COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1758 **Cir. Ct. No. 2016CV303**

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

PETERS HEAVY CONSTRUCTION, INC.,

PLAINTIFF,

V.

X-PERT ONE TRUCKING CORPORATION AND JOSEPH ADOLPHSON,

DEFENDANTS-APPELLANTS,

NORTHFIELD INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Wood County: TODD P. WOLF, Judge. *Reversed and cause remanded for further proceedings*.

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. X-Pert One Trucking Corporation and its owner, Joseph Adolphson, appeal the circuit court's order granting summary judgment in favor of X-Pert One's insurer, Northfield Insurance Company.[1] The circuit court concluded that Northfield had no duty to defend and no duty to indemnify X-Pert One for claims brought against it. We reverse. On the duty to defend issue, we apply the four-corners rule and conclude that Northfield had a duty to defend X-Pert One. On the duty to indemnify issue, we conclude that Northfield has not demonstrated that it is entitled to summary judgment. We remand for further proceedings consistent with this opinion.

Background

¶2 Peters Heavy Construction, Inc., brought suit against X-Pert One and Northfield, alleging claims against X-Pert One for negligence and private nuisance. Peters' allegations, discussed in more detail below, included that X-Pert One negligently deposited shingle materials, tires, and other solid materials on Peters' property causing damage to Peters, including the loss of use of portions of Peters' property. Peters also alleged that X-Pert One's actions and inactions negligently created a private nuisance causing harm to Peters' property.

¶3 Northfield appointed defense counsel for X-Pert One and moved to stay proceedings on the underlying liability and damages issues pending resolution

[1] In the remainder of this opinion, we use the shorthand "X-Pert One" regardless whether we mean X-Pert One individually or X-Pert One and Adolphson collectively.

of the duty to defend and duty to indemnify issues. The circuit court granted the motion, ordering the bifurcation of proceedings. Northfield then moved for summary judgment, arguing that it had neither a duty to defend nor a duty to indemnify X-Pert One. The circuit court agreed in both respects, and dismissed Northfield from the case. As noted, X-Pert One appealed.

Discussion

¶4 On appeal, X-Pert One and Northfield continue to dispute both duty to defend and duty to indemnify. As we explain below, we agree with X-Pert One that Northfield had a duty to defend X-Pert One against Peters' claims. We also agree with X-Pert One that Northfield has not shown that it is entitled to summary judgment on the duty to indemnify issue.

¶5 "Contracts for insurance typically impose two main duties—the duty to indemnify the insured against damages or losses, and the duty to defend against claims for damages." ***Johnson Controls, Inc. v. London Mkt.***, 2010 WI 52, ¶28, 325 Wis. 2d 176, 784 N.W.2d 579. "The duty to indemnify and the duty to defend are separate contractual obligations." ***Id.*** Accordingly, we discuss each separately below.

A. Duty to Defend

¶6 Duty to defend analysis is governed by the four-corners rule. ***Marks v. Houston Cas. Co.***, 2016 WI 53, ¶39, 369 Wis. 2d 547, 881 N.W.2d 309. Under that rule, only two documents matter: the complaint against the insured and the insurance policy. ***Id.*** Courts compare the policy with the complaint allegations and determine whether the facts alleged in the complaint, if proven, would constitute a covered claim under the policy language. *See* ***id.***, ¶¶39-40. We

review de novo whether there is a duty to defend. ***Baumann v. Elliott***, 2005 WI App 186, ¶8, 286 Wis. 2d 667, 704 N.W.2d 361.

¶7 "When comparing the allegations of a complaint to the terms of an insurance policy, the allegations in the complaint are construed liberally." ***Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.***, 2003 WI 33, ¶20, 261 Wis. 2d 4, 660 N.W.2d 666. Courts "'assume all reasonable inferences' in the allegations of a complaint and resolve any doubt regarding the duty to defend in favor of the insured." ***Id.*** (quoted source and footnotes omitted). Further, an insurer must defend against *all* claims alleged in the complaint so long as the insurer has the duty to defend at least one of those claims. *See* ***Society Ins. v. Bodart***, 2012 WI App 75, ¶19, 343 Wis. 2d 418, 819 N.W.2d 298 ("The duty to defend extends to the 'entire suit' against an insured, even if only one claim in the suit is covered.").

¶8 Before we apply the four-corners rule, we note that Northfield may be asserting that there is an exception to the four-corners rule that applies when, as here, an insurer provides a defense to the insured pending resolution of coverage issues. Under this alleged exception, as we understand Northfield's argument, courts may consider submissions in addition to the complaint. If that is Northfield's argument, we reject it. Our supreme court has clearly stated that "there is no exception to the four-corners rule in duty to defend cases in Wisconsin." ***Water Well Solutions Serv. Grp. Inc. v. Consolidated Ins. Co.***, 2016 WI 54, ¶24, 369 Wis. 2d 607, 881 N.W.2d 285.

¶9 In its apparent argument to the contrary, Northfield relies on a paragraph from ***Talley v. Mustafa***, 2017 WI App 31, 375 Wis. 2d 757, 897 N.W.2d 55, *review granted*, 2017 WI 83, 377 Wis. 2d 461, 900 N.W.2d 308. That paragraph reads:

> As [the insurer] points out, because it made an initial determination to retain counsel to defend [the insured], in reviewing the circuit court's grant of summary and declaratory judgment, we may do as the circuit court did and consider not only the language of the policy and the four corners of the complaint but also evidence in the record. *See* ***Olson***, 338 Wis. 2d 215, ¶3. At this stage of the proceedings, [the insurer's] "duty to continue to defend is contingent upon the court's determination that [the insured] has coverage" if Talley proves his case. *See* ***Sustache***, 311 Wis. 2d 548, ¶29.

Id., ¶20; *see also* ***Stimac Family Trust v. Wisconsin Power & Light Co.***, 2017 WI App 33, ¶¶7-12 & n.1, 375 Wis. 2d 787, 896 N.W.2d 383 (concluding, based on ***Olson v. Farrar***, 2012 WI 3, 338 Wis. 2d 215, 809 N.W.2d 1, and ***Estate of Sustache v. American Family Mutual Insurance Co.***, 2008 WI 87, 311 Wis. 2d 548, 751 N.W.2d 845, that, "[w]hen an insurer provides a defense to its insured, any extrinsic evidence offered by either party must be considered by the court on the question of coverage," ***Stimac***, ¶11), *review denied*, 2017 WI 90, 378 Wis. 2d 24, 904 N.W.2d 123.

¶10 ***Olson***, a supreme court case, and ***Stimac***, a court of appeals case, do not support the proposition that there is an exception to the four-corners rule. Rather, those cases address scenarios in which a duty to defend analysis was deemed no longer necessary. *See* ***Olson***, 338 Wis. 2d 215, ¶¶26-39, 70 (relying on ***Estate of Sustache***, 311 Wis. 2d 548); ***Stimac***, 375 Wis. 2d 787, ¶¶7-12 & n.1.

¶11 Moreover, ***Talley*** itself does not provide support for an exception to the four-corners rule. Although we might have spoken with more precision in the ***Talley*** language quoted above, we were simply agreeing with a party's assertion that we could follow the circuit court's lead and skip a duty to defend analysis and proceed to address the parties' summary-judgment/duty-to-indemnify arguments based on the complaint "but also evidence in the record." ***Talley***, 375 Wis. 2d

757, ¶20. And, even if ***Talley*** (or for that matter the supreme court's decision in ***Olson*** or ***Sustache***) was somehow in conflict with the supreme court's 2016 holding in ***Water Well*** that "there is no exception to the four-corners rule in duty to defend cases in Wisconsin," *see* ***Water Well***, 369 Wis. 2d 607, ¶24, we would be bound by the ***Water Well*** pronouncement. *See* ***Madison Reprographics, Inc. v. Cook's Reprographics, Inc.***, 203 Wis. 2d 226, 238, 552 N.W.2d 440 (Ct. App. 1996) ("When a court of appeals decision conflicts with a supreme court opinion, we must follow the supreme court opinion."); ***Hill v. LIRC***, 184 Wis. 2d 101, 110, 516 N.W.2d 441 (Ct. App. 1994) ("When decisions of our supreme court appear to be inconsistent, we follow the court's most recent pronouncement.").

¶12 We also note that, regardless whether a ***Talley***-type scenario is present here, neither X-Pert One nor Northfield asserts that a duty to defend analysis is unnecessary in this case. Rather, both parties treat the duty to defend issue as a live dispute in need of resolution. Accordingly, we resolve that dispute and, in doing so, we adhere to the four-corners rule and consider only the policy and the complaint.

¶13 The parties' duty to defend dispute is multifaceted. It involves whether there was an "occurrence" within the meaning of the policy, whether there was "property damage" within the meaning of the policy, and whether one or more of several policy exclusions apply.

¶14 In the discussion that follows, we first quote the most pertinent complaint allegations. We then set forth our duty to defend analysis in three subsections corresponding to the "occurrence," "property damage," and exclusion topics, referring back to particular complaint allegations as needed.

¶15 Peters' complaint includes the following allegations:

2. … X-Pert One … was engaged in the trucking business.

....

COUNT I: NEGLIGENCE

….

8. … X-Pert One … negligently deposited items of personal property, including shingle materials, tires and other solid materials on Plaintiff's Property and negligently allowed such items of personal property to remain on Plaintiff's Property.

9. … [S]uch negligence of … X-Pert One … was a cause and a substantial factor in producing damage to the Plaintiff.

10. … [S]uch negligence of … X-Pert One … caused damages to the Plaintiff which include the cost of removal of such items of personal property from the Plaintiff's Property, damage to Plaintiff's Property which may include diminution in the value of the Plaintiff's Property and loss of use of certain portion [sic] of the Plaintiff's Property, all in a sum to be determined by the trier of fact.

COUNT II: PRIVATE NUISANCE

….

12. … [T]he negligent actions and inactions of … X-Pert One … have created and have permitted a private nuisance on the Plaintiff's Property which has substantially interfered with the Plaintiff's use and enjoyment of Plaintiff's Property; such nuisance consists of ashes, shingle material and other solid materials.

13. … [S]uch invasion and interference with Plaintiff's private use and enjoyment of Plaintiff's Property resulted in significant harm to the Plaintiff and has caused and in the future may cause the Plaintiff additional damages, including the cost to clean and remove the materials which created the private nuisance and diminution in the value of the Plaintiff's Property.

14. … X-Pert One … w[as] negligent in creating and suffering such private nuisance; further, … X-Pert One … w[as] negligent in failing to abate such private nuisance

> after [X-Pert One] knew or should have known of the nuisance and ... could have remedied such private nuisance within a reasonable period of time.
>
> 15. … [T]he negligence of … X-Pert One … caused the private nuisance.
>
> ….
>
> 17. … [B]y reason of the foregoing, if … X-Pert One … do[es] not abate the private nuisance, the Plaintiff will incur substantial costs to remove the items of personal property which constitute the private nuisance upon the Plaintiff's Property and, if such nuisance is not abated, the Plaintiff's Property will sustain a diminution in value by reason of the negligent creation of the private nuisance upon the Plaintiff's Property.

1. Duty to Defend—"Occurrence"

¶16 The policy defines "occurrence" as follows:

> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

An "accident" is not defined in Northfield's policy. However, our supreme court has defined "accident" in this context by reference to dictionary definitions to mean "'[a]n unexpected, undesirable event' or 'an unforeseen incident' which is characterized by a 'lack of intention.'" *See* ***Wilson Mut. Ins. Co. v. Falk***, 2014 WI 136, ¶30, 360 Wis. 2d 67, 857 N.W.2d 156 (quoted sources omitted).

¶17 As noted, Peters' complaint includes allegations that X-Pert One negligently deposited shingle materials, tires, and other solid materials on Peters' property, and that X-Pert One also negligently allowed those materials to remain on the property for some unspecified period of time. In addition, as noted, the complaint alleges that X-Pert One's negligent actions and inactions created a private nuisance resulting in harm.

¶18 X-Pert One argues that negligence, what the plaintiff alleges here, is by its very nature "accidental." This view, unsurprisingly, has case law support. *See, e.g.*, ***Doyle v. Engelke***, 219 Wis. 2d 277, 289-90, 580 N.W.2d 245 (1998) (the definitions of "accident" and "negligence" both "center on an unintentional occurrence leading to undesirable results…. [C]omprehensive general liability policies are 'designed to protect an insured against liability for negligent acts resulting in damage to third-parties.'" (quoted source omitted)).

¶19 Northfield counters that the "negligence" label in a complaint is not controlling; rather, courts must look to the underlying facts alleged. This view also has case law support. *See, e.g.*, ***James Cape & Sons Co. v. Streu Constr. Co.***, 2009 WI App 154, ¶18, 321 Wis. 2d 604, 775 N.W.2d 117. Thus, in ***James Cape***, for example, the court concluded that "the factually unsupported use of the term 'negligence' in Cape's complaint, when measured against the extensive factual allegations of intentional criminal conduct, is insufficient to trigger Zurich's duty to defend." ***Id.***

¶20 Here, however, unlike the facts in ***James Cape*** and similar cases, we see nothing in the complaint allegations that is inconsistent with the proposition that X-Pert One inadvertently or accidentally deposited or left materials on Peters' property. That is, the underlying factual allegations, unlike in ***James Cape***, do not contradict the negligence label that the plaintiff has attached to X-Pert One's alleged activities and the results of those activities.

¶21 Northfield's argument to the contrary is not persuasive. Northfield does not identify any particular factual allegations showing that X-Pert One must have acted intentionally, not only in initially depositing materials on the property, but also in failing to fully remove such materials from the property. Rather,

Northfield cites generally to the complaint and incorrectly asserts that the complaint allegations show that X-Pert One "acted intentionally when [it] deposited material on Peters' property, and failed to remove the material." In making this assertion, Northfield appears to do the opposite of what we must do under the four-corners rule. That is, Northfield construes the complaint restrictively and makes assumptions in its own favor instead of in its insured's favor.

¶22 Before moving on to the next topic, "property damage," we add that we see another reason why Peters' complaint alleges an "occurrence." Apart from the intentional or non-intentional nature of X-Pert One's depositing or leaving actions, there is no allegation that the alleged resulting private nuisance was intentionally created. That is, even if X-Pert One intentionally deposited and intentionally left the materials on Peters' property, the complaint allegations support the view that the resulting nuisance was not intended or expected.

¶23 Instructive here is our supreme court's decision in ***Wilson***, 360 Wis. 2d 67, one of the cases on which Northfield relies. In ***Wilson***, the insured spread liquid manure on its property as fertilizer, leading to contamination of neighboring wells. *See* ***id.***, ¶¶1, 5-6. The court in ***Wilson*** concluded that the "occurrence" was not the spreading of the manure but the contamination of the wells by seepage of manure into the wells. ***Id.***, ¶¶28-33. Because the insured "neither 'expected nor intended' the[] manure to get into the groundwater," the court in ***Wilson*** concluded that the well contamination was an accident. *See* ***id.***, ¶32.

¶24 What ***Wilson*** makes clear is that an intentional act may have an unexpected and, thus, accidental result, which can be an occurrence within the meaning of an insurance policy. We note that this view is consistent with the

common legal understanding of what a private nuisance is: an activity or a *condition* that can result from intentional *or negligent* conduct. *See* ***Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.***, 2002 WI 80, ¶21 n.14, 254 Wis. 2d 77, 646 N.W.2d 777 ("In ***Schiro***, this court quoted with approval the following language defining a private nuisance: 'As commonly used, [nuisance] connotes a condition or activity which unduly interferes with the use of land or of a public place. Conduct which interferes solely with the use of a relatively small area of private land is tortious … and is called a private nuisance.'"); RESTATEMENT (SECOND) OF TORTS 2d § 840B cmt. d (1979) ("Many nuisances, both public and private, are not intended by the defendant and do not arise from any abnormally dangerous activity, but are the result of mere negligence in failing to take proper precautions to prevent the invasion of the right.").

¶25 To sum up so far, we conclude that the complaint alleges an occurrence within the meaning of the policy.

2. Duty to Defend—"Property Damage"

¶26 We turn to whether the complaint alleges "property damage" within the meaning of the policy. For the reasons below, we agree with X-Pert One that it does.

¶27 The policy defines "property damage" as having two alternative definitions, either of which will satisfy the property damage requirement:

> "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.

Because it is pertinent to our analysis below, we highlight now that this "property damage" definition is written to include "loss of use" *with or without* an accompanying physical injury to the property.

¶28 Turning to the complaint, the allegations include that X-Pert One's negligence "caused damages to the Plaintiff which include … damage to Plaintiff's Property which may include diminution in the value of the Plaintiff's Property and *loss of use* of certain portion [sic] of the Plaintiff's Property" (emphasis added). The complaint also alleges that the negligently created nuisance "has substantially interfered with the Plaintiff's use and enjoyment of Plaintiff's Property."

¶29 While the first of these two allegations might have been drafted more artfully, when we liberally construe both allegations in the context of the broader complaint, we conclude that the complaint at a minimum alleges covered property damage in the form of loss of use.

¶30 We find Northfield's many arguments to the contrary difficult to follow. We explain below why those arguments, as we understand them, do not persuade us. Any arguments that we do not expressly address are too undeveloped to merit discussion. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider inadequately developed arguments).

¶31 Northfield argues that the complaint alleges only "hypothetical future economic harm," which does not constitute "property damage" under the policy. It is true that some of the complaint alleges future harm, in the form of

damage that will occur absent abatement by X-Pert One. But we disagree that the complaint alleges *only* future harm. The complaint also alleges existing harm, including past or present diminution in value, loss of use, and interference with use and enjoyment. Northfield points to no authority for the proposition that the complaint must more particularly describe the alleged diminution in value, loss of use, or interference.

¶32 It appears that Northfield's future-harm-only interpretation of the complaint is based on the complaint's use of the term "may" in one of the allegations quoted above: Peters suffered "damage to [Peters'] Property which *may* include diminution in the value of the Plaintiff's Property and loss of use of certain portion [sic] of the Plaintiff's Property" (emphasis added).

¶33 Northfield apparently interprets "may" in this context to mean that Peters had no existing damages at the time Peters filed its complaint. We disagree. It is more reasonable to conclude that "may" in this context is an expansive term intended to indicate that Peters is pleading several types of damages in the alternative. Further, other allegations reinforce the conclusion that Peters alleges existing damage and not solely future harm. These include the allegation that X-Pert One's interference with Peters' use of the property "*resulted* in significant harm" to Peters (emphasis added).

¶34 Northfield argues that the complaint fails to allege physical injury to Peters' property. However, regardless whether the complaint, liberally construed, alleges physical injury, the policy's "property damage" definition is written to include "loss of use" with or without an accompanying physical injury. Thus, alleging physical injury is unnecessary when, as here, there is an allegation of loss of use.

¶35 Northfield argues that the complaint insufficiently alleges loss of use. In support of this argument, Northfield relies primarily on ***Everson v. Lorenz***, 2005 WI 51, 280 Wis. 2d 1, 695 N.W.2d 298. As we now explain, however, ***Everson*** *supports* a conclusion that the complaint adequately alleges loss of use.

¶36 In ***Everson***, even though underlying allegations might have been suggestive of loss of use, the court deemed the allegations insufficient because those allegations did not expressly allege "loss of use" or otherwise use terms putting the insurer on notice that the plaintiff was claiming a covered type of "property damage." *See* ***id.***, ¶¶13, 23-27. Here, in contrast, the plaintiff expressly alleges "loss of use" along with its supporting allegations. *See* ***Smith v. Katz***, 226 Wis. 2d 798, 817, 595 N.W.2d 345 (1999) (explaining that complaint "must contain some statement about physical injury to tangible property, *some reference to loss of use*, or some demand for relief beyond money damages if the complaint is to satisfy the requirement that 'property damage' be alleged within the four corners of the complaint" (emphasis added)).

¶37 It is true that the ***Everson*** court went on to explain that loss of use requires proof of "uselessness." *See* ***Everson***, 280 Wis. 2d 1, ¶¶28-32. However, that explanation was not in the context of the court's discussion of what constitutes a sufficient *pleading*. Rather, the ***Everson*** court's later discussion comes in the context of summary judgment taking into account evidentiary submissions. *See* ***id.***, ¶¶1, 28-32. The ***Everson*** court explained that the claim, even if it had been properly pled, must be rejected because of a lack of evidence of "uselessness." *See* ***id.***, ¶28 ("Our holding here is bolstered by the insufficiency of evidence to support a claim for 'loss of use.' Therefore, even if we decided that

'loss of use' was properly pled, it is clear from our review of the record that such a claim could not be supported.").

3. Duty to Defend—Exclusions

¶38 We turn to Northfield's argument that, even if Peters' complaint alleges an "occurrence" and "property damage," Northfield has no duty to defend X-Pert One because one or more policy exclusions apply. We reject this argument for the reasons that follow.

¶39 It is true that exclusions are considered in a duty to defend analysis. *See, e.g.*, ***Marks***, 369 Wis. 2d 547, ¶40 (quoting ***Estate of Sustache***, 311 Wis. 2d 548, ¶¶22-23). However, it will also often be true that the applicability of an exclusion is not obvious from the allegations in a complaint and will instead require further factual development to decide. *See* ***id.***, ¶41 (citing and quoting Peter F. Mullaney, *Liability Insurers' Duty to Defend*, WIS. LAW., at 10-11 (July 1995)). Further, "'[e]xclusions are narrowly or strictly construed against the insurer if their effect is uncertain.'" ***J.G. v. Wangard***, 2008 WI 99, ¶24, 313 Wis. 2d 329, 753 N.W.2d 475 (quoted source omitted).

¶40 Here, in arguing that it had no duty to defend based on several exclusions, Northfield repeatedly refers to factual material beyond the complaint, contrary to the four-corners rule. And, to the extent that we can discern exclusion arguments based *only* on a comparison of the policy with allegations in the complaint, we deem Northfield's arguments undeveloped. Consequently, we do not address those arguments. *See* ***Pettit***, 171 Wis. 2d at 646-47.

B. Duty to Indemnify (Coverage)

¶41 We turn to the duty to indemnify issue, that is, whether Northfield is entitled to summary judgment because undisputed facts in the pleadings and additional submissions demonstrate that there is no coverage under the Northfield policy for Peters' claims against X-Pert One. The parties dispute whether the circuit court correctly granted summary judgment in favor of Northfield. For the reasons below, we agree with X-Pert One that Northfield does not demonstrate that it is entitled to summary judgment.

¶42 Likely because the parties' arguments before the circuit court did not plainly differentiate the duty to defend issue from the duty to indemnify issue, the circuit court's summary judgment decision on coverage incorrectly intertwines the two issues. When we strip away the duty to defend part of the circuit court's reasoning, it becomes clear that the circuit court did not engage in a full summary judgment analysis regarding Northfield's duty to indemnify. Similarly, on appeal, the parties muddle the two topics.

¶43 We review summary judgment de novo. ***H&R Block E. Enters., Inc. v. Swenson***, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421 (2007). "A party is entitled to summary judgment when there are no disputed issues of material fact and that party is entitled to judgment as a matter of law." ***Id.*** (citing WIS. STAT. § 802.08(2)).[2]

¶44 "[T]he 'burden is on the moving party to prove that there are no genuine issues of material fact.'" ***AccuWeb, Inc. v. Foley & Lardner***, 2008 WI

[2] All references to the Wisconsin Statutes are to the 2015-16 version.

24, ¶21, 308 Wis. 2d 258, 746 N.W.2d 447 (quoting ***Central Corp. v. Research Prods. Corp.***, 2004 WI 76, ¶19, 272 Wis. 2d 561, 681 N.W.2d 178); *see also* ***Affeldt v. Green Lake Cty.***, 2011 WI 56, ¶59, 335 Wis. 2d 104, 803 N.W.2d 56 ("The moving party bears the burden of establishing the absence of a genuine, that is, disputed, issue of material fact.").

¶45 In arguing that it is entitled to summary judgment on the duty to indemnify issue, Northfield focuses on the same topics we addressed in the context of our duty to defend analysis: "occurrence," "property damage," and exclusions. However, Northfield's arguments do not persuade us that there is no genuine issue of material fact. Each of Northfield's main summary judgment arguments either fails to direct our attention to pertinent evidence showing a lack of a material factual dispute or proceeds from a legal proposition that we rejected in our duty to defend discussion.

¶46 We will provide one example. Northfield directs our attention to an affidavit indicating that shingles and other materials were intentionally deposited on Peters' property as part of a shingle drop-off and recycling operation. Northfield also points to another affidavit attaching a written agreement between the DNR and X-Pert One that required X-Pert One to remove all "waste shingle material and other solid waste" by September 1, 2015. Northfield apparently views this evidence as establishing beyond dispute that there was nothing accidental about X-Pert One's conduct and, therefore, no "occurrence" within the meaning of the policy. We disagree. These factual assertions, even if undisputed, do not address the specifics of how it happened that this deposited material was not fully removed or why it is true that X-Pert One acted in a manner showing an intent to cause damage to the property or an intent to create a nuisance. Rather, just as the allegations in the complaint do, these assertions leave open the

possibility that X-Pert One negligently handled shingle materials on the property or inadvertently created a nuisance in the course of shingle-related operations.

¶47 Before concluding, we address three topics: (1) an admission by Peters; (2) a purported concession by X-Pert One; and (3) an X-Pert One argument involving a fire, and ash from that fire, that affected Peters' property.

¶48 **Peters' admission**. Northfield directs our attention to *plaintiff* Peters' response to a request for admission in which Peters admitted that a business risk exclusion applies to Peters' claims against X-Pert One. Northfield seemingly views this admission by Peters as binding on X-Pert One and conclusive as to the exclusion's applicability. It is not apparent to us why X-Pert One would be bound by this type of admission by the party suing X-Pert One, and Northfield provides no authority on the topic. Based on the argument before us, we decline to rely on Peters' admission, and address the topic no further.

¶49 **X-Pert One's purported concession**. Northfield argues that X-Pert One, in its principal brief on appeal, "has now conceded, likely unintentionally, that the facts in this case are consistent with allegations of 'faulty workmanship.'" According to Northfield, X-Pert One thereby has also effectively conceded that there was no "occurrence" under case law, and that a business risk exclusion relating to faulty workmanship applies. We disagree with Northfield's characterization of X-Pert One's briefing.

¶50 What X-Pert One states in its brief is that "[t]he facts are consistent with allegations of *pure negligence*, 'faulty workmanship,' *or* 'negligent supervision'" (emphasis added). It is unreasonable to read this statement, as Northfield urges, to be a concession that there was no occurrence or that an exclusion applies. Although the statement may have been carelessly phrased, in

context it is most reasonably read as nothing more than an attempt by X-Pert One to underscore its broader argument that the facts here are consistent with negligence, rather than intentionally caused harm.

¶51 **Fire and ash.** Finally, we note that X-Pert One bases some of its arguments as to why Northfield is not entitled to summary judgment on the proposition that some of the damage to the property may have been caused by a fire and resulting ash. In response, Northfield points out that Adolphson, X-Pert One's owner, submitted an affidavit averring that Northfield already "'provided coverage for the fire and resulting property damage.'" In its reply brief, X-Pert One does not make clear why the fire and ash damage might nonetheless remain relevant. We have not relied on X-Pert One's fire and ash arguments to decide this appeal. If there is a remaining dispute that still matters relating to fire and ash, the parties and the circuit court will have the opportunity to address that dispute on remand.

Conclusion

¶52 For the reasons stated above, we reverse the circuit court's order granting summary judgment in favor of Northfield, and remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.