COURT OF APPEALS
DECISION
DATED AND RELEASED

August 15, 1995

NOTICE

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

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

No. 94-0648

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

BARBARA J. WALBRINK,
and NANCY PORTE,

Plaintiffs-Appellants,

v.

AMERICAN FAMILY INSURANCE GROUP,

Defendant-Respondent,

ROBERT SCOTT MC CONNELL
and SUSAN T. MC CONNELL,

Defendants-Appellants,

JAMES E. LEE,
ACCURATE HOME INSPECTION, INC.,
PRUDENTIAL PREFERRED PROPERTIES,
ELAINE ZALE,
ALICIA SCHWARTZ,
DEF INSURANCE COMPANY,
and XYZ INSURANCE COMPANY,

Defendants.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICK J. MADDEN, Judge. *Reversed and cause remanded with directions.*

Before Sullivan, Fine and Schudson, JJ.

SULLIVAN, J. Barbara J. Walbrink and Nancy Porte, and Robert Scott Mc Connell and Susan T. Mc Connell (collectively, the appellants), appeal from a summary judgment dismissing Walbrink and Porte's amended complaint against American Family Insurance Group, the Mc Connells' homeowners liability insurer. The issue before this court is whether American Family had a duty to defend the Mc Connells against claims of misrepresentation in the sale of their home based on specific assertions that the misrepresentations caused an underground oil tank to rupture and contaminate the property during the policy period. The trial court concluded that American Family had no duty to defend the Mc Connells and granted summary judgment. Because we conclude that Walbrink and Porte's complaint does provide the minimal allegations necessary to trigger American Family's duty to defend, we also conclude that the trial court improperly granted American Family's motion for summary judgment. Consequently, we reverse.

Walbrink and Porte purchased a single-family home from the Mc Connells in August 1990. In September 1992, Walbrink and Porte discovered that an underground heating oil tank had ruptured and contaminated the property. Walbrink and Porte filed a complaint alleging negligent and intentional misrepresentation and strict liability arising out of the alleged failure by the Mc Connells to reveal the presence of the underground tank during the sale of their home. Walbrink and Porte alleged that this misrepresentation "caused" the contamination to occur, which in turn caused them "to expend monies in ameliorating and alleviating the contamination;" reduced the value of the property; and "interrupted" their "enjoyment of the premises ... due to a toxic and offensive odor created by seepage of heating oil into the underlying soil and pump system." They later filed an amended complaint, adding American Family as a defendant in the company's role as the Mc Connells' homeowner's liability insurer. American Family then filed a motion for summary judgment, arguing that under either of its two insurance policies with the Mc Connells there was no coverage for the misrepresentation claims and, consequently, it had no duty to defend. Both Walbrink and Porte and the Mc Connells opposed the motion. In December 1993, the trial court granted the motion for summary judgment, concluding that the homeowners' insurance policies did not provide coverage for damages arising out of the alleged

misrepresentations, and that American Family, as a matter of law, had "no duty to defend the Mc Connells." Both Walbrink and Porte and the Mc Connells appeal from the trial court's order.

The determination of whether an insurance company has a duty to defend is a question of law that we review *de novo*. ***Grube v. Daun,*** 173 Wis.2d 30, 72, 496 N.W.2d 106, 122 (Ct. App. 1992). An insurer's duty to defend "is dependent solely on the allegations of the complaint." ***Qualman v. Bruckmoser,*** 163 Wis.2d 361, 364, 471 N.W.2d 282, 284 (Ct. App. 1991). The allegations "must state or claim a cause of action for the liability insured against or for which indemnity is paid in order for the suit to come within any defense coverage of the policy." ***Grieb v. Citizens Casualty Co. of New York,*** 33 Wis.2d 552, 557, 148 N.W.2d 103, 106 (1967). "The duty of defense depends on the nature of the claim and has nothing to do with the merits of the claim. If there is any doubt about the duty to defend, it must be resolved in favor of the insured." ***Elliott v. Donahue,*** 169 Wis.2d 310, 321, 485 N.W.2d 403, 407 (1992).

In their amended complaint, Walbrink and Porte allege that:

> As a direct and proximate result of the negligent and careless representations of defendants, Robert Scott McConnell [and] Susan T. McConnell ... in failing to disclose the existence of an underground oil heating storage tank and the tendering of the Property Condition Report, which directly references the absence of underground heating oil storage tanks, plaintiffs purchased the Subject Property, and contamination of the Subject Property, both as to soil and improvements, occurred.

We conclude that the allegations in Walbrink and Porte's complaint, if proven, would be covered under the unambiguous terms of American Family's homeowners' policy. The pertinent language of the homeowners' insurance policy issued to the Mc Connells provides as follows:

> We will pay, up to our limit, compensatory damages for which any insured is legally liable because of bodily injury or property damage caused by an occurrence covered by this

> policy. *We will defend any suit, even if it is groundless, false or fraudulent, provided the suit resulted from bodily injury or property damage not excluded under this coverage.*
>
> We will defend any suit or settle any claim for damages payable under this policy as we think proper.

(Bold omitted; emphasis added.) The policy defines "property damage" as "physical damage to or destruction of tangible property, including loss of use of [the] property."

The trial court based its erroneous decision, in part, upon ***Qualman***, in which we concluded that a homeowner's insurance policy, nearly identical to that in the case at bar, did not provide coverage for economic damages to the buyer of a home arising out of alleged misrepresentations made by the seller of the home concerning physical defects to the property existing at the time of the sale. ***Qualman,*** 163 Wis.2d at 364-68, 471 N.W.2d at 284-85. The appellants contend that ***Qualman*** is not controlling because, unlike ***Qualman***, where the alleged defects to the property already existed at the time of the sale, in the case at bar the complaint alleges that the oil tank ruptured and caused damages after the sale of the home was completed. *Cf*. ***Grube,*** 173 Wis.2d at 46-47, 496 N.W.2d at 111 (ruptured oil tank already contaminated property at time of sale). We agree that ***Qualman*** is distinguishable. In ***Qualman*** the only damages alleged were economic damages which fell outside of the insurer's duty to defend against claims arising out of *property* damage. ***Qualman,*** 163 Wis.2d at 366-67, 472 N.W.2d at 285.

Similarly, in ***Benjamin v. Dohm,*** 189 Wis.2d 352, 525 N.W.2d 371 (Ct. App. 1994), the plaintiff purchased property from a defendant, who allegedly failed to disclose that the property contained landfills. ***Id***. at 357, 525 N.W.2d at 373. The plaintiff's condominiums were damaged when they began to settle over the landfills. ***Id***. The plaintiff sued, alleging negligent and strict liability misrepresentation. ***Id***. Although we concluded that there was no coverage under the defendant's insurance contract, we stated that, in part, this was because the plaintiff's complaint did not allege that "the misrepresentations caused damage to [the plaintiff's] property but rather that [the plaintiff] suffered economic losses from [the defendant's] misrepresentations with regard to the value of the property." ***Id***. at 362, 525 N.W.2d at 375.

Unlike in either ***Benjamin*** or ***Qualman***, Walbrink and Porte's complaint does allege actual physical damage to the property arising out of the alleged misrepresentations. In essence, Walbrink and Porte allege in their complaint that the misrepresentations were a substantial factor in causing the storage tank to rupture, thereby causing the physical damage to their property; that is, they would have done something to prevent the tank from rupturing had they been told that it was there. When we review whether an insurer has a duty to defend, we only look at the nature of the claim as stated in the complaint—we do not consider whether the claim is of dubious merit. *See* ***Elliot,*** 169 Wis.2d at 321, 485 N.W.2d at 407. Accordingly, at the duty-to-defend stage of the proceeding, Walbrink and Porte's complaint alleges that the misrepresentations caused physical damage to the property, thereby triggering American Family's duty to defend the Mc Connells. Consequently, the trial court erred when it granted American Family's motion for summary judgment at the duty-to-defend stage of the proceedings based upon its errant conclusion that American Family had no duty to defend the Mc Connells. Accordingly, we must reverse the judgment and remand the matter to the trial court for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.