* if and when an insured re-tenders the insured's defense at a later point in the case. Specifically to this case, R&B submits that the Circuit Court's articulation of the potential claim against R&B when it denied R&B's own motion for summary judgment triggered a duty to defend on the part of West Bend. West Bend disputes both arguments.

1. Properly applying the "four corners" rule, the pleadings do assert an "arguable" and "fairly debatable" claim that would be covered by West Bend's insurance policy.

West Bend opens its argument with "[t]his is, at root, a home sale misrepresentation case" and later argues that the third-party complaint against R&B is "a garden-variety contribution/indemnification cross-claim or third-party complaint" without much clarification of what that means. [Resp. Brf., pp. 1, 13, 17] West Bend hopes that this Court will affirm the Court of Appeals and dismiss this appeal as a case of misrepresentation that is not covered by insurance, just like *Qualman v. Bruckmoser*, 163 Wis. 2d 361, 471 N.W.2d 282 (Ct. App. 1991). West Bend hopes that this Court, like the Court of Appeals, will not consider the Circuit Court's decision where it denied R&B's motions to dismiss the third-party complaint finding a claim against R&B that invokes the duty to defend under its policy.

In its first brief R&B asserted that unlike the insured in *Qualman*, it is not being sued for

misrepresentation. West Bend has not suggested otherwise, but rather, has argued that because R&B is being sued for "indemnification" and/or "contribution", this is just like a misrepresentation claim. This is not correct.

West Bend argues: "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." [Resp. Brf., p. 17] However, *Qualman* did not involve a third-party complaint. There the insureds were sued for misrepresentation, and the court had to decide whether that misrepresentation claim was covered by insurance. Statements like the third-party complaint "only alleged a pass-through kind of liability for indemnification" and that this is a "garden-variety" indemnification/contribution claim only serve to obscure the point that R&B is not being sued for misrepresentation.

When it denied R&B's motions to dismiss the third-party complaint, the Circuit Court ruled that the third-party complaint, which incorporated the plaintiff's complaint by reference, stated a claim that R&B might have caused or contributed to the damage claimed by the plaintiff, which was leakage and clogging of drain tile, when R&B added supports to the basement walls of the house.[1] Nowhere did the

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[1]The Circuit Court stated [R.65,pp.16-17, App.,pp.50-51]: You know, there's -- I've reviewed -- If you look at Jendusa and his report, there appears to be -- assuming that the standards are those of Wisconsin Association of Foundation Repair Professionals. According to him, there's some deviations which are significant in the design by 4-D of the basement walls. Now I'm not concluding that that is in fact the standard or that in fact their deviation, if there is one, would contribute to the condition of this faulty leaky basement. But it is a disputed fact.

And [R.65,pp.17-19, App.,pp.51-53]: So with the evidence before the court, there's – and taking all inferences in favor of the defendant, I can't find that there's not a dispute of material fact. I think there is a dispute of material fact and the allocation of responsibility within or – negligence within which is allocated, I am not sure about at this juncture nor do I have to decide.

.... I don't know that we have the facts today. But I wonder whether or not R&B shares responsibility, but we'll find that out through discovery I suspect.

Circuit Court rule that the pleadings claimed that R&B made misrepresentations to the plaintiff.

West Bend cites *Whirlpool Corp. v. Ziebert*, 197 Wis. 2d 144, 155, 539 N.W.2d 883, 887 (1995) and *Wausau Tile, Inc. v. County Concrete Corp.*, 226 Wis. 2d 235, 269, 593 N.W.2d 445, 460 (1999) suggesting that as a matter of law the Court must regard the third-party complaint against R&B as a misrepresentation claim. [Resp. Brf., pp. 12-13] To the contrary, in precedent cited with approval in these cases the court determined that "Wisconsin cases lead to the conclusion that a cause of action for contribution is separate and distinct from the underlying cause of action whether that underlying cause sounds in contract or in tort." *State Farm Mut. Auto. Ins. Co. v. Schara*, 56 Wis. 2d 262, 264, 201 N.W.2d 758, 759 (1972); *Johnson v. Heintz*, 73 Wis. 2d 286, 295, 243 N.W.2d 815, 822 (1976).

Furthermore, the elements of a contribution claim are different from the elements of a

misrepresentation claim. In *Mutual Automobile Ins. Co. v. Milwaukee Automobile Ins. Co.* (1959), 8 Wis.2d 512, 515, 99 N.W.2d 746, 748, the court stated that the elements of a contribution claim are:

> 1. Both parties must be joint negligent wrongdoers; 2. they must have common liability because of such negligence to the same person; 3. one such party must have borne an unequal proportion of the common burden.

While R&B does not believe it is liable for contribution, it did assert to the Circuit Court on West Bend's motion for summary judgment that this contribution claim was an arguable claim invoking West Bend's duty to defend. [R.64,pp.17-18, App.,pp.23-24] As noted in our first brief, that argument first gained traction when the Circuit Court denied R&B's own motions for summary judgment and judgment on the pleadings. Unfortunately, when R&B raised that argument on West Bend's earlier motion for summary judgment, the Circuit Court ruled: "I can't surmise the claim. The claim has to be pled." [R.64,p.17, App.,p.23]

West Bend suggests that even if the Circuit Court erred by not acknowledging the contribution claim when West Bend made its motion, there still would be no arguable duty to defend because of the way the complaint described the damage. West Bend argues that "the complaint alleged that the drain tiles were plugged - - not that they were damaged" and that consequently, there was no property damage under the policy. [Resp. Brf., p. 18] This appears to be a new argument.

First, the argument does not recite all of the allegations of the complaint relating to the drain tile. In the fact allegations of her complaint the plaintiff alleged at ¶7: "That in order to repair or correct the condition of the property plaintiff will need to replace the drain tile and install drain tile." [R.11, App.,p.63] The fact that drain tile need to be replaced and new drain tile need to be installed suggests damage to the drain tile at issue. Second, the argument is immaterial under West Bend's insurance policy. As

noted in both our first brief and West Bend's brief, "property damage" is defined as follows:

> "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.

In context, the Circuit Court found that there was a claim that something that R&B did in straightening the walls of the basement damaged the drain tile and caused leakage. The function of drain tile is to collect and move water away from the foundation of a house. Even were one to assume that the only damage to the drain tile is that it became plugged, there is a "loss of use" of the drain tile, and consequently "property damage" under the terms of the policy.

West Bend generally argues: "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." [Resp. Brf., p. 19] Counsel for West Bend then proceeds to recite the allegations of the third-party complaint, leaving out any reference to the allegations of the complaint or amended complaint. The fact that the third-party complaint incorporates the plaintiff's complaint by reference undermines this argument. The third-party complaint attached the plaintiff's complaint as an exhibit and asserted a claim for indemnification and contribution for the damage alleged in that complaint. [App., pp. 55, ¶1, 58 ¶5]

West Bend then argues that the Supreme Court cannot consider the decision made by the Circuit Court when it denied R&B's motions for summary judgment and judgment on the pleadings, because that decision was made after West Bend was dismissed from the lawsuit. West Bend states as its

basis for this argument: "The denial of R&B's summary judgment motion did not result in a final judgment that was appealable as of right." [Resp. Brf., p. 25] And: "An appeal from a final judgment does not include orders entered after the judgment." [Resp. Brf., p. 26]

R&B acknowledges that the Court of Appeals would not accept its petition for an interlocutory appeal of the Circuit Court's order denying its motion to dismiss the third-party complaint and that that order is not on this appeal. However, the authority West Bend cites, Heffernan, *Appellate Practice and Procedure in Wisconsin*, §4.21 (State Bar of Wis. 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), does not preclude the Supreme Court from considering the statements made by the Circuit Court which relate to its understanding of the pleadings at issue.

First, the Court can consider whether the Circuit Court's later remarks confirm that it erroneously applied the "four corners" rule when it granted West Bend summary judgment declaring that it had no duty to defend R&B. Second, giving consideration to the Circuit Court's later remarks does not affirm or reverse the Circuit Court's ruling on R&B's motions to dismiss. Third, it would be so fundamentally unfair not to consider how within the short period of time, with the same pleadings before it, the Circuit Court determined that the pleadings sufficiently stated a claim that should have invoked West Bend's duty to defend. The maxim "justice is blind" means that courts are to be objective and impartial. It does not mean that courts must turn a blind eye to relevant considerations in the record before them.

2. The Court should decide that a summary judgment declaring that there is no duty to defend is not *res judicata* if and when an insured re-tenders the insured's defense at a later point in the case.

If this Court is not inclined to determine that the Circuit Court erred in its application of the "four corners" rule to the prejudice of R&B, then R&B asks the Court to consider revisiting the rule and fashioning a remedy.

The ultimate concern is for the finality of a circuit court's determination that an insurance company has no duty to defend an insured. The "four corners" rule was designed as an aid to the insured. *Olson v. Farrar*, 2012 WI 3, ¶¶ 32-33, 338 Wis. 2d 215, 229-30, 809 N.W. 2d 1, 8. However, in the present case West Bend has attempted to use this rule as a weapon.

As is commonplace in disputes over the duty to defend, the insured is not the party responsible for drafting the pleadings that are subjected to the "four corners" rule. When the pleadings are unclear, the

insured suffers the consequences because the "four corners" rule has been interpreted as requiring precise claims. Here, the Circuit Court ruled: "I can't surmise the claim. The claim has to be pled." [R.64,p.17, App.,p.23] This should not be the result under the "arguable" or "fairly debatable" standard, but that may be the trend.

R&B has asked the Court to consider a rule that a summary judgment declaring that there is no duty to defend is not *res judicata* if and when an insured re-tenders the insured's defense at a later point in the case. As shown in its first brief, once judgment was entered in favor of West Bend, R&B tried to advance its own alternative motions for judgment on the pleadings and summary judgment as fast as it could, to preserve the possibility of appealing the dismissal of West Bend if those motions were not successful. West Bend opposed and the Circuit Court declined to stay entry of the judgment dismissing West Bend pending a hearing on R&B's

motion. Once West Bend obtained its judgment, it served a notice of appeal to shorten R&B's time to appeal. Had there been some certainty that the judgment granted in favor of West Bend could be revisited during the proceedings, there would have been no need for this procedural quandary.

West Bend's reaction is that the rule proposed by R&B "would disserve the interest of justice" [Resp. Brf., p. 38] and "would effectively negate the insurer's recognized right to have the court resolve insurance coverage issues." [Resp. Brf., p. 40] West Bend asserts that there is already an adequate remedy, that being the right of an insured to re-tender the defense of a claim if the party making the claim amends the pleadings.  We are not aware of any Wisconsin case that says this. West Bend refers the Court to a treatise, Sheila M. Sullivan et al., *Anderson on Wisconsin Insurance Law* §7.27 (7th ed. 2015).

West Bend's concession that there are circumstances when an insured will have the right to

re-tender the defense of the claim is in itself an acknowledgment that there is something conceptually wrong with giving full preclusive effect to a judgment declaring no duty to defend. Moreover, if West Bend is suggesting that there should be an "amendment to the pleadings" exception to the rule that a judgment declaring no duty to defend is final, it is worth considering whether such a rule would provide any relief to R&B.

As has been stated more than once, the Circuit Court considered the exact same pleadings when it declared that West Bend had no duty to defend R&B and when it later denied R&B's alternate motions for dismissal on the pleadings or summary judgment. At the second hearing, the Circuit Court decided that those pleadings adequately stated a claim that R&B negligently caused property damage to another component of the house when it undertook reinforcing the basement walls. Given that the Circuit Court concluded that the claim was already stated, why

would the third-party plaintiff ever have reason to amend the third-party complaint?

To take this discussion one step further, what if either the plaintiff or the third-party plaintiff made some amendment to the complaint or third-party complaint? How much of an amendment would be sufficient to allow R&B to successfully re-tender the claim? In the circumstances of R&B's case, if the third-party plaintiff amended the third-party complaint to better detail the claim described by the Circuit Court at the hearing on R&B's motion to dismiss and R&B re-tendered the claim to West Bend, could West Bend then argue that the amendment did not change anything because the Circuit Court had ruled that the unamended third-party complaint already stated that claim?

R&B is not suggesting that an "amendment to the pleadings" exception to the rule that a judgment declaring no duty to defend is final is a bad thing. However, R&B does not believe that it is the best

solution. R&B believes that its proposal is better because it is more comprehensive and may avoid time-consuming arguments over how much of an amendment is sufficient to avoid an otherwise preclusive fact of the judgment declaring no duty to defend.

## CONCLUSION

For these additional reasons, the appellant R&B Construction, Inc., asks the Court to reverse the decisions of both the Circuit Court and the Court of Appeals in this matter.

Dated this 14th day of June, 2016.

Respectfully submitted,
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CERTIFICATION

I certify that this Reply Brief of Third-Party Defendant-Appellant-Petitioner R&B Construction, Inc. conforms to the rules contained in Wis. Stat. §§809.19(8)(b) and 809.62(4)(a) for a brief produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 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 Reply Brief of Third-Party Defendant-Appellant-Petitioner R&B Construction, Inc. is 2,817 words.

Dated this 14th day of June, 2016.

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CERTIFICATION OF COMPLIANCE WITH
RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this Reply Brief of Third-Party Defendant-Appellant-Petitioner R&B Construction, Inc., which complies with the requirements of § 809.19(12). I further certify that the electronic Brief submitted is identical in content and format to the printed form of the Brief filed as of this date.

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

Dated this 14th day of June, 2016.

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