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DISTRICT IV

October 5, 2023

To:

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Circuit Court Judge
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1224

Everett Foytik, LLC v. Jessica Riley (L.C. # 2021CV55)

Before Kloppenburg, P.J., Blanchard, and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Everett Foytik, LLC (“Everett”) appeals a summary judgment order that determined that West Bend Mutual Insurance Company has no duty to defend or indemnify Everett against defendant Jessica Riley’s counterclaim in this action. Everett contends that the circuit court erred by dismissing West Bend without considering extrinsic material that Everett offered to establish that West Bend has a duty to indemnify Everett for losses under the policy’s Voluntary Property Damage endorsement. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We summarily affirm.

Everett brought this action to foreclose its lien on Riley’s home based on its claim that Riley had failed to pay it for its construction work. Riley counterclaimed, alleging that Everett had failed to properly complete the work on Riley’s home.²

Everett tendered its defense to West Bend under the general liability insurance policy that West Bend had issued to Everett, and West Bend declined to provide a defense. West Bend successfully sought to intervene, to bifurcate the coverage and liability proceedings, and to stay the proceedings on the merits. West Bend then moved for summary judgment, contending that, under the four-corners rule, it has no duty to defend or indemnify Everett as to Riley’s counterclaim. *See Marks v. Houston Cas. Co.*, 2016 WI 53, ¶40, 369 Wis. 2d 547, 881 N.W.2d 309 (“An insurer’s duty to defend its insured is determined by comparing the allegations of the complaint to the terms of the insurance policy”).

Everett argued, pertinent here, that the circuit court should allow an exception to the four-corners rule because known facts extrinsic to the complaint reveal the existence of a covered claim. Specifically, Everett cited a letter from Riley’s counsel to Everett’s counsel that asserted that Everett damaged Riley’s personal property during the construction phase. Everett acknowledged that the claim for personal property damage is not set forth in the counterclaim. It

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

² Specifically, Riley asserted claims for violation of the Home Improvement Practices Act, breach of contract, negligence, breach of warranty, misappropriation, and to quiet title.

asserted, however, that the claim for personal property damage would be covered under the endorsement, triggering West Bend's duty to defend.

The endorsement provides that West Bend "will pay, at the request of the insured, for 'property damage' to property of others in the insured's care, custody or control" that was caused by an "occurrence." The endorsement also provides that West Bend "shall have no duty whatsoever to defend claims and/or lawsuits for which the only coverage provided is under this endorsement."

The circuit court determined that whether West Bend has a duty to defend Everett is controlled by the four-corners rule. It determined that Riley's counterclaim does not allege an "occurrence" that could arguably implicate coverage under the general policy or the endorsement. It determined that West Bend has no duty to defend or indemnify Everett. The court therefore dismissed West Bend from this action.

On appeal, Everett argues that Everett's claim for indemnification under the endorsement does not implicate the four-corners rule. Therefore, Everett's argument continues, the circuit court erred in failing to consider extrinsic evidence to determine whether Everett is entitled to indemnification under the endorsement.

When an insured tenders a defense to its insurer, "[t]he four corners rule is used to determine whether the complaint alleges a covered claim, by comparing the words in the complaint to the language of the entire insurance policy." *Choinsky v. Employers Ins. Co. of Wausau*, 2020 WI 13, ¶16, 390 Wis. 2d 209, 938 N.W.2d 548. "The duty to defend is broader than the duty to indemnify, and, accordingly, if there is no duty to defend there is also no duty to indemnify." *Great Lakes Beverages, LLC v. Wochinski*, 2017 WI App 13, ¶15, 373 Wis. 2d

649, 892 N.W.2d 333 (citation omitted). “[I]f the complaint does not allege a covered claim, the insurer has no obligations under the policy.” *Choinsky*, 390 Wis. 2d 209, ¶16. The proper application of the four-corners rule presents a question of law, which we review independently. *Olson v. Farrar*, 2012 WI 3, ¶22, 338 Wis. 2d 215, 809 N.W.2d 1.

Everett argues that the duty to defend is not at issue here, and, therefore, the four-corners rule does not apply, because Everett seeks not a defense but only indemnification under the endorsement. Thus, Everett continues, the circuit court should have proceeded to a coverage trial. However, the endorsement expressly provides that it does not provide a duty to defend for coverage under the endorsement, and Everett does not explain how, in this case, there could be a duty to indemnify when there is no duty to defend.³ See *Sustache v. American Fam. Mut. Ins. Co.*, 2008 WI 87, ¶20, 311 Wis. 2d 548, 751 N.W.2d 845 (“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.”).

³ We note that our supreme court has recognized that, despite the “well-established principle that an insurer’s duty to defend its insured is broader than its duty to indemnify,” there may nonetheless be “isolated instances in which an insurer has no duty to defend based on the complaint’s allegations, but nevertheless owes a duty to indemnify based on extrinsic evidence considered later during a coverage determination.” *Water Well Sols. Serv. Grp., Inc. v. Consolidated Ins. Co.*, 2016 WI 54, ¶30 n.17, 369 Wis. 2d 607, 881 N.W.2d 285. Here, however, Everett does not develop an argument that this is one of those “isolated instances” in which there is a duty to indemnify against a claim despite the lack of a duty to defend. Indeed, Everett concedes in its reply brief that it is not claiming any right “to liability coverage [or a defense]” under the endorsement.

Rather, Everett’s argument is that Riley has other claims against Everett—not asserted in her counterclaim—for which West Bend must indemnify Everett under the endorsement (despite its lack of any obligation to provide a defense or liability coverage as to Riley’s asserted counterclaim). West Bend responds that the record contains no evidence that Everett has made a “request” that West Bend pay for “property damage” to property in its “care, custody or control,” an express prerequisite for coverage under the endorsement. We do not address this issue because, as explained in the text, the issue in this appeal is whether the circuit court properly granted summary judgment to West Bend on the issue of whether West Bend has any duty to defend or indemnify Everett against Riley’s counterclaim, and our rejection of Everett’s arguments on that issue is dispositive.

Everett cites *Olson* for the proposition that, when the duty to defend is not at issue, the four-corners rule is not implicated and the court proceeds to a coverage trial. Everett's reliance on *Olson* is misplaced. In *Olson*, the insurer provided an initial defense to its insured pursuant to a reservation of rights and then sought a no-coverage declaration. *Olson*, 338 Wis. 2d 215, ¶26. The *Olson* court explained that the purpose of the four-corners rule is to further Wisconsin's clear policy that, "[i]f the allegations in the complaint, construed liberally, appear to give rise to coverage, insurers are required to provide a defense until the final resolution of the coverage question by a court." *Id.*, ¶¶30-31. The *Olson* court explained that "the purpose of the four-corners rule has been served once the insurer has elected to provide a defense pending a final determination on coverage" because, "[a]t that point, the insurer has protected its insured by providing a defense." *Id.*, ¶34. In that scenario, "[t]he four-corners rule is not further implicated, and the court proceeds to a determination of coverage." *Id.* Thus, when the insurer appoints counsel for its insured and "request[s] that the court provide a final determination on coverage[,] [i]f extrinsic evidence is relevant to that inquiry, it is admissible." *Id.*, ¶39. However, the *Olson* court also reiterated that "the four-corners rule is implicated when the insurer *makes an initial determination about whether it will defend its insured.*" *Id.*, ¶33 (emphasis added).

Such is the case here. West Bend declined Everett's request for a defense as to Riley's counterclaim. West Bend then sought to intervene, bifurcate, and stay, and sought summary judgment declaring that it had no duty to defend or indemnify Everett as to Riley's counterclaim. Everett opposed summary judgment. Thus, West Bend made the initial determination not to defend Everett and the issue on summary judgment was whether West Bend has a duty to do so. Under *Olson*, the four-corners rule governs the resolution of that issue. *See Olson*, 338 Wis. 2d

215, ¶33; *Water Well Sols. Serv. Grp., Inc. v. Consolidated Ins. Co.*, 2016 WI 54, ¶30, 369 Wis. 2d 607, 881 N.W.2d 285 (recognizing the “long-standing precedent that duty-to-defend cases are governed by the four-corners rule, with no exceptions”).

Applying the four-corners rule here, the circuit court determined there is no arguable coverage for the claims in Riley’s counterclaim. Significantly, Everett does not appeal that determination. Rather, Everett argues that there are other claims, not asserted in the counterclaim, concerning personal property damage, for which West Bend must indemnify Everett under the endorsement. However, the court’s determination that there is no arguable coverage under the four corners of the counterclaim—a decision Everett has not challenged on appeal—is dispositive as to whether West Bend has any duty to defend or to indemnify in this case. See *Choinsky*, 390 Wis. 2d 209, ¶16.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals