COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-3418 Cir. Ct. No. 01CV002803

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

JOHN J. DROEGKAMP AND LYNNE L. DROEGKAMP,

PLAINTIFFS,

AMERICAN SOUTHERN INSURANCE COMPANY,

INTERVENING PLAINTIFF-RESPONDENT,

V.

JAMES F. LANGDON AND SUSAN M. LANGDON,

DEFENDANTS,

REALTY EXECUTIVES AND TIMOTHY MICHELIC,

DEFENDANTS-APPELLANTS,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

INTERVENOR.

APPEAL from a judgment of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 SNYDER, J. Realty Executives and Timothy Michelic appeal from summary judgment orders dismissing American Southern Insurance Company (American Southern) from this action, concluding that American Southern does not have a duty to defend Realty Executives and Michelic in this action because all causes of action alleged in the complaint are outside the coverage of its insurance policy. Both Realty Executives and Michelic argue that the policy exclusions relied upon by American Southern and the circuit court do not preclude coverage for all the claims alleged by John J. Droegkamp and Lynne L. Droegkamp (Droegkamps). We agree that some of the claims against Realty Executives and Michelic are not precluded by American Southern's policy exclusions. We affirm the circuit court in part, reverse in part and remand this matter for proceedings consistent with this opinion.

FACTS

¶2 This case arises from the sale of a residence located in Oconomowoc, Wisconsin. The Droegkamps purchased the property from James F. Langdon and Susan M. Langdon (Langdons). The Droegkamps and the Langdons signed the purchase contract on March 16, 2000. Michelic acted as the real estate broker in the transaction and at all times relevant to this matter was employed by Realty Executives. American Southern is Michelic's and Realty Executives's errors and omissions insurer.

¶3 The Droegkamps alleged eight causes of action against the Langdons, Michelic and Realty Executives: (1) breach of contract (warranty); (2) intentional misrepresentation; (3) statutory misrepresentation pursuant to WIS. STAT. §§ 895.80 and 943.20(1)(d) (2001-02);[1] (4) fraudulent misrepresentation pursuant to WIS. STAT. § 100.18; (5) strict liability misrepresentation; (6) negligent misrepresentation; (7) negligence; and (8) rescission/restitution. In their complaint, the Droegkamps alleged that certain defects in the property were not disclosed to them. The Droegkamps alleged the Langdons and Michelic did not disclose that the garage roof and windows leaked and that the basement wall got wet. The Droegkamps also alleged that the Langdons and Michelic falsely represented that the only defect in the property was a window that did not open. The Droegkamps seek various damages, including diminished value, repair costs, personal injury damages, "mold problems" and loss of use.

¶4 American Southern moved to intervene, a motion that was granted on May 2, 2002. This first intervenor complaint addressed American Southern's coverage for Michelic and claimed that the policy's pollution exclusion (Exclusion Q) precluded coverage for claims alleged against Michelic.

¶5 American Southern filed a motion for summary judgment on June 27, 2002, regarding its coverage of Michelic. American Southern argued that the pollution exclusion, along with two additional policy exclusions, precluded coverage for Michelic. After Michelic filed his brief opposing summary

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

judgment, American Southern amended its intervenor complaint, adding the two additional exclusions (Exclusions A and F) argued in its brief.

¶6 A hearing on American Southern's motion for summary judgment was held on July 29, 2002. The circuit court granted American Southern's motion, ruling that Exclusions A, F and Q all apply, precluding coverage. The circuit court did not specify which claims were covered by which exclusion. The court also ruled that the complaint did not allege a causal connection between Michelic's conduct and the claimed damages. The order granting summary judgment was filed on August 8, 2002.

¶7 On August 5, 2002, American Southern filed a second amended intervenor complaint that asserted the same policy exclusions raised with regard to Michelic precluded coverage for Realty Executives. That same day, American Southern filed a motion for summary judgment based upon the three exclusions cited in the second amended intervenor complaint and sought a declaration it was not required to defend or indemnify Realty Executives. American Southern also argued that the Droegkamps' complaint failed to allege a causal connection between Michelic's conduct and the claimed damages.

¶8 A hearing on American Southern's second motion for summary judgment was held on November 4, 2002. The circuit court granted summary judgment in favor of American Southern. The court held that the allegations of the Droegkamps' complaint were insufficient to trigger coverage for Realty Executives under the policy. An order granting summary judgment was filed on November 15, 2002. Michelic and Realty Executives appeal.

DISCUSSION

¶9 Michelic argues that American Southern's policy exclusion for deliberate misrepresentation does not preclude coverage for all the claims against him. He further argues that the policy exclusion for bodily injury and property damage does not preclude coverage for all alleged damages. In addition, Michelic argues that the policy exclusion for pollution does not preclude coverage for all the claims against him. Specifically, Michelic argues that the record is inadequate to support summary judgment based upon the pollution exclusion, that claims based upon water infiltration are not encompassed by the pollution exclusion, that mold does not qualify as a pollutant under the pollution exclusion and that mold did not seep, discharge, disperse, release or escape as required by the pollution exclusion. Finally, Michelic argues that the circuit court erred in finding no causal connection between Michelic's conduct and the alleged damages.

¶10 Realty Executives argues the complaint alleges facts sufficient to invoke American Southern's insurance coverage because the complaint's allegations satisfy the requirements of the policy's insuring agreement. Realty Executives argues that a claim is asserted against an insured, the complaint requests damages and the damages result from a claim which arises out of a negligent act, error or omission which occurred in rendering or a failure to render professional services. Realty Executives further argues that the policy's coverage exclusions are inapplicable.

¶11 The circuit court held, and American Southern argues, that the policy's exclusions, specifically Exclusions A, F and Q, operate to preclude coverage. The coverage of the policy is as follows:

> The Company will pay on behalf of the **Insured** all sums which the **Insured** shall become legally obligated to pay as **Damages** for **Claims** first made against the **Insured** and reported to the company during the **Policy Period**, arising out of any negligent act, error, omission or **Personal Injury** in the rendering of or failure to render **Professional Services** by an **Insured** covered under this policy.

The policy also contains several exclusions:

> This insurance does not apply to **Claims**:
>
> A. Arising out of a dishonest, fraudulent, criminal or malicious act or omission or deliberate misrepresentation (including, but not limited to, actual or alleged violations of state or federal anti-trust, price fixing, restraint of trade or deceptive trade practice laws, rules or regulations) committed by, at the direction of or with the knowledge of any **Insured**;
>
> ....
>
> F. Of bodily injury, sickness, disease or death of any person or physical injury to or destruction of or loss of use of tangible property; provided, however, that this exclusion does not apply to the performance of **Professional Services** by an **Insured** in the distribution, maintenance, operation or use of a lock box or keyless entry system on property not owned or occupied by or leased to the **Insured**. The limit of liability available for **Claims** arising from the distribution, maintenance, operation or use of a lock box or keyless entry system shall not exceed $25,000 per claim. This limit shall be part of, and not in addition to, the limit of liability stated in the Declarations and the deductible provision shall apply;
>
> ....
>
> Q. Based on any claim, action, judgment, liability, settlement, loss, defense, cost, or expense in any way arising out of actual, alleged, or threatened pollution, contamination, or any environmental impairment resulting from seepage, discharge, dispersal, release, or escape of any solid, liquid, gaseous, or radioactive matter including, but not limited to smoke, vapors, soots, fumes, acids, alkalis, chemicals, or toxic matter; or waste material (including materials to be recycled, reconditioned, or reclaimed); or oil or other petroleum substances or derivatives (including any oil refuse or oil mixed with

> waste), or thermal or vibratory effect including, but not limited to, sound or noise, or heat or cold, into or upon land, the atmosphere, or any water course or body of water, underground water or water table supplies, whether such results directly, indirectly, or in concurrence or in any sequence from the insured's activities or the activities of others and whether or not such is sudden, gradual, accidental, intended, foreseeable, expected, fortuitous, or inevitable and wherever or however such occurs.
>
> But this exclusion shall not apply to bodily injury or property damage caused by heat, smoke, or fumes from a hostile fire unless such fire involves:
>
> 1. materials which are or were at any time used for the handling, storage, disposal, processing or treatment of waste; or
>
> 2. any premises, site or location:
>
> a. which is or was at any time used for the handling, storage, disposal, processing or treatment of waste; or
>
> b. on which any insured or contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations to test for, monitor, cleanup, remove, contain, treat, detoxify, or neutralize, or in any way respond to, or assess the effects of, pollutants.

In essence, the policy does not cover intentional acts (Exclusion A), bodily injury of any person or physical injury to any tangible property (Exclusion F) or any claim resulting from pollution (Exclusion Q).

¶12 The means by which we review a grant of summary judgment are well known and need not be repeated here. ***C.L. v. Sch. Dist. of Menomonee Falls***, 221 Wis. 2d 692, 697, 585 N.W.2d 826 (Ct. App. 1998). In essence, if there is no genuine issue of material fact and one side is entitled to judgment as a matter of law, the action is appropriate for summary judgment. ***U.S. Fire Ins. Co. v. Good Humor Corp.***, 173 Wis. 2d 804, 818, 496 N.W.2d 730 (Ct. App. 1993).

¶13 Interpretation of an insurance policy is a question of law we review independently without deference to the decisions of the trial court. ***Peace ex rel. Lerner v. Northwestern Nat'l Ins. Co.***, 228 Wis. 2d 106, 120, 596 N.W.2d 429 (1999). When determining whether an insurer has a duty to defend, we must compare the allegations contained within the four corners of the complaint with the terms of the insurance policy. ***C.L.***, 221 Wis. 2d at 699. The duty to defend is determined solely from the allegations contained in the complaint and extrinsic facts cannot be considered. ***Atl. Mut. Ins. Co. v. Badger Med. Supply Co.***, 191 Wis. 2d 229, 236, 528 N.W.2d 486 (Ct. App. 1995).

¶14 The existence of a duty to defend depends solely upon the nature of the claim being asserted against the insured and has nothing to do with the merits of that claim. ***C.L.***, 221 Wis. 2d at 699. At this stage, it is irrelevant if the allegations in the suit are later proven to be "groundless, false or fraudulent." ***Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.***, 2003 WI 33, ¶21, 261 Wis. 2d 4, 660 N.W.2d 666. If the allegations contained in the complaint would be covered by the policy if proven, the insurer has a duty to defend. ***C.L.***, 221 Wis. 2d at 699.

¶15 The complaint in the instant case makes eight allegations against the Langdons, Realty Executives and Michelic: (1) breach of contract (warranty); (2) intentional misrepresentation; (3) statutory misrepresentation pursuant to WIS. STAT. §§ 895.80 and 943.20(1)(d); (4) fraudulent misrepresentation pursuant to WIS. STAT. § 100.18; (5) strict liability misrepresentation; (6) negligent misrepresentation; (7) negligence; and (8) rescission/restitution. The Droegkamps' request for relief asks for:

> A. Difference in value between the property as represented and its actual value;

B. Cost of placing the property in the condition that it was represented to be in;

C. Costs of all repairs;

D. Costs of the action;

E. Actual reasonable attorney fees pursuant to Wis. Stats.;

F. Personal injury;

G. Mold problems;

H. Diminished value;

I. Loss of use.

¶16 The question is whether the allegations of the complaint fall within an exclusion under the insurance policy. If the allegations, if true, fall under any exclusion, American Southern is not obligated to defend Realty Executives and Michelic and the circuit court properly granted summary judgment. We will address each claim separately.

¶17 Again, the policy does not cover intentional acts (Exclusion A), bodily injury of any person or physical injury to any tangible property (Exclusion F) or any claim resulting from pollution (Exclusion Q). The first cause of action, breach of contract (warranty), reads as follows:

> ... That as a term and condition of the contract, the sellers [Langdons] warranted and represented that they had no notice or knowledge of any structural or mechanical defects of material significance in the sale of the property that is the subject of this action.
>
> ... That in truth and in fact, there were significant structural or mechanical defects in the subject property that were known to the defendants, including, but not limited to: garage roof leaks, windows leak, basement wall gets wet.
>
> ... That the fact that the property contained these defects constitutes a breach of the warranty provided by the defendants.

> ... That as a direct and proximate cause of the breach of the contract by the defendants, the plaintiffs incurred substantial monetary damages.

This breach of contract (warranty) claim alleges an intentional act, the "sellers warranted and represented" no knowledge of any defects but in truth there were significant defects "known to the defendants." Pursuant to Exclusion A, count one is not covered by the policy.

¶18 The second cause of action, intentional misrepresentation, reads as follows:

> ... That the defendants made the following false representations of fact regarding the condition of the subject premises, knowing that said representations were untrue, or recklessly, without caring whether they were true or not: only defect was window, didn't open.
>
> ... That the defendants additionally owed a duty to the plaintiffs to disclose all known material facts about the property, specifically significant defects in the property, which they failed to do.
>
> ... That the defendants made these representations, including the failure to disclose material facts, with the intent to deceive and induce the plaintiffs to act upon them, and indeed the plaintiffs did believe such representations to be true and justifiably relied on them, and as a result, purchased the subject property.
>
> ... That as a direct and proximate result of the false representations made by the defendants, the plaintiffs suffered pecuniary damages.

This claim of intentional misrepresentation, by its very name, requires an intentional act; in addition, the complaint alleges an intentional act of misrepresentation. Pursuant to Exclusion A, count two is not covered under the policy.

¶19 The third cause of action, statutory misrepresentation pursuant to WIS. STAT. §§ 895.80 and 943.20(1)(d), reads as follows:

> ... That the defendants made the following false representations of fact regarding the condition of the subject premises, knowing that said representations were untrue, or recklessly, without caring whether they were true or not: only defect was window, didn't open.
>
> ... That the defendants additionally owed a duty to the plaintiffs to disclose all known material facts about the property, specifically significant defects in the property, which they failed to do.
>
> ... That the defendants made these representations, including the failure to disclose material facts, with the intent to deceive and induce the plaintiffs to act upon them, and indeed the plaintiffs did believe such representations to be true and justifiably relied on them, and as a result, purchased the subject property.
>
> ... That the misrepresentations made by the defendants are in violation of Wis. Stats. §§ 895.80 and 943.20(1)(d), entitling the plaintiffs to treble damages, attorney fees, and all costs.
>
> ... That as a direct and proximate result of the false representations made by the defendants, the plaintiffs suffered pecuniary damages.

The third cause of action alleges that the defendants failed to disclose material facts with the "intent to deceive and induce the plaintiffs to act upon them." Pursuant to Exclusion A, count three is not covered under the policy.

¶20 The fourth cause of action, misrepresentation pursuant to WIS. STAT. § 100.18, reads as follows:

> ... That the defendants made the following false representations of fact regarding the condition of the subject premises: only defect was window, didn't open.
>
> ... That the defendants additionally owed a duty to the plaintiffs to disclose all known material facts about the

> property, specifically significant defects in the property, which they failed to do.
>
> ... That the defendants made these representations, including the failure to disclose material facts, with the intent to induce the plaintiffs to act upon them, and indeed the plaintiffs did believe such representations to be true and justifiably relied on them, and as a result, purchased the subject property.
>
> ... That the fraudulent misrepresentations made by the defendants are in violation of Wis. Stats. § 100.18, entitling the plaintiffs to attorney fees, and all costs.
>
> ... That as a direct and proximate result of the false representations made by the defendants, the plaintiffs suffered pecuniary damages.

The fourth cause of action alleges that the defendants failed to disclose material facts with the "intent to induce the plaintiffs to act upon them." Pursuant to Exclusion A, count four is not covered under the policy.

¶21 The fifth cause of action, strict liability misrepresentation, reads as follows:

> ... That the defendants made false representations as previously alleged and additionally failed to disclose material facts which also constitutes misrepresentation.
>
> ... That these representations were made under circumstances where the defendants necessarily ought to have known the truth or untruth of the statements, or was [sic] in a position to know the truth and purported to know the truth.
>
> ... That the plaintiffs believed such statements and justifiably relied on these statements to their pecuniary damage.

Exclusion A applies only to misrepresentations characterized by deliberate or intentional conduct. The strict liability misrepresentation claim does not allege an

intentional or deliberate act and can be established without proof of deliberate conduct. Exclusion A does not apply.

¶22 Nor is the strict liability misrepresentation claim precluded by Exclusions F or Q. Again, Exclusion F excludes coverage for bodily injury or physical injury to tangible property. While this may apply to some claimed damage, the Droegkamps also allege pecuniary damage, damage not excluded by the policy. Exclusion Q precludes coverage for any claim based upon actual or alleged pollution. The strict liability claim does not allege any pollution damage. Admittedly, the Droegkamps' request for relief does request compensation for mold problems. However, the mold language in the complaint appears only in the request for relief, not in the substantive portion of the complaint; thus it is not properly considered a substantive allegation. *See* ***Midway Motor Lodge of Brookfield v. Hartford Ins. Group***, 226 Wis. 2d 23, 35-36, 593 N.W.2d 852 (Ct. App. 1999). Furthermore, there is some support for the argument that mold does not constitute pollution. *See* ***Leverence v. U.S. Fid. & Guar.***, 158 Wis. 2d 64, 97, 462 N.W.2d 218 (Ct. App. 1990). We must therefore conclude that Exclusion Q does not preclude coverage for the strict liability misrepresentation claim.

¶23 The sixth cause of action, negligent misrepresentation, reads as follows:

> ... That the defendants negligently disclosed or negligently failed to disclose or discover material facts regarding the condition and/or history of the property under circumstances in which a person of ordinary intelligence, prudence and similar experience would have discovered and disclosed including, but not limited to: garage roof leaks, windows leak, basement wall gets wet.
>
> ... That this misrepresentation created an unreasonable risk of monetary damages to the plaintiffs.

> ... That the defendants' actions constituted a lack of reasonable care in ascertaining and disclosing those facts.
>
> ... That the plaintiffs believed such representations to be true and justifiably relied on them to their pecuniary damage.

The same logic from the strict liability misrepresentation claim applies with equal force here. Exclusion A applies only to misrepresentations characterized by deliberate or intentional conduct but the negligent misrepresentation claim does not allege an intentional or deliberate act. Exclusion F only excludes coverage for bodily injury or physical injury to tangible property but the Droegkamps allege monetary and pecuniary damage, damage not excluded by Exclusion F. Exclusion Q, the pollution exclusion, does not apply as the negligent misrepresentation claim does not allege any pollution damage and there is some authority that holds mold is not a pollutant. *See **id***. Count six is not excluded by the policy.

¶24 The seventh cause of action, negligence, reads as follows:

> ... That the defendants owed a duty of due care to provide the plaintiffs with all pertinent information regarding the subject premises and to inspect the subject premises to determine whether it contained structural or mechanical defects or other material facts that should have been brought to the attention of the plaintiffs including, but not limited to: garage roof leaks, windows leak, basement wall gets wet.
>
> ... That the defendants breached their duty by failing to discover said defects or material facts where, in the exercise of ordinary care and considering the expertise of the defendants, should have ascertained said defects or facts, and by failing to provide all pertinent information regarding the property to the buyers.
>
> ... That because of the failure of the defendants to locate the defects and/or notify the plaintiffs of said defects or material facts, the plaintiffs purchased the property and, as a result, sustained pecuniary loss.

Our previous rationale applies. Exclusion A applies only to misrepresentations characterized by intentional conduct but the negligence claim does not allege an intentional or deliberate act. Exclusion F only excludes coverage for bodily injury or physical injury to tangible property but the Droegkamps allege pecuniary damage, damage not excluded by the policy. Exclusion Q does not apply as the negligence claim does not allege any pollution damage and there is some authority that holds mold is not a pollutant. *See* ***id***. The negligence claim is not excluded by the policy.

¶25 The eighth and final cause of action, rescission/restitution, reads as follows:

> ... In the alternative, the plaintiffs allege that as a result of the misrepresentation of the defendants, the plaintiffs have purchased property that is defective and will never be the property that was represented to the plaintiffs.
>
> ... That the plaintiffs ask the Court to rescind the sale, return all moneys paid by the plaintiffs in purchasing and improving the property, plus moving costs and other expenses related to the purchase of the property.

While this count is labeled a separate cause of action, it is, at heart, an alternative prayer for relief; the Droegkamps are asking the court to rescind the sale based upon the misrepresentations of the defendants. Because we conclude that some of the misrepresentation claims are covered under American Southern's policy, the request for rescission must also be covered.[2]

[2] Even though the complaint does contain theories of liability not covered by the policy, American Southern is obligated to defend the entire action because one theory of liability falls within the coverage of the policy. *See* ***Sch. Dist. of Shorewood v. Wausau Ins. Cos.***, 170 Wis. 2d 347, 366, 488 N.W.2d 82 (1992).

¶26 We next address the "causal nexus" issue. Relying on ***Qualman v. Bruckmoser***, 163 Wis. 2d 361, 471 N.W.2d 282 (Ct. App. 1991), ***Benjamin v. Dohm***, 189 Wis. 2d 352, 525 N.W.2d 371 (Ct. App. 1994), and ***Smith v. Katz***, 226 Wis. 2d 798, 595 N.W.2d 345 (1999), American Southern argues, and the circuit court agreed, that the complaint does not allege a causal connection between the alleged misconduct and the damages alleged. We disagree.

¶27 In determining whether damage was caused by an occurrence, we must look at the alleged misconduct and determine whether a "causation nexus" exists between the alleged misconduct and the damage claimed. ***Smith***, 226 Wis. 2d at 823. Without a "causation nexus," the alleged occurrence cannot cause damage. ***Id***.

¶28 The ***Smith*** facts are as follows: The Smiths purchased a lot in July 1991 but did not discover underground springs on the lot until they prepared for construction in March 1993. ***Id.*** at 801. When their builder began to construct the foundation of the house, the foundation hole filled with water, causing the concrete foundation to collapse three or four times during construction. ***Id***. The Smiths filed suit against the seller alleging breach of warranty, intentional misrepresentation, strict liability misrepresentation and negligent misrepresentation. ***Id***.

¶29 In addressing causation, the supreme court held that there were several reasons why the seller's misrepresentations did not cause physical injury to the property. ***Id***. at 823. First, the court noted that the Smiths purchased the property in July 1991 but there was no physical injury to the property until after March 1993. ***Id***. In addition, ownership and control of the lot had changed hands during the interim. ***Id***. The Smiths had decided not only to build a house but also

decided where on the lot the house would be located. ***Id***. Someone other than the seller decided to continue building the house on the same spot even after the foundation had collapsed several times. ***Id***.

¶30 Furthermore, the supreme court noted that the Smiths' additional allegations of negligence against the builder provided evidence that the seller's misrepresentations did not cause the property damage. ***Id***. The supreme court concluded that negligent misrepresentations do not cause groundwater pressure or cracks in concrete foundations and there were too many "interruptions" between the occurrence and the property damage to show an unbroken chain of causation under the policies. ***Id***. at 824.

¶31 However, the ***Smith*** court indicated that in a different factual situation, the nexus requirement could be satisfied, citing with approval to a passage in our decision in ***Welter v. Singer***, 126 Wis. 2d 242, 250, 376 N.W.2d 84 (Ct. App. 1985):

> The Wisconsin Supreme Court in ***Olsen v. Moore***, [56 Wis. 2d 340, 202 N.W.2d 236 (1972)], joined the majority of jurisdictions by adopting the "cause" analysis. That is, where a single, uninterrupted cause results in all of the injuries and damage, there is but one "accident" or "occurrence." If the cause is interrupted or replaced by another cause, the chain of causation is broken and there has been more than one accident or occurrence.

Smith, 226 Wis. 2d at 824.

¶32 Here the facts relating to causation alleged in the Droegkamps' complaint are markedly different from those in ***Smith***. First, the Droegkamps remained in full ownership and control of the property. Second, the home in question on the property already existed at the time of purchase. Third, the

Droegkamps have not alleged any intervening negligent acts by or against third parties.

¶33 The complaint alleges that the Langdons made false representations of material facts, representations that the Langdons necessarily ought to have known the untruth of, and that the Droegkamps believed these representations and relied upon them to their damage. The complaint also alleges that the Langdons negligently disclosed or failed to disclose or discover material facts regarding the condition of the property, which constituted a lack of reasonable care, and that these misrepresentations created an unreasonable risk of monetary damage to the Droegkamps, who believed the misrepresentations and relied upon them to their pecuniary damage. The complaint further alleges that the Langdons owed the Droegkamps a duty of care to provide them with pertinent information regarding the property, that the Langdons breached this duty by failing to discover material defects and that this breach caused the Droegkamps to purchase the property and suffer pecuniary loss.

¶34 In examining the allegations of a complaint in relation to the terms of an insurance policy, we must liberally construe those allegations and assume all reasonable inferences. ***Id.*** at 815-16. Under this favorable test, we conclude the Droegkamps' complaint sufficiently alleges a nexus between the alleged misrepresentations and negligence and the ensuing loss.

¶35 We also conclude that ***Qualman***, 163 Wis. 2d at 361, and ***Benjamin***, 189 Wis. 2d at 352, are equally inapplicable. Both of these cases hold that allegations of pecuniary loss resulting from structural damage do not constitute property damage under an insurance policy and that even if an allegation of pecuniary loss included a claim for loss of use thereby resulting in property

damage, coverage would still not exist since it was the structural defect, not the misrepresentation, that caused the damage. ***Qualman***, 163 Wis. 2d at 366-68; ***Benjamin***, 189 Wis. 2d at 361-63. However, as noted, the statements regarding the effect of an allegation of loss of use were dicta. Furthermore, it is not clear from the text of the two cases whether the complaints expressly alleged that the misrepresentations induced the purchasers to buy. Here, the Droegkamps' complaint expressly alleges that the Langdons' misrepresentations were made to induce the Droegkamps to purchase the property and the misrepresentations directly and proximately caused the Droegkamps to do so. Again, our duty to defend analysis is limited to a comparison of the language of the complaint against the language of the policy. ***Smith***, 226 Wis. 2d at 806-07. The complaint adequately alleges a causal nexus.

CONCLUSION

¶36 We agree with Michelic and Realty Executives that some of the allegations of the complaint, specifically the strict liability misrepresentation claim, the negligent misrepresentation claim, the negligence claim and the rescission/restitution claim, are not excluded under American Southern's policy. We also conclude that a sufficient causal nexus between the alleged misrepresentations and the damage is alleged in the complaint. We therefore affirm that portion of the judgment granting summary judgment to American Southern on the intentional causes of action and reverse that portion of the judgment granting summary judgment on the strict liability misrepresentation claim, the negligent misrepresentation claim, the negligence claim and the rescission/restitution claim and on the issue of causal nexus. We remand this matter to the circuit court for proceedings consistent with this opinion.

Costs are denied to all parties.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.