THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. **SUPERIOR COURT**

Nationwide Insurance Company

v.

Kimball F. Walen

218-2010-EQ-0090

ORDER ON PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

In this proceeding, the petitioner, Nationwide Insurance Company ("Nationwide"), has brought a declaratory judgment action against the respondent, Kimball F. Walen ("Walen").[1] Nationwide insured Walen for personal liability through a homeowner's policy, # 51 28 HO 374789, and a personal umbrella policy, # 51 28 PU 886927, and seeks a declaration that neither policy provides coverage with respect to claims made against Walen, individually and as co-trustee of a revocable trust, in the Massachusetts Superior Court for fraud and deceit (Count I), and negligent misrepresentation (Count IV) in the underlying matter of John W. Cole and Courtney Cole v. Laura A. DeLuca, et. al, Essex County Superior Court, Commonwealth of Massachusetts, No. 2009-0922-D (filed in October, 2009). Walen, in his Answer, counterclaims against Nationwide and seeks a declaration that he is entitled to insurance coverage in the Massachusetts litigation pursuant to the policies issued to him in New Hampshire.

[1] The Court notes that Nationwide's Petition names "Kimball F. Whalen" as the respondent in its caption and sometimes in its body. It is clear, however, that the respondent's name is "Kimball F. Walen." The Court refers to the respondent here as "Walen."

Nationwide now moves for summary judgment and argues that the homeowner's insurance policy and umbrella policy do not provide coverage. Walen objects and has filed a Cross-Motion for Summary Judgment. Both parties have since filed supplemental responses.

FACTUAL BACKGROUND

In October, 2007, John W. Cole and Courtney Cole ("the Coles") purchased a home located at 15 Penzance Road, Rockport, Massachusetts ("the premises") from Walen and Mark H. Holly ("Holly"), acting as trustees of the Harry L. Walen Revocable Trust ("the Trust"). At all pertinent times, Walen was insured under a Nationwide homeowner's insurance policy providing for personal liability coverage in the amount of $300,000.00, as well as under a personal umbrella policy providing for excess liability coverage in the amount of $1,000,000.00. The homeowner's policy also provided property coverage for Walen's residence located at 16 Rockrimmon Road, Kingston, New Hampshire.

Per the allegations the Coles advance in the underlying suit, Walen executed a document, known as a "Seller's Statement of Property Condition" on or about January 31, 2007 relating to the 15 Penzance Road property—a premises where his father, Harry L. Walen, with his wife Elizabeth, had lived for many years. See Pet.'s Pet. for Dec. J., Ex A, Cole Compl. ("Cole Complaint"), ¶ 10. This statement allegedly indicated that the "basement [of the house] had 'seepage during [the] May 2006 flood only' and that it was 'dry otherwise,'" that "the house had 'no' 'water drainage problems,'" and that "the garage had 'no problems.'" Cole Complaint, ¶¶ 17-18.

The Coles received a copy of the statement and allegedly relied upon it in deciding to purchase the premises. Id., ¶ 26. They allege that after their purchase of the pertinent premises, water-related damage was discovered, which, they claim, created "unhealthful conditions that forced them to abandon their home, make substantial repairs to their home, suffer a substantial decrease in the value of their home, discard many items of personal property and suffer serious and lasting illness." Id., ¶¶ 1, 37.

Harry L. Walen (now deceased) ceased residing in the premises in November, 2005. See Deposition of Kimball Frederick Walen, taken on September 15, 2010 ("Walen Deposition"), at 9, 11. The premises thereafter remained vacant for a considerable time, with Walen arranging and overseeing certain repair/renovation work, per a power of attorney, or as a trustee, in the approximate 2006-2007 time frame. Id., at 13, 15-19, 46, 66. It appears that Walen paid for the repair/renovation work with his parents' money, id., at 15, but paid real estate taxes and certain other premises-related bills using his own funds. Id. at 50-51. It appears that the premises was not placed into the Trust until about September/October, 2006. Id., at 66.[2] Walen's deposition, already cited, generally reflects that he acted here at all pertinent times as an active manager of the premises. It also reflects that Holly played a much less active role in dealing with the premises than Walen. Id., at 48, 61.

The Coles brought the underlying Massachusetts suit against Walen and five others: the co-trustee Holly, a real estate broker, two of the broker's

[2] Walen testified in his deposition that the Trust was not "formed until September or October, 2006." Walen Deposition at 50-51. It appears, however, that the Trust was created in March, 2006. See Nationwide's Mot. for Summ. J., Ex. E, Pg. 1.

employees, and a contractor. They accuse the defendants of wrongfully making false representations, and of taking other associated actions, to induce them to purchase the pertinent allegedly defective premises. They allege, among other things, that the representations contained in the "Seller's Statement of Property Condition" "were false" since "the basement and the garage had had frequent seepage and flooding problems for years." Cole Complaint, ¶ 19.

For the claims specifically advanced against Walen, as set forth in Counts I and IV of the complaint, the Coles allege fraud and deceit, as well as reckless and negligent misrepresentation. They aver that Walen "knew that the representations [in the seller's statement] were false when they were made," id., ¶ 20; but, in the alternative, they allege that "such representations were made of facts susceptible of actual knowledge with recklessness as to their truth or falsehood, or were the utterance of half truths which in effect were lies or were the failure to disclose known facts, when there was a duty, original or supervening, to disclose," id., or that the "said representations were made with failure to exercise reasonable care or competence in obtaining or communicating the information." Id., ¶ 25.

Walen notified Nationwide of the lawsuit, and by a letter dated July 15, 2009, Nationwide advised Walen that it had determined that it was not obligated to provide insurance coverage for the underlying lawsuit under either policy. See Walen's Cross Mot. for Summ. J. and Obj. to Nationwide's Mot. for Summ. J., Ex. 4. The letter listed the following reasons for the denial of coverage:

> 1. The alleged incident does not meet the policy definition of "Occurrence" under both the Homeowners Policy and the

Personal Umbrella Policy.

2. The property at 15 Penzance Rd., Rockport, MA does not meet the definition of an "insured location" under the Homeowners Policy.
3. "Fraudulent misrepresentation" is construed as being caused intentionally and, therefore, is excluded from liability coverage under the Homeowners Policy and the Personal Umbrella Policy.
4. "Fraudulent misrepresentation" is construed as an act criminal in nature and, therefore, is excluded from liability coverage under the Homeowners Policy.
5. The claimants John W. Cole and Courtney Cole did not sustain a "Personal Injury" as defined under the Personal Umbrella Policy.

Id.

Nationwide sent an additional letter on October 26, 2009 reaffirming that there would be no coverage for the fraud and deceit claim. Id., Ex. 5. The letter also addressed the negligent misrepresentation claim and stated:

> The allegations in the Complaint under Count IV: Negligent Misrepresentation by Defendants Walen, et. al. may be covered under this policy if you were found Negligent but NOT by Misrepresentation which was previously denied in the attached denial letter.
>
> Based on the Count for Negligence, Nationwide will provide you a defense until such time the Courts determine we do not owe you a defense or indemnification.

Id.

Nationwide initiated this declaratory judgment proceeding against Walen to resolve the insurance coverage issues. As stated previously, Walen responded and filed a counterclaim against Nationwide seeking a declaration that he is entitled to insurance coverage pursuant to the homeowner's policy and the umbrella policy.

The Nationwide homeowner's policy states, in relevant part:

Section II – Liability Coverages

Coverage Agreements

COVERAGE E – PERSONAL LIABILITY

We will pay damages an **insured** is legally obligated to pay due to an **occurrence** resulting from negligent personal acts or negligence arising out of the ownership, maintenance or use of real or personal property. **We** will provide a defense at **our** expense by counsel of **our** choice.

Nationwide's Mot. for Summ. J., Ex B, Pg. G1 ("the Policy") (emphasis in original). Additionally, the homeowner's policy defines the following:

1. "BODILY INJURY" means bodily harm, including resulting care, sickness or disease, loss of services or death. **Bodily injury** does not include emotional distress, mental anguish, humiliation, mental distress or injury, or any similar injury unless the direct result of bodily harm.

2. "PROPERTY DAMAGE" means physical injury to or destruction of tangible property. This includes its resulting loss of use.

4. "OCCURRENCE" means **bodily injury** or **property damage** resulting from an accident, including continuous or repeated exposure to the same general condition. The **occurrence** must be during the policy period.

Id. (emphasis in original). The policy's exclusions section states, in pertinent part:

Section II – Liability Exclusions

1. Coverage E – Personal Liability and Coverage F – Medical Payments to Others do not apply to **bodily injury** or **property damage:**

    a) caused intentionally by or at the direction of an **insured**, including willful acts the result of which the **insured** knows or ought to know will follow from the **insured's** conduct.

2. Coverage E – Personal Liability does not apply to:

d) **property damage** to property rented to, occupied or used by, or in the care of an **insured**.

Id., Pgs. H1-H3 (emphasis in original).

The Nationwide personal umbrella policy states, in relevant part:

Coverages

EXCESS LIABILITY INSURANCE

We will pay for damages an **insured** is legally obligated to pay due to an **occurrence** in excess of:

a) the **retained limit**; plus,
b) any other liability insurance available to an **insured** which applies to an **occurrence**.

The **bodily injury** or **property damage** must occur during this policy's term. The **personal injury** must be due to an offense committed during this policy's term.

Id., Ex. C, Pg. C1 (emphasis in original). The policy's exclusions section states, in pertinent part:

Exclusions

Excess liability and additional coverages do not apply to:

1. **Bodily injury**, **property damage** and **personal injury** caused intentionally by or at the direction of an **insured**, including willful acts the result of which the **insured** knows or ought to know will follow from the **insured's** conduct. This does not include **bodily injury** or **property damage** caused by an **insured** trying to protect person or property.

3. **property damage** to:

   a) property owned by an **insured**; or
   b) property owned by others when an **insured** has physical control of it, or agreed to be responsible for it.

20. **Bodily injury** or **property damage** arising out of **biological**

deterioration or damage.

Id., Ex. C, Pg. E1-E3 (emphasis in original). Additionally, the umbrella policy defines, in pertinent part:

> 5. **Occurrence(s)** means an accident including continuous or repeated exposure to the same general conditions. It must result in **bodily injury**, **property damage**, or **personal injury** caused by an **insured**. The **occurrence** resulting in **bodily injury** or **property damage** must be during the policy period. The **occurrence** resulting in the **personal injury** must be due to an offense committed during the policy period.
>
> 6. **Bodily injury** means bodily harm, including resulting sickness, disease, or death. **Bodily injury** does not include emotional distress, mental anguish, humiliation, mental distress or injury, or any similar injury unless the direct result of bodily harm.
>
> 7. **Property damage** means physical injury to or destruction of tangible property. This includes any resulting loss of its use.
>
> 8. **Personal injury** means:
>   a) false arrest, false imprisonment, wrongful conviction; wrongful entry;
>   b) wrongful detention or malicious prosecution;
>   c) libel, slander, defamation of character, or invasion of rights of privacy.
>
> 12. **Biological deterioration or damage** meaning damage or decomposition, breakdown, and/or decay of manmade or natural material due to the presence of fungi, algae, lichens, slime, mold, bacteria, wet or dry rot and any by-products of these organisms, however produced. Fungi as used above include, but are not limited to: yeasts, mold, mildew, rust, smuts, or fleshy fungi such as mushrooms, puffballs or coral fungi.

Id., Ex. C, Pgs. D1-D2 (emphasis in original).

Nationwide moves for summary judgment and argues that the homeowner's policy and the umbrella policy do not provide coverage for the

claims of fraud and deceit and negligent misrepresentation because

> (1) the underlying claims do not involve 'bodily injury' or 'property damage' caused by an 'occurrence' resulting from negligent acts as required in order for coverage to apply; (2) coverage is expressly excluded for property damage to property in the care of the insured; (3) liability coverage is expressly excluded for bodily injury or property damage caused intentionally by the insured, including willful acts the result of which the insured knows or ought to know will follow from the insured's conduct; and (4) the umbrella policy excludes coverage for bodily injury or property damage arising out of biological deterioration or damage, including mold.

Nationwide's Mot. for Summ. J. ¶ 6.

Walen does not contest Nationwide's claim that he is not entitled to coverage on Count I of the Coles' complaint, the fraud and deceit claim. See Walen's Mem. of Law in Support of his Cross Mot. for Summ. J. and Obj. to Nationwide's Mot. for Summ. J. at 7. Walen objects, however, and files a Cross Motion for Summary Judgment arguing that he is "entitled to defense and indemnification [arising from the negligent misrepresentation claim] under both policies because the negligent misrepresentation claim in the underlying complaint alleges 'an occurrence resulting from negligent personal acts or negligence arising out of the ownership, maintenance or use of real or personal property.'" Id., at 1. Further, Walen argues that the claim involves "property damage" and "physical injury" resulting from the negligent misrepresentation, that his status as a "co-trustee" does not implicate the homeowner's and the umbrella policy's pertinent exclusions, and that the umbrella policy exclusion for "biological deterioration or damage" does not negate coverage. Id. Nationwide objects to Walen's Cross-Motion for Summary Judgment.

ANALYSIS

The parties dispute whether the negligent misrepresentation claim in the underlying suit constitutes an "accident" under the policy; whether the underlying complaint sufficiently alleges "property damage" or "bodily injury" actually caused by, or resulting from, an "occurrence"; and whether certain exclusions apply.

In determining whether, in a declaratory judgment action, an insurance policy covers a certain claim, the insurer has the burden of proving that no coverage exists. See Merchant's Ins. Group v. Warchol, 132 N.H. 23, 26 (1989) (citing, particularly RSA 491:22-a). "It is well-settled in New Hampshire that an insurer's obligation to defend its insured is determined by whether the cause of action against the insured alleges sufficient facts in the pleadings to bring it within the express terms of the policy." Webster v. Acadia Ins. Co., 156 N.H. 317, 319 (2007) (citing Broom v. Cont'l Cas. Co., 152 N.H. 749, 753 (2005)). "In considering whether a duty to defend exists based upon the sufficiency of the pleadings, [the Court] considers the reasonable expectations of the insured as to its rights under the policy." Id. (citations omitted). Accordingly, the Court must examine the language of the policies to determine whether Nationwide has satisfied its burden of proving that no coverage exists. While the Court also deals here, to some degree, with whether indemnity is available, the underlying suit is still pending and so the particular focus here is on the duty to defend.

Generally, the "final interpretation of the language in an insurance policy is a question of law . . . [for the] court to decide." Curtis v. Guaranty Trust Life Ins. Co., 132 N.H. 337, 340 (1989). The Court will "construe the language of an

insurance policy as would a reasonable person in the position of the insured based on a more than casual reading of the policy as a whole." Haley v. Allstate Ins. Co., 129 N.H. 512, 514 (1987) (citation omitted). "[I]n interpreting contracts, the fundamental inquiry centers on determining the intent of the parties at the time of the agreement." Trombly v. Blue Cross/Blue Shield, 120 N.H. 764, 770 (1980) (citation omitted). "If the language of the policy reasonably may be interpreted more than one way and one interpretation favors coverage, an ambiguity exists in the policy that will be construed in favor of the insured and against the insurer." High Country Assocs. v. N.H. Ins. Co., 139 N.H. 39, 41 (1994) (citation omitted).

While ambiguities in insurance policies are construed against the insurer, see Trombly, 120 N.H. at 770-72, the court "will not . . . create an ambiguity simply to resolve it against the insurer." Haley, 129 N.H. at 514. "Moreover, [the court] will not apply the Trombly rule so as to create coverage where it is clear that none [was] intended." Niedzielski v. St. Paul Fire & Marine Ins. Co., 134 N.H. 141, 147 (1991) (quotation and citation omitted).

(1) The Alleged Negligent Misrepresentation is Deemed an "Accident" Under Both Policies

The homeowner's policy defines "occurrence" as "bodily injury or property damage resulting from an accident." See Policy, pg. G1. Additionally, that policy states that Nationwide will cover "damages . . . due to an occurrence resulting from negligent personal acts **or** negligence arising out of the ownership, maintenance or use of real or personal property." Id. (emphasis added). The

umbrella policy defines "occurrence" as an "accident." See Umbrella Policy, pg. D1.

Though neither of the pertinent policies define the term "accident," the New Hampshire Supreme Court has defined it "in the context of an 'occurrence' [for insurance coverage] to mean 'circumstances, not necessarily a sudden and identifiable event, that were unexpected or unintended from the standpoint of the insured.'" See Webster, 156 N.H. at 322 (quoting High Country Assocs., 139 N.H. at 44).

Whether a negligent misrepresentation claim may be deemed an "occurrence" or an "accident" under insurance policies such as those here at issue is presently unsettled in this State. However, Fisher v. Fitchburg Mut. Ins. Co., 131 N.H. 769 (1989) is instructive. There, homeowners filed a declaratory judgment action against their insurance carrier, asking the court to find that under the terms of the policy, the insurance company was obligated to defend and indemnify them in regard to suits alleging breach of contract and negligent and intentional misrepresentation respecting the sale of their home. Id. at 770. One of the plaintiffs signed two separate purchase and sale agreements for the same residence, and the plaintiffs came to be sued by the purchasers whose agreement was not honored. Id.

The New Hampshire Supreme Court considered the term "accident" and held that "occurrence" coverage does not encompass the sort of intentional conduct in which the insureds had engaged. Id. at 773 (stating that "[t]he activity described in the pleadings of the underlying action [could not] be described as

'accidental'" because "[a] reasonable person would foresee that entering into two contracts to sell the same property would inevitably lead to a breach of at least one of the two contracts"). Further, the Court rejected "the plaintiffs' . . . argument that the negligent misrepresentation claim [they offered] somehow converts the plaintiffs' action into an accidental occurrence." Id. It did not rule, however, that, on other facts, a negligent misrepresentation may not be deemed an "occurrence" or "accident" for insurance coverage purposes. Id.

Looking to other jurisdictions, a split of authority exists among those courts which have passed on the issue. Some courts have determined that negligent misrepresentation claims are not "accidents" or "occurrences" for insurance coverage. These courts highlight the volitional aspect of negligent misrepresentation, classifying the tort as closely related to "non-accident" intentional wrongs because the insured intends that the other party rely on the misrepresentation. See e.g., Allstate Ins. Co. v. Chaney, 804 F.Supp. 1219, 1221-22 (N.D. Cal. 1992) (under California law, negligent misrepresentation is treated as a type of fraud and therefore cannot be an "accident" or an "occurrence" under an insurance policy); Farr v. Design Phosphate and Premix Int'l, Inc., 570 N.W.2d 320, 325-26 (Neb. 1997) (determining that "the events complained of [those concerning or relating to the sale of unregistered stock certificates] were not accidents, [and thus not covered under the policy], because they were intended, deliberate acts initiated by [the appellee's] negligence, which was well attenuated from the volitional act itself," and further, that negligent misrepresentation is "more appropriately viewed as a subspecies of fraud");

Everson v. Lorenz, 695 N.W.2d 298, 304 (Wisc. 2005) (holding that the insurer was not obligated to defend misrepresentation claims because "[t]o be liable, Lorenz must have asserted a false statement, and such an assertion requires a degree of volition inconsistent with the term accident. Although this assertion may be prompted by negligence, it is nevertheless devoid of any suggestion of accident").

Other courts, however, have held that negligent misrepresentation is "accidental" in nature, highlighting the negligence component of the tort and the tortfeasor's lack of intent to make a misrepresentation. See e.g., Wood v. Safeco Ins. Co. of Amer., 980 S.W.2d 43, 49 (Mo. Ct. App. 1998) (seller's negligent misrepresentation claims that residence was not in flood plain and had never flooded were covered under liability insurance providing coverage for an "occurrence" defined as an "accident"); Sheets v. Brethren Mut. Insur. Co., 679 A.2d 540, 545-52 (Md. 1996) (holding that negligent misrepresentation is treated like other forms of negligence that are covered as "accidents" if the insured does not expect or foresee the resulting damage); Am. States Ins. Co. v. Cooper, 518 So. 2d 708, 710 (Ala. 1987) (holding that an intentional misrepresentation claim was clearly excluded from coverage, but that a negligent misrepresentation claim could constitute an "occurrence" within the definition of an insurance contract); Universal Underwriters Ins. Co. v. Youngblood, 549 So.2d 76, 78 (Ala. 1989) (determining that actions for innocent or reckless misrepresentation have been held to be covered under certain insurance policy provisions).

In both Massachusetts and New Hampshire, negligent misrepresentation is recognized to be solidly distinct from fraud or deceit. To recover for negligent misrepresentation in Massachusetts, where the Coles' action is filed, "a plaintiff must show that the defendant: (1) in the course of its business, (2) supplied false information for the guidance of others[,] (3) in their business transactions, (4) causing and resulting in pecuniary loss to those others[,] (5) by their justifiable reliance upon the information, and (6) that it failed to exercise reasonable care or competence in obtaining or communicating the information." Cummings v. HPG Int'l, 244 F. 3d 16, 24-25 (1st Cir. 2001) (citations omitted). Further, in Massachusetts, "[a]lthough courts sometimes analyze negligent misrepresentation claims and deceit claims together, the degrees of culpability a plaintiff must prove to establish liability for negligent misrepresentation is different, and less demanding, than that to establish liability for deceit." Id. (citations omitted). In addition, Massachusetts courts generally:

> treat negligent misrepresentations claims more as negligence actions than deceit actions, focusing on the degree of care exercised by the speaker in making the statement. For a negligent misrepresentation claim, courts ask simply whether the speaker was negligent in failing to discover the falsity of his or her statements.

Id. at 25 (internal citations and quotations omitted).

Similarly, in New Hampshire, "[t]he essential elements of negligent misrepresentation are a negligent misrepresentation by the defendant of a material fact and justifiable reliance by the plaintiff." Ingaharro v. Blanchette, 122 N.H. 54, 57 (1982) (citations omitted). Fraud, on the other hand, requires the plaintiff to "prove that the defendant made a representation with the knowledge of

its falsity or with conscious indifference to its truth and with the intention of causing another person to rely on it." Snierson v. Scruton, 145 N.H. 73, 77 (2000) (citation omitted). "In addition, a plaintiff must establish justifiable reliance." Id. (citation omitted).

To be sure, negligent misrepresentation has a volitional component, and its "very name breeds confusion." Sheets, 679 A.2d at 552 (Karwacki, J. dissenting) ("The name 'negligent misrepresentation' is, in itself, an oxymoron because to 'misrepresent' requires some measure of intentionality, while the word 'negligent' seemingly contradicts the necessity of intent."). Yet, to deem such misrepresentations to not qualify as within the meaning of an "accident" for insurance coverage purposes, as some courts have done, ignores that, after all is said and done, the tort remains solidly grounded in negligence, requiring not intentional wrong-doing but "a careless or inadvertent false statement in circumstances where care should have been taken." Everson v. Lorenz, 695 N.W.2d at 313 (Bradley, J. dissenting).

In this case, the underlying suit accuses Walen of, among other things, having made negligent misrepresentations in regard to the "Seller's Statement of Property Condition" he provided. The Coles allege that Walen's statements "were made with failure to exercise reasonable care or competence in obtaining or communicating the information." See Cole Complaint, ¶ 25. These allegations fit within the concept of "accident." As earlier observed, the homeowner's policy, in particular, expressly highlights its coverage of "negligent" conduct, and does not exclude from its coverage "negligence" related to making representations.

The Court concludes that the Cole complaint alleges sufficient facts regarding an "accident" to bring it within the express terms of the policies to allow for coverage in regard to a duty to defend and potential indemnity.

(2) The Underlying Complaint Sufficiently Alleges Some "Property Damage" and "Bodily Injury" Caused by an "Occurrence"

The Cole complaint alleges the following damages:

> . . . the plaintiffs Coles were damaged in that soon after they purchased the property, they discovered that it was in fact plagued by frequent flooding, seepage, and other water problems, and damage resulting from those problems, including contamination by dangerous mold. They were forced to abandon the property, their home; forced to spend funds for alternative housing; will have to spend substantial funds to remediate mold contamination in the property and the water problems that led to that contamination; lost much of their personal property and household possessions due to mold contamination; and plaintiff Courtney Cole has suffered the onset of serious and lasting illness related to her exposure to said mold, has suffered a diminution of her earning capacity related thereon, and has been and will continue to be forced to spend funds to treat her said illness.

Cole Complaint, ¶ 37.

According to the policies, "property damage" is defined as "physical injury to or destruction of tangible property," including "[its or any] resulting loss of use." Nationwide contends that the Coles' allegations of damages do not set forth "property damage" under the policies, but are instead "economic damages" or "pecuniary damages" for which there is no coverage. Nationwide further contends that the Coles' alleged damages were not caused by Walen's alleged misrepresentations, but were instead caused by actual water-related/mold problems and infestations that pre-existed the sale. Specifically, Nationwide asserts that "the alleged misrepresentations and sale – and any resulting loss of

use was attributable to the pre-existing condition of the property, not to the alleged misrepresentations." Nationwide's Mem. of Law in Support of Mot. for Summ. J., at 12-13. Walen argues that the underlying complaint "alleges property damage and bodily injury 'resulting from' the negligent misrepresentation, and therefore, Nationwide has a duty to defend and indemnify its insured, Mr. Walen." Walen's Mem. of Law in Support of Cross-Motion and Obj. to Nationwide's Mot. for Summ. J., at 13.

It is generally the case "that the measure of damages recoverable for misrepresentation, whether intentional or negligent, is actual *pecuniary* loss." Crowley v. Global Realty, Inc., 124 N.H. 814, 818 (1984). However, consequential damages may also be recoverable, to include physical injury, damage to other property, or expenses to which a plaintiff has been put. Id.; see also W. Prosser and W. Keaton, Torts § 110, at 769 (5th ed. 1984, Supp. 1988).

The Cole complaint alleges that "[a]s a direct and proximate result of the negligent misrepresentations made by [the] defendant[ ] Walen . . . in relation to the sale of the said property to the Coles, the plaintiff Coles sustained the damages set forth in paragraph 37." Cole Complaint, ¶ 46. The recitation of damages in paragraph 37 includes losses the Coles claim related to: the need to abandon their home; to pay for alternative housing; and to deal with the costs associated with remediation of mold contamination in the property and the water problems that led to the mold issues. Id., ¶ 37.

Though the Coles aver that the damages referenced immediately above were caused by the negligent misrepresentations, the great weight of authority

supports Nationwide's position that these claims of damage do not constitute causal "property damage" under the policies at issue here. See e.g., St. Paul Fire & Marine Ins. Co. v. Lippincott, 287 F.3d 703, 706 (8th Cir. 2002) (holding that the claimed negligent misrepresentations did not cause any property damage to the house, and that while "[t]he structural flaws in the house constitute tangible property damage . . . these flaws predate the occurrence of . . . misrepresentations by which the Lippincotts incurred liability"); Aluise v. Nationwide Mut. Fire Ins. Co., 615 S.E.2d 260, 268-70 (W.Va. 2005) (holding that the policy did not provide coverage for the alleged "property damage as a result of negligent repair and negligent failure to disclose" because they "sought damages for economic losses they sustained as a result of the negligent or intentional failure of the [defendants in the underlying suit] to disclose defects in the home at the time of the sale"); Boggs v. Great N. Ins. Co., 659 F.Supp.2d 1199, 1212 (N.D. Okla. 2009) ("Even assuming that the Boggses' alleged negligent misrepresentations [pertaining to defective fireplaces] are occurrences, they did not cause the property damage asserted in the Underlying Claims. . . . [S]everal other courts have determined that no coverage exists because misrepresentations do not cause the condition that was misrepresented.").

But see Jares v. Ullrich, 667 N.W.2d 843, 847-48 (Wis. App. 2003) (the underlying complaint of negligent misrepresentation deemed to have sufficiently alleged "property damage" and a "causation nexus" under the policy for purposes of determining the duty to defend issue through its allegations of "inability to occupy the property" with repair and restoration costs); Wood, 980 S.W.2d at 53

(determining that allegations in the underlying petition of flood water damaging a residence post-sale "sufficiently implicate[d] the 'loss of use' provision of the policy's definition of 'property damage,'" for purposes of finding a duty to defend); Sheets, 679 A.2d at 545 (concluding, with reference, however, to a broader definition of "property damage," that the loss of use of a septic system constituted "property damage" under the policy).

The Court concludes that the pertinent policies provide no coverage stemming from water/mold-type home defects/conditions that pre-existed the sale and which (though perhaps latent or emerging as a negative condition) were not caused by, or a result of, the alleged negligent misrepresentations themselves. These claimed losses, or forms of harm, do not constitute causally connected "property damage" as defined by the policies.

While Walen argues that the Cole complaint may be read as advancing some water-related property damage that occurred after the sale, perhaps prompting the discovery of the home defects/conditions, it remains the case, for purposes of insurance coverage, and insofar as the premises is concerned, that the claimed damages stem from, or were caused by, the claimed pre-existing defects/conditions, and not the alleged negligent misrepresentations themselves.

The Coles, however, also allege in the underlying complaint that their damages stemming from Walen's negligent misrepresentations encompass loss of "much of their personal property and household possessions due to mold contamination." Cole Complaint, ¶ 37. Here, the Court concludes that these injuries, as alleged, would constitute "physical injury or destruction of tangible

property," including "resulting loss of use" under the policies, caused by, or resulting from, the claimed wrongful conduct. After all, the Coles here complain of loss of, or damage to, property which they aver they brought to a premises which they would not have purchased, or been subjected to, absent Walen's negligent misrepresentations.

As earlier stated, the policies define "bodily injury" as "bodily harm, including resulting care, sickness or disease, loss of services or death," but "does not include emotional distress, mental anguish, humiliation, mental distress or injury, or any similar injury unless the direct result of bodily harm." In this case, the Coles allege that "Courtney Cole has suffered the onset of serious and lasting illness" upon being subjected to the mold in the home—something they claim would not have occurred but for the claimed negligent misrepresentations. Cole Complaint, ¶ 37. The Cole complaint sufficiently alleges "bodily injury" caused by an "occurrence" for coverage purposes.

The Cole complaint thus potentially gives rise to a covered claim encompassing both property and bodily injury damages. The Court now deals with the exclusions Nationwide raises.

(3) Exclusions

Nationwide argues that Walen is not entitled to coverage for "property damage" under either the homeowner's policy or the umbrella policy because the property was "in his care," or he "agreed to be responsible for it." Nationwide also contends that the personal umbrella policy excludes coverage for "bodily

injury" and "property damage" arising out of biological deterioration or damage, including mold.

Under the homeowner's policy, personal liability coverage does not apply to "property damage to property rented to, occupied or used by, **or in the care of** an insured." Nationwide's Mot. for Summ. J., Ex. B, Pgs. H1-H3 (emphasis added). Under the umbrella policy, liability coverage is excluded for property damage to "property owned by others when an insured has physical control of it, or **agreed to be responsible for it**." Id., Ex. C, Pgs. E1 (emphasis added). Nationwide contends that the facts establish that at the pertinent time here, the premises was in Walen's care, and he had agreed to be responsible for it. Walen argues that the exclusions do not apply.

At the outset, the Court observes that inasmuch as it has already determined that the policies do not provide coverage here for "property damages" to the premises stemming from claimed water/mold-type home defects/conditions that pre-existed the sale, and the "in the care of" and the "agreed to be responsible for it" exclusions pertain to "property damage" claimed to occur to the premises itself, any ruling that these exclusions apply, or that one of them applies, would represent an alternative basis for a finding of non-coverage for that "property damage." However, these exclusions do not bar coverage for the claimed damages to "property" the Coles brought into the premises—"property damages" as to which the Court has found coverage to exist. As discussed below, the Court concludes that neither of these exclusions negate coverage.

The Trust was executed on March 9, 2006. See Nationwide's Mot. for Summ. J., Ex. E, Pg. 1. Walen was named a trustee. Id. Under the terms of the Trust, the trustees,

> declare[d] and agree[d] with the said Donor that **they shall hold, manage, invest and administer the property which is now or hereafter may be transferred to them as such Trustees**, or in any way acquired and held hereunder, and will hold the proceeds of any insurance payable to the Trust IN TRUST for the purposes, in their manner, and with and subject to the powers and provisions herein contained as follows: . . . .

Id. (emphasis added).

Walen allegedly executed the "Seller's Statement of Property Condition" in January 2007. At that time, he did so per a power of attorney that allowed him to act for his father and mother. The premises later came to be part of the Trust, and was sold to the Coles in October 2007 with Walen's active involvement as a trustee in achieving the sale.

With respect to the "in the care of" exclusion, it is clear that when courts interpret liability policies that have a "care, custody, and control" exclusion, it is usually when the "insured is a contractor who has been sued by an owner of property on which work was being performed." Acadia Ins. Co. v. Peerless Ins. Co., 679 F.Supp.2d 229, 241 (D.Mass. 2010). "The New Hampshire Supreme Court has stated that whether property damage comes within the ambit of the 'care, custody, and control' provision depends upon the sufficiency of the evidence that the property was in the possessory, and not merely the proprietary, control of the insured at the time it was damaged. Moreover, this provision does not exclude property damage from coverage unless the insured exercised

exclusive control over the property at the time of the harm." Id. (citing United States Fidelity & Guar. Co., Inc. v. Johnson Shoes, Inc., 123 N.H. 148, 153 (1983)).

Here, Walen did not have "care" of the premises by himself, or individually, at the time of sale, when the claimed negligent misrepresentations allegedly were relied upon by the Coles to their detriment. Rather, the record is clear that, at that time, he and a co-trustee jointly owned the premises, and made joint decisions respecting it. Given these circumstances, and though Walen did himself carry out care-taking functions respecting the premises, the "in the care of" exclusion does not apply to bar coverage.

As to the umbrella policy, and its "agreed to be responsible for it" exclusion, again it is clear that, as one of two co-trustees of the Trust, Walen did not take on sole responsibility for the premises but accepted shared powers and responsibilities with another trustee. Walen's trustee status and associated assumption of duties thus does not amount to Walen's "agreeing to be responsible" for the property by himself. As Walen correctly points out, "[t]he [T]rust does not afford [him] unilateral or sole-decision making authority . . . because the responsibilities created by the [T]rust were bestowed upon the co-trustees as a unit instead of upon each individually." Walen's Mem. of Law in Support of his Cross Mot. for Summ. J. and Obj. to Nationwide's Mot. for Summ. J., at 18. The Court concludes that this exclusion does not bar coverage.

Lastly, Nationwide argues that the personal umbrella policy excludes coverage for both "bodily injury or property damage arising out of biological

deterioration or damage," and that the Coles' alleged injuries are attributable to exposure to mold as well as for any loss of use alleged to have resulted from remediation of biological deterioration or mold. Nationwide's Mem. of Law in Supp. of Obj. to Cross-Mot. for Summ. J. at 16. Walen contends that the underlying complaint includes damage allegations that are not encompassed within the biological deterioration or damage exclusion.

Whatever misrepresentations were made, along with other associated wrongful conduct, to get the Coles to buy the house, it is clear that a good deal of the damages that the Coles raise in their complaint arise out of water/mold defect conditions within the house, and thus constitute claims "arising out of" "damage or decomposition, breakdown, and/or decay of manmade or natural material due to the presence of fungi . . . mold, bacteria, wet or dry rot and any by-products of these organisms, however produced." Besides the damages alleged to have occurred respecting the premises itself, the property the Coles brought into the home is alleged to have been damaged by mold/water defect conditions; and Mrs. Cole's claimed illness problems is averred as stemming from exposure to mold.

The term "arising out of" is given broad and expansive reach, and has been defined to mean, in the contract context, "originating from, or growing out of or flowing from." Merrimack School Dist. v. Nat'l School Bus Serv., 140 N.H. 9,13 (1995) (quoting Carter v. Bergeron, 102 N.H. 464, 470-71 (1960)). Much of the damages alleged in the Cole complaint clearly fall within this exclusion.

Yet, the underlying complaint also broadly references damages stemming from "water problems," and it is not clear that these damages would entirely be covered by the exclusion. Accordingly, summary judgment may not be granted respecting this exclusion.

CONCLUSION

As explained above, the Court determines that Nationwide has a duty to defend, though the potential for it to indemnify is limited, and certain exclusions do not bar coverage. The Court also denies summary judgment respecting the umbrella policy exclusion due to the "biological deterioration or damage." Thus, the parties' motions are both **GRANTED IN PART** and **DENIED IN PART**, consistent with this Order.

So Ordered.

DATED: 7/22/11 ______________________________

John M. Lewis
Presiding Justice