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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2013

1120764

Owners Insurance Company

v.

Jim Carr Homebuilder, LLC, et al.

Appeal from Shelby Circuit Court
(CV-09-900247)

STUART, Justice.

Owners Insurance Company ("Owners") appeals a judgment entered by the Shelby Circuit Court declaring that Owners was obligated to pay an arbitration award entered against Jim Carr Homebuilder, LLC ("JCH"), under the terms of a commercial

general-liability ("CGL") insurance policy Owners had issued JCH. We reverse and remand.

I.

In January 2006, Thomas Johnson and Pat Johnson contracted with JCH, a licensed homebuilder, for the construction of a new house on Lay Lake in Wilsonville.[1] The Johnsons paid approximately $1.2 million for the design and construction of the house and took possession of the substantially finished house in early February 2007. Within a year, the Johnsons noted several problems with the house related to water leaking through the roof, walls, and floors, resulting in water damage to those and other areas of the house. The Johnsons notified JCH of the problems, and JCH apparently made some efforts to remedy them; however, the Johnsons were not satisfied with those efforts, and, on May 13, 2008, the Johnsons sued JCH, alleging breach of contract, fraud, and negligence and wantonness.[2]

[1]JCH acted as the general contractor on the project; it employed subcontractors to perform all the actual construction work.

[2]The Johnsons also sued the architectural firm that designed the house; however, their claims against that firm are not relevant to this appeal.

The Johnsons' contract with JCH required JCH to maintain general-liability insurance, and, during the relevant period, JCH held a CGL policy issued by Owners ("the Owners policy"). After receiving notice of the Johnsons' lawsuit, JCH filed a claim with Owners requesting that it provide a defense and indemnification for the Johnsons' claims. On July 21, 2008, Owners hired counsel to defend JCH while reserving its right to withdraw the defense if it later determined that the Johnsons' claims were not covered under the Owners policy. Subsequently, on September 12, 2008, Owners moved the trial court to allow it to intervene in the case for the limited purpose of determining whether there was in fact coverage for the Johnsons' claims.

On December 19, 2008, the trial court issued an order declining to rule on Owners' motion to intervene at that time but inviting Owners to reapply to intervene at "the appropriate time." On March 23, 2009, Owners instead filed the instant declaratory-judgment action asking the trial court to determine whether Owners had a duty to defend and indemnify JCH with regard to the Johnsons' claims. This action was assigned to the same trial judge presiding over the Johnsons'

action against JCH, and JCH and the Johnsons thereafter filed separate answers to Owners' complaint, asserting their own counterclaims and taking the position that Owners was required to defend and indemnify JCH for the Johnsons' claims.[3]

During this same time, the Johnsons' underlying action against JCH proceeded. On July 30, 2008, JCH, through its Owners-provided counsel, moved the trial court to compel arbitration of the Johnsons' claims pursuant to an arbitration provision in the construction contract entered into by the parties. The trial court granted that motion in the same December 19, 2008, order in which it had declined to grant Owners' petition to intervene. The Johnsons thereafter moved the trial court to reconsider its order compelling arbitration, and there was thereafter some delay, presumably related to the parties' reaching an agreement on the mechanics of arbitration. On September 24, 2010, the trial court entered an order noting that the parties had reached an agreement regarding arbitration and staying the case pending completion of the arbitration proceedings. On August 22,

[3]In its answer, JCH also asserted additional counterclaims against new parties, and those parties subsequently brought in additional parties. Those parties and claims are not relevant to the instant appeal.

2011, the trial court also stayed the instant case until the underlying case resolving the Johnsons' claims against JCH was completed.

The Johnsons' case against JCH proceeded to a final arbitration hearing on March 6, 2012, and, on March 13, 2012, the arbitrator entered an award in favor of the Johnsons in the amount of $600,000 based on the following findings:

> "a. That flashing was either not installed or was improperly installed by [JCH's] subcontractor in certain areas and has subjected other parts of the completed house to leaks, moisture, water intrusion, and damage resulting therefrom;
>
> "b. That the mortar and brick used on the house was not defective, but rather the brick was improperly prepared for installation by [JCH's] subcontractor, which resulted in excessive absorption of water from the mortar which thereby damaged the completed mortar and requires its replacement;
>
> "c. That the damaged mortar has subjected other parts of the completed house to leaks, moisture, water intrusion, and damage resulting therefrom;
>
> "d. That sufficient weep holes were not installed in the brick or else were covered by mortar by [JCH's] subcontractor, which has subjected other parts of the completed house to leaks, moisture, water intrusion, and damage resulting therefrom;
>
> "e. That certain windows and doors were not properly installed by [JCH's] subcontractor and have subjected other parts of the completed house to

> leaks, moisture, water intrusion, and damage resulting therefrom;
>
> "f. That certain windows and doors either were not caulked or were not properly caulked by [JCH's] subcontractor, which has subjected other parts of the completed house to leaks, moisture, water intrusion, and damages resulting therefrom;
>
> "g. That the exposed upper porches on the house were not properly installed and waterproofed by [JCH's] subcontractor, subjecting the completed porch ceilings and areas of the completed dining room to damage from leaks, moisture and water intrusion ...;
>
> "h. That part of the roofing was not properly installed by [JCH's] subcontractor, resulting in a small hole in the attic through which daylight is visible and in water damage to the completed roof decking;
>
> "i. That the completed window sill on the large 'great room' window has suffered visible water damage from water leaks;
>
> "j. That certain areas of the completed hardwood floors have suffered visible water damage from water leaks (to quote [JCH's] expert, even a 'blind monkey' could see this);
>
> "k. That a downstairs bathtub was not properly installed by [JCH's] subcontractor, resulting in leaks and resulting water damage to the completed wood subfloor below ...."

The arbitrator also found that the Johnsons had suffered "significant mental anguish." The trial court thereafter

entered a judgment in the underlying case consistent with the arbitrator's award. That judgment was not appealed.

On March 14, 2012, the day after the arbitrator returned its award in the underlying case, the Johnsons moved for a summary judgment in Owners' declaratory-judgment action, asking the trial court to enter a judgment declaring that the Owners policy did in fact cover the award entered against JCH. JCH thereafter filed its own summary-judgment motion seeking the same relief. On April 6, 2012, Owners filed its response to the motions filed by the Johnsons and JCH and simultaneously moved the trial court to enter a summary judgment in its favor. The trial court heard arguments on the outstanding summary-judgment motions on April 19, 2012, and, on May 25, 2012, granted the summary-judgment motions filed by the Johnsons and JCH, stating, in part:

> "It is hereby declared that the entire arbitrator award is covered by the Owners' policy and that Owners' duty to indemnify its insured is triggered. This court hereby orders [Owners] to fully indemnify [JCH] for the arbitrator award plus post-judgment interest running from the date of the arbitrator award."

Some additional claims among these and other parties remained outstanding until March 25, 2013, when the last of those

claims was dismissed, and on March 26, 2013, Owners filed this appeal.

II.

We review Owners' arguments on appeal pursuant to the following standard:

> "This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12."

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004).

III.

Owners first argues that the trial court erred by holding that Owners was required to indemnify JCH for the award entered against it because, Owners argues, the property damage

and bodily injury (i.e., mental anguish) upon which the award was based was not the result of an "occurrence" under the Owners policy and, by its terms, the Owners policy applies only if "[t]he 'bodily injury' or 'property damage' is caused by an 'occurrence' ...." The Owners policy further defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." We have previously considered the issue whether poor workmanship constitutes an occurrence and have held that, in each case, it depends "on the nature of the damage caused by the faulty workmanship." Town & Country Prop., L.L.C. v. Amerisure Ins. Co., 111 So. 3d 699, 705 (Ala. 2011). We explained this principle in further detail by comparing two cases involving claims based on faulty workmanship:

> "In [United States Fidelity & Guaranty Co. v.] Warwick [Development Co., 446 So. 2d 1021 (Ala. 1984)], the purchasers of a newly built house sued the builder, stating claims of faulty construction and misrepresentation, after taking possession of the house and discovering extensive defects in its construction. The builder then alleged a third-party claim against its insurer after it sought coverage for the purchasers' claims pursuant to a CGL policy, and its request for coverage was denied. At the conclusion of a trial on all those claims, the trial court awarded damages to the purchasers and held that the insurer was required to indemnify the builder for the purchasers' claims. On appeal,

however, this Court reversed the judgment against the insurer, stating:

> "'The first issue is whether [the insurer's] policy provided coverage for alleged faulty workmanship and noncomplying materials in the construction of plaintiffs' residence when the alleged damage was confined to the residence itself. [The insurer] contends that the policy affords no coverage because (1) no insurable loss occurred with the policy period and (2) damages to the work of the insured attributable to faulty workmanship are expressly excluded from coverage. After a review of the record and the policy involved, we conclude that the trial court incorrectly held that [the insurer] was bound under its policy of insurance to [the builder]. In our view, there was no "occurrence" within the definition of "occurrence" found in the pertinent policy provisions. The policy clearly states that the company will pay damages for: "A. bodily injury or B. property damage to which this insurance applies caused by an occurrence." The [insurer's] policy defines "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the Insured." For a contrary holding under circumstances amounting to "an occurrence," see Moss v. Champion Ins. Co., 442 So. 2d 26 (Ala. 1983).'

"Warwick, 446 So. 2d at 1023. Thus, Warwick held that faulty workmanship itself is not an 'occurrence.'

"In Moss [v. Champion Insurance Co., 442 So. 2d 26 (Ala. 1983)], however, a homeowner sued a contractor she had hired to reroof her house in order 'to recover for damage she allegedly incurred due to rain which fell into her attic and ceilings because, as she claimed, the roof was uncovered much of the time that the re-roofing job was being performed.' 442 So. 2d at 26. The contractor's insurer argued that it was not required to provide a defense or to pay any judgment against the contractor because, it argued, the damage was not the result of an occurrence and was therefore not covered under the contractor's CGL policy. Following a bench trial limited to deciding the insurance-coverage issue, the trial court ruled in the insurer's favor, holding that the damage to the homeowner's house was not the result of an occurrence. On appeal, we reversed the trial court's judgment, stating:

> "'That the attempt was made to keep the roof covered as the work progressed was established by the testimony of [the homeowner] herself. That it became insufficient was not attributable to [the contractor], who, for aught that appears from the evidence, did not intend the damage, and who by his personal efforts could not have reasonably foreseen the negligence of his crews in their failure to follow his instructions. [The homeowner's] complaint against him charged him with negligence (and breach of contract), not conscious acts made with intent to cause damage. His instructions establish his definite steps taken to prevent damage. And finally, after the "repeated exposure to conditions," the roof leaked. Thus, there was an "occurrence" under the policy, and the [insurer] is obligated by the terms of the policy to defend the [homeowner's]

> action and perform other duties contracted for thereunder.'
>
> "Moss, 442 So. 2d at 29. Thus, in Moss we held that there had been an occurrence for CGL policy purposes when the contractor's poor workmanship resulted in not merely a poorly constructed roof but damage to the plaintiff's attic, interior ceilings, and at least some furnishings. Reading Moss and Warwick together, we may conclude that faulty workmanship itself is not an occurrence but that faulty workmanship may lead to an occurrence if it subjects personal property or other parts of the structure to 'continuous or repeated exposure' to some other 'general harmful condition' (e.g., the rain in Moss) and, as a result of that exposure, personal property or other parts of the structure are damaged."

Town & Country, 111 So. 3d at 705-06.

JCH and the Johnsons latch onto the statement in the final paragraph of the above excerpt from Town & Country indicating that "faulty workmanship may lead to an occurrence if it subjects personal property or other parts of the structure to 'continuous or repeated exposure' to some other 'general harmful condition,'" 111 So. 3d at 706, to argue that there was an occurrence in this case because faulty workmanship related to the roof, windows, doors, brick, and mortar, etc., led to damage to other parts of the house such as the floor. However, this isolated statement from Town & Country must be considered in the context in which it was made

-- a discussion of Moss v. Champion Insurance Co., 442 So. 2d 26 (Ala. 1983), and United States Fidelity & Guaranty Co. v. Warwick Development Co., 446 So. 2d 1021 (Ala. 1984). That discussion makes it clear that faulty workmanship performed as part of a construction or repair project may lead to an occurrence if that faulty workmanship subjects personal property or other parts of the structure outside the scope of that construction or repair project "to 'continuous or repeated exposure' to some other 'general harmful condition'" and if, as a result of that exposure, that personal property or other unrelated parts of the structure are damaged. Hence, there was no occurrence in Warwick, where the builder's poor workmanship resulted in just a poor final product (the house itself), but there was an occurrence in Moss because the contractor's poor workmanship resulted not just in a poor final product (the new roof), but also in damage to the homeowner's personal property and other parts of the house outside the scope of the contractor's project -- the attic and interior ceilings. See also United States Fid. & Guar. Co. v. Bonitz Insulation Co. of Alabama, 424 So. 2d 569, 573 (Ala. 1982) ("If damage to the roof itself were the only damage

claimed by the [plaintiff], the exclusions would work to deny [the roofing contractor] any coverage under the [CGL] policy. The [plaintiff], however, also claims damage to ceilings, walls, carpets, and the gym floor. We think there can be no doubt that, if the occurrence or accident causes damage to some other property than the insured's product, the insured's liability for such damage becomes the liability of the insurer under the policy.").

In this case, it is evident that the facts are substantially identical to those in Warwick, in which we held that an insurer was not required to indemnify its insured homebuilder for damages stemming from an action alleging that a new house had been poorly constructed, because "there was no 'occurrence' within the definition of 'occurrence' found in the pertinent policy provisions." 446 So. 2d at 1023. Importantly, this case is not akin to Moss -- JCH was not hired to construct only a part of a house (such as a roof) and JCH's poor workmanship did not thereafter result in damage to other parts of the house outside the scope of the work JCH was hired to complete. Rather, the Johnsons contracted with JCH for JCH to build them a house, and any damage that resulted

from poor workmanship was damage to JCH's own product.[4] Accordingly, there was no occurrence, and the trial court erred by entering a summary judgment in favor of the Johnsons and JCH holding that Owners was required to indemnify JCH for the judgment entered against it in the underlying action.

IV.

Owners initiated a declaratory-judgment action against JCH and the Johnsons seeking a declaration that it was not obligated to indemnify its insured JCH for any judgment entered against it in the Johnsons' separate action alleging that the house JCH constructed for them was poorly built. After the Johnsons prevailed in their action against JCH, the trial court in the declaratory-judgment action entered a summary judgment holding that Owners was required to pay the judgment entered against JCH pursuant to the terms of the Owners policy. However, because JCH's faulty workmanship was not an occurrence, the trial court's judgment was in error, and it is hereby reversed. All other arguments raised by the

[4]We note also that the Owners policy differs from the CGL policy issued by Amerisure in Town & Country inasmuch as the Owners policy does not contain the "subcontractor exception" described in Town & Country, 111 So. 3d at 705.

parties on appeal are accordingly pretermitted and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Moore, C.J., and Parker, Shaw, and Wise, JJ., concur.