COURT OF APPEALS
DECISION
DATED AND FILED

April 5, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP206 **Cir. Ct. No. 2014CV143**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STACY MILLER AND KOSTANTINOS AGOUDEMOS,

PLAINTIFFS-RESPONDENTS,

V.

BRYAN MARDAK,

DEFENDANT-APPELLANT,

AMCO INSURANCE COMPANY,

INTERVENOR-DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN and MEL FLANAGAN, Judges. *Affirmed*.

Before Curley, P.J., Brennan and Brash, JJ.

¶1 CURLEY, P.J. Bryan Mardak appeals the grant of summary judgment to intervenor AMCO Insurance Company (AMCO) in this suit for monetary damages brought by the buyers of a condominium previously owned by Mardak. The trial court also relieved AMCO of any duty to defend Mardak in that suit.[1] Mardak contends that the trial court erred in determining that his commercial general liability (CGL) insurance policy issued by AMCO covered no damages being sought in the underlying action, which alleges that Mardak failed to reveal a sewer lateral defect in the condominium that he sold. The buyers claim that Mardak: 1) breached the contract (warranty) for the sale of the home; 2) intentionally misrepresented the condition of the home; 3) violated WIS. STAT. § 100.18 (2013-14)[2]; and 4) negligently misrepresented the condition of the home.[3]

¶2 Mardak concedes that there is no coverage for breach of contract, intentional misrepresentation, or a violation of WIS. STAT. § 100.18, as these causes of action allege intentional conduct. However, Mardak contends that the trial court erred in finding no initial grant of coverage for the claim alleging he negligently misrepresenting the condition of the sewer lateral. This is so, according to Mardak, because he made no misrepresentation of a defect to the buyers. Rather, he believes the sewer issue is a maintenance problem that can be

[1] The Honorable Paul R. Van Grunsven issued a written decision granting AMCO's summary judgment motion. His order was sent back after this court concluded we had no jurisdiction, as his order was not a final order. The Honorable Mel Flanagan signed the final order dismissing with prejudice all claims against AMCO as a result of the grant of summary judgment.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[3] Plaintiffs Miller and Agoudemos took no part in the insurance dispute.

remedied when serviced periodically. Thus, he maintains that there is a genuine issue of material fact preventing the trial court from granting summary judgment.

¶3 We disagree and affirm. We are obligated, when interpreting an insurance policy, to compare the allegations in the complaint to the terms of the insurance policy. ***Estate of Sustache v. American Family Mut. Ins. Co.***, 2008 WI 87, ¶20, 311 Wis. 2d 548, 751 N.W.2d 845. Here, the buyers allege that Mardak misrepresented both orally and in the Real Estate Condition Report that there was no defect in the sewer lateral. There is no mention in the amended complaint of a maintenance problem. When we look at the amended complaint and compare it to the policy language defining "property damage" and an "occurrence," we conclude that here, there was neither "property damage" nor an "occurrence" alleged. Thus, the trial court correctly granted summary judgment to AMCO.

BACKGROUND

¶4 Miller and Agoudemos purchased a condominium located at 815 E. Reservoir Avenue in Milwaukee from Mardak on March 29, 2013. They allege that Mardak told them orally and in the Real Estate Condition Report that he was unaware of any major defects in the sewer lateral running from the dwelling to the sewer main. After their purchase, Miller and Agoudemos experienced raw sewage backing up into their basement. Miller and Agoudemos contacted Roto-Rooter to respond to the situation, and they were told by a Roto-Rooter representative that they had diagnosed the defect when Mardak owned the property and advised Mardak of the problem. According to Miller and Agoudemos's amended complaint, the defect can only be corrected by "saw cutting and jack hammering the basement floor, foundation and front yard and replacing the defective sewer

components," which will be expensive. Plaintiffs' itemization of Special Damages reflects damages of approximately $92,000.

¶5 Miller and Agoudemos sued Mardak. In their original complaint they brought three causes of action: (1) breach of contract (warranty); (2) intentional misrepresentation; and (3) a violation of WIS. STAT. § 100.18. Mardak filed an answer. Several months later, AMCO, the insurance company that, as noted, issued a CGL policy of insurance to Mardak, moved to intervene, bifurcate liability and coverage issues, and stay the liability issues until the coverage issues could be resolved. AMCO provided an attorney for Mardak while the question of coverage was being decided. The trial court granted the insurance company's request to intervene over the objection of both Miller and Agoudemos and Mardak.[4] Shortly thereafter, Miller and Agoudemos filed an amended complaint adding a fourth cause of action: negligent misrepresentation.

¶6 AMCO filed a motion for summary judgment and a brief in support of its motion. Mardak opposed the motion and also filed a brief. In a well-written decision, the trial court granted summary judgment to AMCO. This appeal follows.

ANALYSIS

¶7 Appellate courts are to review summary judgments rulings *de novo*, using the same methodology as the trial court. ***Sustache***, 311 Wis. 2d 548, ¶17. Interpretation of an insurance contract is also a question of law, which the

[4] The trial court also granted Mardak's motion to file a third-party complaint against others connected to the condominium. That suit is not part of this appeal.

appellate court reviews *de novo*. ***Smith v. Katz***, 226 Wis. 2d 798, 805, 595 N.W.2d 345 (1999). An insurer's duty to defend its insured is determined by comparing the allegations of the complaint to the terms of the insurance policy. ***Sustache***, 311 Wis. 2d 548, ¶20; *see also* ***Professional Office Bldgs., Inc. v. Royal Indem. Co.***, 145 Wis. 2d 573, 580, 427 N.W.2d 427 (Ct. App. 1988). "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 (1993); *see also* ***Elliott v. Donahue***, 169 Wis. 2d 310, 320-21, 485 N.W.2d 403 (1992); *see also* ***Grieb v. Citizens Cas. Co. of New York***, 33 Wis. 2d 552, 557–58, 148 N.W.2d 103 (1967). It is the *nature* of the alleged claim that is controlling, even though the suit may be groundless, false, or fraudulent. ***Grieb***, 33 Wis. 2d at 558 (citations omitted). The insurer's duty to defend is therefore broader than its duty to indemnify insofar as the former implicates arguable, as opposed to actual, coverage. ***Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.***, 2003 WI 33, ¶20, 261 Wis. 2d 4, 660 N.W.2d 666; *see also* ***Red Arrow Prods. Co., Inc. v. Employers Ins. of Wausau***, 2000 WI App 36, ¶17, 233 Wis. 2d 114, 607 N.W.2d 294.

¶8 In determining whether there is a duty to defend, the court first considers whether the insuring agreement makes an initial grant of coverage—*i.e.*, whether the insurer has a duty to defend its insured—for the claims asserted. *See* ***American Family Mut. Ins. Co. v. American Girl, Inc.,*** 2004 WI 2, ¶24, 268 Wis. 2d 16, 673 N.W.2d 65. If the court determines that the policy was not intended to cover the claims asserted, the inquiry ends. ***Id.*** "[T]he insurer is under an obligation to defend only if it could be held bound to indemnify the insured, assuming that the injured person proved the allegations of the complaint,

regardless of the actual outcome of the case." ***Grieb***, 33 Wis. 2d at 558 (quoting 29A Am. Jur. *Insurance* § 1452 (1960)).

¶9 Only after concluding that coverage exists does the court examine the policy's exclusions to determine whether they preclude coverage. *See* ***American Girl***, 268 Wis. 2d 16, ¶24. In other words, when a court determines that there is no coverage in the policy for the allegations in the complaint, it is not necessary to interpret the policy's exclusions. *See* ***Smith***, 226 Wis. 2d at 806.

¶10 We first examine the policy language. An insurance policy's terms should be interpreted as they would be understood by a reasonable person in the position of the insured. *See* ***State Farm Mut. Auto. Ins. Co. v. Langridge***, 2004 WI 113, ¶47, 275 Wis. 2d 35, 683 N.W.2d 75. We will interpret a policy's language so that it comports with "the common and ordinary meaning it would have in the mind of a lay person." ***Cieslewicz v. Mutual Serv. Cas. Ins. Co.***, 84 Wis. 2d 91, 97-98, 267 N.W.2d 595 (1978). If, however, the language of a policy is unambiguous, and its terms plain on their face,

> the policy should not be rewritten by construction to bind the insurer to a risk it was unwilling to cover, and for which it was not paid. Litigants should not be able to resort to rules of construction for the purpose of modifying the contract or creating a new contract; and a court need not resort to either construction or case law to bolster its recognition of that plain meaning.

Garriguenc v. Love, 67 Wis. 2d 130, 135, 226 N.W.2d 414 (1975) (citations omitted). An otherwise unambiguous provision is not rendered ambiguous solely because it is difficult to apply the provision to the facts of a particular case. ***Lawver v. Boling***, 71 Wis. 2d 408, 422, 238 N.W.2d 514 (1976).

¶11 "Property damage" in the AMCO policy is defined as "[p]hysical injury to tangible property" or the "[l]oss of use of tangible property that is not physically injured."[5] Although one might expect a claim for physical injury to the property or the loss of use of tangible property in the basement in question, the amended complaint is devoid of any such claim. In addition, the amended complaint fails to allege any property damage that occurred as a result of the misrepresentation. The only claim in the complaint is for monetary damages to correct the alleged defective sewer lateral.

¶12 There is also no initial grant of coverage because the amended complaint fails to allege an "occurrence" or that any "occurrence" caused the property damage. In the policy, an "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Here, there was no accident. Mardak's excuse for failing to advise the buyers of a defect is because he does not believe the sewer lateral is a defect, rather it is simply a maintenance issue. His belief, whether reasonable or not, is not an accident.

¶13 In the amended complaint, Miller and Agoudemos allege that Mardak made a false statement to the buyers and in the Real Estate Condition Report. Mardak's alleged false statement "'requires a degree of volition inconsistent with the term accident.'" *See* ***Stuart v. Weisflog's Showroom Gallery***, 2008 WI 86, ¶32, 311 Wis. 2d 492, 753 N.W.2d 448 (citation omitted).

[5] In his reply brief, Mardak argues that AMCO's argument claiming no property damage was not raised below and therefore it was waived. We disagree. New arguments may be made relative to an issue raised below. *See* ***Gibson v. Overnite Transp. Co.***, 2003 WI App 210, ¶9, 267 Wis. 2d 429, 671 N.W.2d 388. Here, the policy language was an issue raised below.

The measure of damages awarded to a party who successfully litigates a claim for negligent misrepresentation is the difference between the fair market value of the property at the time of the sale and the amount actually paid, or the "out-of-pocket" rule. ***Gyldenvand v. Schroeder***, 90 Wis. 2d 690, 697-98, 280 N.W.2d 235 (1979). Thus, the damages alleged in a claim for misrepresentation are for economic loss and are "pecuniary in nature and do not constitute property damage." *See* ***Qualman v. Bruckmoser***, 163 Wis. 2d 361, 366, 471 N.W.2d 282. (Ct. App. 1991).

¶14 As a result of this analysis, AMCO's policy does not cover the causes of action set forth in Miller and Agoudemos's amended complaint. Consequently, AMCO had no duty to defend Mardak or indemnify him with respect to claims brought by Miller and Agoudemos.

¶15 Mardak argues that the case ***Phillips v. Parmelee***, 2013 WI App 5, 345 Wis. 2d 714, 826 N.W.2d 686, supports his position that the AMCO policy language covers a claim for negligent misrepresentation.[6] ***Phillips*** is distinguishable from the facts presented here in several ways.

¶16 First, Phillips never alleged a cause of action for negligent misrepresentation, only negligence. *See* ***id.***, ¶2. Second, Parmelee did not actually know for a fact that the building he sold contained asbestos. *See* ***id.***, ¶¶5-6. In a building inspection report, an inspector stated that "[t]here is probably asbestos in the basement heating supply ducts, [they] must be tested to be sure …." *See*

[6] Mardak cites to the court of appeals decision because the only issue reviewed by the supreme court was the asbestos exclusion. The supreme court did not weigh in on the question of whether there was an initial grant of coverage when it affirmed the court of appeals decision. This issue was only discussed in the court of appeals decision.

id., ¶4. Parmelee never acted upon this suggestion. *See* ***id.***, ¶7. The matter was further complicated by Parmelee's claim that he turned over his entire file concerning the building (including the building inspection report) to Phillips for his review prior to accepting Phillips's offer to purchase. *See* ***id.***, ¶6. Phillips denied seeing it. ***Id.*** Finally, the asbestos was only discovered when a contractor hired by Phillips attempted to remove some pipes. ***Id.***, ¶7.

¶17 In sum, in ***Phillips***, there was never a claim for negligent misrepresentation; the seller did not know conclusively that the building contained asbestos; the seller claimed to have given the buyer the building inspection report before the purchase, which would have alerted the buyer to the asbestos concern; and there was an accident that led to the asbestos contamination. These facts differ greatly from those presented here and do not persuade us that the AMCO policy covered any of the causes of action found in Miller and Agoudemos's amended complaint.

¶18 Finally, both parties, and to some extent the trial court, addressed the exclusions found in the policy. We decline to address them. Inasmuch as there is no initial grant of coverage, it is not necessary to interpret the policy's exclusions. *See* ***Smith***, 226 Wis. 2d at 806.

¶19 For the reasons stated in this opinion, the order granting summary judgment is affirmed

By the Court.—Order affirmed.

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