OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

June 30, 2021

To:

Hon. Angela W. Sutkiewicz
Circuit Court Judge
Sheboygan County Courthouse
615 N. 6th St.
Sheboygan, WI 53081

Melody Lorge
Clerk of Circuit Court
Sheboygan County Courthouse
615 N. 6th St.
Sheboygan, WI 53081

Vicki L. Arrowood
Emile Banks & Associates LLC
Highway Point, Suite 290
1200 N. Mayfair Rd.
Milwaukee, WI 53226-3287

John D. Dries
7251 W. North Ave.
Milwaukee, WI 53213

Justin F. Wallace
Mayer, Graff & Wallace, LLP
1425 Memorial Dr., Ste. B
Manitowoc, WI 54220

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

2020AP361 Brian Bengtson v. Inge Batlak (L.C. #2019CV293)

Before Neubauer, C.J., Reilly, P.J., and Davis, J.

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).

Inge Batlak appeals from an order of the circuit court granting American Family Mutual Insurance Company's motion for declaratory or summary judgment. The circuit court held that American Family did not breach its duty to defend Batlak under her American Family homeowner's insurance because the policy does not afford coverage for the misrepresentation

and breach of contract claims asserted against her by Brian and Tammy Bengtson in an underlying civil action. We agree there is no coverage for the claims against Batlak because there are no allegations or facts to show that her misrepresentation regarding the condition of the property sold to the Bengtsons caused property damage. 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 (2019-20).[1] We affirm.

In January 2019, the Bengtsons bought a home from Batlak in Sheboygan, Wisconsin. As part of the sale of the home, the Bengtsons received a real estate condition report signed by Batlak. The condition report contained no mention of any property defects in the basement of the property. After purchasing the property, the Bengtsons discovered that the basement was subject to "substantial water seepage" when it rained. The Bengtsons filed a complaint against Batlak, alleging that Batlak intentionally failed to disclose the water seepage issues and seeking damages and rescission of the contract.

After Batlak sought coverage under her homeowner's insurance policy, American Family issued a reservation of rights letter and appointed counsel to be paid for by American Family to represent Batlak against the Bengtsons' claims, pending its challenge to coverage pursued in this action. Batlak contended that she was entitled to select her own attorney to defend her at American Family's expense.

American Family filed a motion for a declaratory and/or summary judgment, seeking a declaration that it had no duty to defend or indemnify Batlak for the Bengtsons' claims. The

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

circuit court granted American Family's motion, resulting in its dismissal from the case. Batlak appeals.

As we now explain, we need not reach the many issues the parties raise on appeal because American Family had no duty to defend or indemnify Batlak: there are no allegations or facts to show that Batlak's misrepresentation caused the Bengtsons' property damage—their basement water problems. In ***Everson v. Lorenz***, 2005 WI 51, ¶¶3, 33-39, 280 Wis. 2d 1, 695 N.W.2d 298, the Wisconsin Supreme Court explained that misrepresentation claims arising in the real estate context do not trigger coverage under the policy's standard form liability language at issue when there is no showing that the alleged basis for the insured's liability, the misrepresentation, caused the property damage. Similarly, there can be no duty to defend a complaint that makes no allegations of covered property damage. Consequently, Batlak cannot succeed on her contention that American Family breached its duty to defend based on its handling of her defense (requiring Batlak to use the lawyer it identified rather than Batlak's preferred choice), because American Family has no duty to defend. The circuit court appropriately determined that American Family had no duty to defend or indemnify Batlak.

The interpretation of an insurance policy to determine the scope of an insurer's duty to defend involves a question of law that is subject to our de novo review. *See* ***Estate of Sustache v. American Family Mut. Ins. Co***., 2008 WI 87, ¶18, 311 Wis. 2d 548, 751 N.W.2d 845. The

interpretation of an insurance contract presents a question of law which we review de novo. *See* ***Everson***, 280 Wis. 2d 1, ¶10.[2]

In considering whether an insurer has a duty to defend, we compare "the four corners of the underlying complaint to the terms of the entire insurance policy." *See* ***Water Well Sols. Serv. Grp. Inc. v. Consolidated Ins. Co.***, 2016 WI 54, ¶15, 369 Wis. 2d 607, 881 N.W.2d 285. We begin by determining "whether the policy language grants initial coverage for the allegations set forth in the complaint. If the allegations set forth in the complaint do not fall within an initial grant of coverage, the inquiry ends." ***West Bend Mut. Ins. Co. v. Ixthus Med. Supply, Inc.***, 2019 WI 19, ¶11, 385 Wis. 2d 580, 923 N.W.2d 550 (citing ***Water Well***, 369 Wis. 2d 607, ¶16).

An "insurer is under an obligation to defend only if [the insurer] 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." ***Estate of Sustache***, 311 Wis. 2d 548, ¶22 (citation omitted); ***Everson***, 280 Wis. 2d 1, ¶11 (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" (citation omitted)).

[2] We note that extrinsic evidence was submitted for the circuit court's consideration, and thus, the issue was presented as a motion for summary judgment on whether there was either a duty to defend or a duty to indemnify. *See* ***Estate of Sustache v. American Family Mut. Ins. Co***., 2008 WI 87, ¶29, 311 Wis. 2d 548, 751 N.W.2d 845. However, because Batlak contends that American Family failed to defend and contends the court did not consider her extrinsic evidence, along with the fact that her argument is almost exclusively focused on an alleged breach of the duty to defend, we begin with the duty-to-defend framework. That said, the foundational analysis under either framework is the same—the insurer's duty to defend is contingent upon the court's determination that the insured has coverage if the plaintiff proves his or her case. There is nothing in Batlak's affidavit or elsewhere that supports a different conclusion under an indemnity analysis—whether considered under the "four corners" of the complaint duty-to-defend analysis or a full consideration of the extrinsic evidence, there is no "causation nexus" shown.

Again, ***Everson*** controls under the facts of this case. ***Everson*** involved allegations of breach of contract and negligent, strict responsibility, and intentional misrepresentation against a seller brought by a buyer who intended to build a home on property he had purchased from the seller. ***Everson***, 280 Wis. 2d 1, ¶¶4, 5. The buyer alleged that the seller misrepresented that no portion of the property lay within a 100-year flood plain and that, as a result of the misrepresentation, construction of the home was not possible at the location where the buyer intended to build. ***Id.***, ¶5.

The Wisconsin Supreme Court interpreted standard form general liability language nearly identical to that used in American Family's policy.[3] Namely, the insurer would provide coverage

[3] The pertinent terms of the standard form policy include the following:

LIABILITY COVERAGES - SECTION II

COVERAGE D - PERSONAL LIABILITY COVERAGE

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.

Defense Provision.

If a suit is brought against any **insured** for damages because of **bodily injury** or **property damage** caused by an **occurrence** to which this policy applies, **we** will provide a defense at **our** expense by counsel of **our** choice. **We** will defend any suit or settle any claim for damages payable under this policy as **we** think proper.

The policy definitions that are pertinent to these provisions are as follows:

DEFINITIONS

The following words in this policy have defined meanings. They will be printed in bold type.

….

(continued)

for liability for property damage if it resulted from an "occurrence," defined as an accident. ***Id.***, ¶15. The seller argued that the alleged misrepresentation was an occurrence, or accident, resulting in property damage. ***Id.***, ¶16. The court disagreed, holding that the seller's provision of the erroneous flood plain information to the buyer involved a volitional act, not an accident. ***Id.***, ¶20. The court also found that there was no coverage because there was no allegation that the property damage was caused by an occurrence/accident—the alleged misrepresentation. ***Id.***, ¶¶3, 33-39. Thus, there was no "causation nexus" because the property damage was caused by defects in the property—not the alleged misrepresentation of the seller. ***Id.***, ¶¶3, 23 (the "parties agree that there were no acts or omissions" by the seller "that resulted in physical injury to the property").

As we explained in ***United Cooperative v. Frontier FS Cooperative***, 2007 WI App 197, 304 Wis. 2d 750, 738 N.W.2d 578:

> The key to understanding why the analyses in ***Everson*** [and that line of cases] focused on an alleged misrepresentation by an insured, rather than on some other event that arguably caused the alleged property damage, is that the insureds in those cases were not responsible, or apparently not responsible, for the true cause of the alleged property damage. So far as the decisions in those cases reveal, the insureds' misrepresentations were the only hooks on which the insureds seeking coverage could hang their hats if they hoped to obtain coverage…. When the asserted basis for an insured's liability is a misrepresentation, and the misrepresentation

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> 9. **Occurrence** means an accident, including exposure to conditions, which results during the policy period, in:
> a. **bodily injury**; or
> b. **property damage.**
>
> ….
>
> 11. **Property Damage** means physical damage to or destruction of tangible property, including loss of use of this property.

> cannot be said to have caused any "property damage" (or bodily injury) as that term is defined in a typical CGL or other liability policy, the misrepresentation is not an occurrence and the insured will not have coverage.

United Coop., 304 Wis. 2d 750, ¶19.

In this case, the Bengtsons alleged that the water infiltration and subsequent damage were caused by "rainy weather conditions" during which "the basement of the property would repeatedly become substantially wet" due to "water seepage." However, the asserted basis for Batlak's liability is a misrepresentation. *See* ***id.*** As in ***Everson***, there is no causal nexus between the alleged presale misrepresentation and the property damage, the physical damage to the property for which the Bengtsons seek to hold Batlak liable. There are no allegations or facts to show that an act or omission of Batlak caused the physical injury to the basement resulting in the damages claimed by the Bengtsons. Under ***Everson*** and the related line of cases, there is no alleged "occurrence," i.e., property damage caused by an accident, and therefore there is no coverage.[4] *See* ***United Coop.,*** 304 Wis. 2d 750, ¶19. Because the conduct alleged by the Bengtsons did not trigger an initial grant of coverage, American Family had no duty to defend or indemnify Batlak. *See* ***Everson***, 280 Wis. 2d 1, ¶3.[5]

[4] We note that ***Everson v. Lorenz***, 2005 WI 51, ¶¶3, 33-39, 280 Wis. 2d 1, 695 N.W.2d 298, also discussed several other cases holding that where the alleged presale misrepresentation did not cause a property's defects, there was no "causation nexus" required for coverage. Batlak has not addressed this holding of ***Everson*** and the related line of cases upon which it relied, which were discussed extensively by American Family in its respondent's brief.

[5] Based on our conclusion that there is no initial grant of coverage under the policy terms that might trigger a duty to defend, we need not set forth or discuss the exclusion identified by American Family. *See* ***Water Well Sols. Serv. Grp. Inc. v. Consolidated Ins. Co.***, 2016 WI 54, ¶16, 369 Wis. 2d 607, 881 N.W.2d 285; ***Schinner v. Gundrum***, 2013 WI 71, ¶37, 349 Wis. 2d 529, 833 N.W.2d 685.

(continued)

For the foregoing reasons, we conclude that the circuit court properly granted American Family's motion for summary judgment.

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

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

Sheila T. Reiff
Clerk of Court of Appeals

In addition, because our decision that there are not sufficient allegations to establish a "causation nexus" is dispositive of this appeal, thereby resulting in no duty to defend, we need not address Batlak's other arguments, including her assertion that the circuit court failed to consider extrinsic evidence in the form of her affidavit. As noted above, the extrinsic evidence does not establish a causation nexus either. We also need not address Batlak's contention that the misrepresentation alleged in the complaint arose from a mistake rather than a volitional act. *See* ***Lake Delavan Prop. Co. v. City of Delavan***, 2014 WI App 35, ¶14, 353 Wis. 2d 173, 844 N.W.2d 632 (when one issue is dispositive on appeal, we need not address other issues).