RENDERED: JULY 27, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000653-MR

JAMES MATT RYAN — APPELLANT

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 06-CI-00465

ACUITY, A MUTUAL INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: James Matt Ryan appeals from a summary judgment of the Grant Circuit Court finding that Acuity, a Mutual Insurance Company, did not have a duty to defend or indemnify for property damage caused by its insureds, Dan Martin, Dan Martin Construction, and Romart Development, LLC (collectively Martin) and dismissing Ryan's third-party complaint against Acuity.

We agree that, under Kentucky law, Ryan's claims against Martin are not "occurrences" under the Acuity commercial general liability (CGL) policy terms and, therefore, Acuity has no duty to defend or indemnify. Consequently, as a matter of law, Ryan's claims against Acuity were properly dismissed.[1]

Martin and Ryan executed a contract for the construction of a residence in Williamston, Kentucky, for cost plus twenty percent. After Martin constructed the residence, a certificate of occupancy was issued by the Grant County building inspector and Ryan took possession.

In November 2006, Martin filed an action against Ryan for breach of contract, unjust enrichment and promissory estoppel arising from a breach of the construction contract. Ryan filed a counterclaim against Martin asserting claims for breach of contract, failure to perform in a workmanlike manner, and negligence in regard to the construction of the residence. The counterclaim further alleged violations of the applicable building codes. Specifically, the counterclaim alleged that Martin negligently graded the building lot causing excessive pressure on the residence's foundation enhanced by a lateral displacement of the driveway. As a result, cracks formed in the poured foundation permitting excessive water to enter the residence.

[1] To sustain his allegations, Ryan would necessarily have to establish coverage under the CGL policy. KRS 304.12-230. We make no comment regarding the viability of Ryan's claim if there was coverage.

Martin demanded that Acuity defend against Ryan's claims and indemnify it based on a CGL insurance policy issued to Martin by Acuity. The present controversy concerns the following policy terms:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of *bodily injury* or *property damage* to which the insurance applies. We will have the right and duty to defend the insured against any *suit* seeking those damages. However, we will have no duty to defend the insured against any *suit* seeking damages for *bodily injury* and *property damage* to which this insurance does not apply.
>
> ...
>
> This insurance applies to *bodily injury* or *property damage* only if:
>
> (1) The *bodily injury* or *property damage* is caused by an *occurrence* that takes place in the coverage *territory;* [and]
>
> (2) The *bodily injury* or *property damage* occurs during the policy period....
>
> ...
>
> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

Relying on the terms of the policy issued to Martin, Ryan filed a third-party complaint against Acuity alleging bad faith and a violation of the Unfair Settlement Claims Practice Act. Acuity answered and filed a cross-claim with its action for declaratory judgment. Subsequently, it moved to bifurcate and stay discovery pending the outcome of the original action.

Acuity moved for summary judgment seeking a declaration that the CGL policy did not provide coverage for the claims alleged by Ryan because there was no "occurrence" as defined in the policy and, therefore, it had no duty to defend or indemnify Martin. It further alleged that certain exclusions in the policy applied. Ryan opposed the motion and filed a cross-motion for summary judgment maintaining that consequential property damage to the residence caused by faulty workmanship is an occurrence and that no policy exclusion applied. After Martin responded to Ryan's motion, the trial court granted Acuity's motion for summary judgment. This appeal followed.[2]

Our review of a trial court's determination made by summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky.App. 1996). The law applicable to interpretation of an insurance contract is concisely stated:

> As a general rule, interpretation of an insurance contract is a matter of law for the court. While ambiguous terms are to be construed against the drafter and in favor of the insured, we must also give the policy a reasonable interpretation, and there is no requirement that every doubt be resolved against the insurer. Finally, the terms should be interpreted in light of the usage and understanding of the average person.

Stone v. Kentucky Farm Bureau Mut. Ins. Co., 341 S.W.3d 809, 810-811 (Ky.App. 2000) (citations omitted).

[2] Acuity provided Martin a defense under a strict reservation of rights pending a determination by the trial court as to whether indemnification was owed for some or all of Ryan's claims.

During the pendency of this action in the trial court, our Supreme Court reviewed an insurance policy issued to a homebuilder containing identical terms as the Acuity policy. That decision, *Cincinnati Ins. Co. v. Motorist Mut. Ins. Co.*, 306 S.W.3d 69 (Ky. 2010), is pivotal to the parties' arguments. Therefore, we begin with an analysis of the Supreme Court's holding.

In *Cincinnati Ins. Co.*, the homeowners filed an action against the homebuilder alleging latent structural defects caused by faulty workmanship by the builder or its subcontractors. Interpreting the policy provisions, the Court held that faulty workmanship was not an occurrence. Its analysis focused on the distinction between an "occurrence" and an "accident."

In accordance with the rules of insurance contract interpretation, the Court applied the plain meaning of the term "accident" and stated that "[i]nherent in the plain meaning of 'accident' is the doctrine of fortuity." *Id*. at 74. It explained that the concept of fortuity consists of two aspects: intent and control. *Id*. To be fortuitous, harm must be unintended and caused by an event beyond the insured's control. *Id*. at 76.

The Court first examined the intent aspect: It held that in the context of a CGL policy, intent cannot be the determinative factor. Although it is inherent in all liability policies that the insured cannot intend a loss, the Court properly observed that in the context of construction, a contractor's intent to perform shoddy work cannot be the predominate factor. Because a contractor would rarely intend to perform defective work, CGL policies would provide coverage for nearly

all faulty workmanship. *Id*. at 74. The Court recognized the broad ramifications of such a holding:

> [I]nsurance policies would become performance bonds or guarantees because any claim of poor workmanship would fall within the policy's definition of an accidental occurrence so long as there was not proof that the policyholder intentionally engaged in faulty workmanship. This is a point made by other courts. Instead, we agree with the Supreme Court of South Carolina that refusing to find that faulty workmanship, standing alone, constitutes an "occurrence" under a CGL policy ensures that ultimate liability falls to the one who performed the negligent work... instead of the insurance carrier. It will also encourage contractors to choose their subcontractors more carefully instead of having to seek indemnification from the subcontractors after their work fails to meet the requirements of the contract.

Id. at 75. (internal footnotes and quotations omitted).

To effectuate the policy language and its purpose, the Court focused on the concept of control in the fortuity doctrine. Quoting 46 C.J.S. *Insurance* § 1235 (2009), the Court defined a fortuitous event as one that is "beyond the power of any human being to bring…to pass, [or is]…within the control of third persons[.]" *Id*. at 76. It is a chance event. *Id*.

The Court adopted the majority view and held that "a claim for faulty workmanship, in and of itself, is not an 'occurrence' under a commercial general liability policy because a failure of workmanship does not involve the fortuity required to constitute an accident." *Id*. at 79-80 (citation omitted). The Court distinguished *Bituminous Cas. Corp. v. Kenway Contracting, Inc*., 240 S.W.3d 633 (Ky. 2007), where it was held that a contractor's actions constituted an

"occurrence" under a CGL policy because it was not the plan, design, or intent of the insured to damage the property. It pointed out that in *Bituminous*, the contractor improperly demolished over half of a residence in a "short flurry of activity on only one day" and was "a completely different undertaking than the protracted improper construction of a residence." *Id*. at 77.

Although Ryan's claims are for faulty workmanship in the construction of a residence and despite the language used by our Supreme Court, Ryan distinguishes his allegations from those presented in *Cincinnati Ins. Co*. He argues that the CGL policy provides coverage where there is damage to otherwise non-defective components and not defective construction standing alone. His argument is based on the Court's final footnote where it acknowledged that "it appears as if a general rule exists whereby a CGL policy would apply if the faulty workmanship caused bodily injury or property damage to something other than the insured's allegedly faulty work product." *Id*. at 80 n. 45 (citing 9A *Couch on Insurance, Third Edition* § 129:4 (2009)). He emphasizes that he does not claim that the residence was improperly constructed but that the damages were caused by faulty site preparation and the driveway location.

Ryan misinterprets *Cincinnati Ins. Co.* Martin had control of and contracted to construct the entire home. Martin's grading of the lot, pouring the driveway and constructing the concrete foundation was within the scope of work under the construction contract and, therefore, was its work product. Likewise, Martin's

decision to build on the lot without consulting an engineer was part of Martin's work.

On appeal, Ryan argues that his claim for "property damage" includes damage to personal property caused by water seeping into the residence. Therefore, he contends that there was damage to property other than the defective work product. He relies on the South Carolina Supreme Court's opinion in *Crossman Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011), where the Court held that "negligent or defective construction resulting in damage to otherwise non-defective components may constitute 'property damage,' but the defective construction would not."

After review of the record, we agree with Acuity that Ryan did not present his argument to the trial court that damage to his personal property was sufficient to trigger coverage under the CGL policy. Although he asserted a general claim for "property damage," his allegation is insufficient to preserve the issue for review.

Generally, a new theory or specific ground of error cannot be presented for the first time on appeal. The rule was explained in *Giddings & Lewis, Inc. v. Industrial Risk Insurers*, 348 S.W. 3d 729, 743-744 (Ky. 2011):

> This Court has long held that a party may not argue one theory to the trial court and then a different theory to an appellate court, which is "without authority to review issues not raised in or decided by the trial court." *Ten Broeck Dupont, Inc. v. Brooks,* 283 S.W.3d 705, 734 (Ky. 2009). Recently, in *Fischer v. Fischer,* 348 S.W.3d 582 (Ky. 2011), this Court refused to

> consider an appellee's argument, which while similar to one made to the trial court, was not specifically argued to the trial court. As we noted, "when a movant states specific grounds... to the trial court, the court rules on those grounds. The court's decision, then, is essentially a denial of the movant's specific argument—of the grounds argued." The Court reiterated, "Specific grounds not raised before the trial court, but raised for the first time on appeal will not support a favorable ruling on appeal."

In *Giddings*, the Court was requested to consider the argument that "other property" was damaged and, therefore, the economic loss rule was not applicable. The Court held that the error was not preserved because the damage to "other property" was merely referenced in depositions and there was no specific claim for damage to property, other than to the product purchased, presented to the trial court. *Id*. at 744.

We are compelled to reach the same conclusion. Ryan's claim and argument before the trial court related only to "property damage" in the context of damage to the driveway and residence as result of Martin's faulty workmanship. On appeal, he does not state what personal property was damaged. "Property damage" cannot be read to include injury to personal property when used only in reference to damages to Ryan's real property. Because the legal argument that coverage for personal property is covered under the CGL policy was not presented to the trial court, we decline to address that issue in this Court.[3]

[3] We have not overlooked the Court's footnote in *Giddings*, where it indicated that the economic loss rule may apply where the damage to "other property" is *de minimus*. *Id*. at 744, n. 10. The same reasoning logically could apply in the context of a CGL policy. Additionally, there is authority that damage that is a "natural and ordinary consequence" of the faulty work is not accidental. *See Westfield Ins. Co. v. Sheehan Const. Co., Inc*., 580 F.Supp.2d 701 (S.D. Indiana 2008).

Finally, Ryan argues that the trial court's interpretation of the CGL policy is against public policy and renders the policy unconscionable. Quoting *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 621 S.W.2d 33, 37 (2005), our Supreme Court expressly stated to the contrary:

> [R]efusing to find that faulty workmanship, standing alone, constitutes an "occurrence" under a CGL policy ensures that ultimate liability falls to the one who performed the negligent work…instead of the insurance carrier. It will also encourage contractors to choose their subcontractors more carefully instead of having to seek indemnification from the subcontractors after their work fails to meet the requirements of the contract.

Cincinnati Ins. Co., 306 S.W.3d at 75 (internal quotations and footnotes omitted).

Likewise, *Cincinnati Ins. Co.* is decisive on the unconscionability issue.[4] The doctrine of unconscionability is a narrow exception to the general rule that parties have right to contract freely and "directed against one-sided, oppressive and unfairly surprising contracts[.]" *Louisville Bear Safety Serv. v. South Central Bell Tel. Co.*, 571 S.W.2d 438, 440 (Ky.App. 1978). In *Cincinnati Ins. Co.*, the Court held that a CGL policy that limits coverage to an "occurrence" combined with the policy's definition of *occurrence*, is "an unequivocal, conspicuous and plain and clear manifestation of the company's intent to exclude coverage…." *Cincinnati Ins. Co.,* 306 S.W.3d at 79 (quoting *James Graham Brown Foundation Inc. v. St. Paul Fire & Marine Co*., 814 S.W.2d 273, 277 (Ky. 1991)). As interpreted by our Supreme Court, the Acuity policy is not unconscionable.

[4] Acuity challenges Ryan's standing to argue that the insurance policy was unconscionable when it was not a party to the contract between Acuity and Martin. Because *Cincinnati Ins. Co.* unequivocally negates Ryan's argument, we dispose of the argument based on that case.

The CGL policy contains certain exclusions which Acquity maintains preclude coverage for the alleged property damage to the residence. However, as stated by the Court in *Cincinnati Ins. Co.*, we need not "consider the applicability of the exclusion if there is no initial grant of coverage under the policy." *Id*. at 78, n. 35.

Based on the foregoing, the judgment of the Grant Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert N. Trainor
Covington, Kentucky

BRIEF FOR APPELLEE:

Timothy B. Spille
Covington, Kentucky