

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001428-MR

ACUITY, A MUTUAL INSURANCE COMPANY

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 09-CI-01276

MARTIN/ELIAS PROPERTIES, LLC

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: MAZE, NICKELL AND STUMBO, JUDGES.

NICKELL, JUDGE: Acuity, a Mutual Insurance Company, has appealed from the Kenton Circuit Court's January 20, 2012, entry of partial summary judgment in favor of Martin/Elias Properties, LLC. The judgment determined Acuity had a duty to defend or indemnify for property damage caused by its insureds, Tony Gosney and Tony Gosney d/b/a/ Creative Concrete (herein collectively referred to

as “Gosney”). Acuity further appeals from the final judgment entered on July 18, 2013. Following a jury trial, the trial court denied Acuity’s motion to void its coverage of the Gosney defendants and ordered Acuity to pay damages to Martin/Elias in the amount of \$472,769.50. Following a careful review, we agree with Acuity. Under prevailing Kentucky law, Martin/Elias’s claims against Gosney are not “occurrences” under the terms of Acuity’s commercial general liability (“CGL”) policy. As a result, Acuity was under no duty to defend or indemnify as no coverage for the alleged damages was triggered. Thus, as a matter of law, the trial court erred in failing to grant summary judgment in favor of Acuity on the coverage issue. Consequently, reversal and remand is required.

In 2005, Martin/Elias Properties purchased a dilapidated home located at 630 Garrard Street, Covington, Kentucky, with the intention of performing a historical restoration and selling the property for a profit. Over the next several years, the century-old residence was extensively renovated and repaired. On May 9, 2008, Martin/Elias Properties contracted with Gosney to perform work on the property. The scope of work called for Gosney to excavate and lower the elevation of the basement floor to gain more ceiling height, underpin the existing foundation, then finish the lowered basement floor. The purpose of this work was to gain more useable square footage within the existing footprint of the home. Representatives from Martin/Elias Properties met with Gosney prior to entering the contract to discuss proper procedures to be used to complete the project. Gosney began the

work on May 15, 2008. It is undisputed Gosney did not perform the desired work in the manner contemplated and discussed at the pre-contract meeting.

About three to four days after Gosney commenced excavating the basement, problems arose with the foundation of the home along the north wall. Upon inspection by representatives of Martin/Elias Properties, it was revealed Gosney had removed a significant portion of the dirt underlying the existing foundation, but failed to add additional support to carry the weight of the home, thereby allowing the foundation—and thus the wall above it—to slump a noteworthy distance. As a result of the failure of the foundation, major structural problems ensued. Gosney placed Acuity on notice of the potential claim against his CGL policy in a timely manner.

After consulting with a structural engineer, Martin/Elias Properties placed temporary support posts in the basement, added concrete blocks under the north wall foundation, ceased all work activities, severed utility connections to the property and vacated the home. Estimates of the cost to stabilize the home exceeded \$250,000.00, and the cost to completely restore the property was estimated to exceed \$787,000.00. Professional real estate appraisers would later value the residence at approximately \$525,000.00 immediately prior to the damage occurring.

On April 29, 2009, Martin/Elias Properties filed the instant action against Gosney alleging negligence, gross negligence, breach of contract and

breach of warranty all arising from the faulty workmanship performed on the Garrard Street property. Martin/Elias Properties also asserted claims against Acuity for bad faith and fraud, but these claims were ultimately stayed pending resolution of the claims levied against Gosney. On March 23, 2011, Acuity filed a cross-claim against Gosney seeking to have the trial court determine whether Acuity was obligated to indemnify or defend Gosney in the suit based on language contained in the CGL policy. The policy contained the following terms relevant to the current dispute:

1. Business Liability

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of *bodily injury, property damage or personal and advertising injury* 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, property damage or personal and advertising injury* to which this insurance does not apply. We may at our discretion investigate any *occurrence* or offense and settle any claim or *suit* that may result.

.....

- b. This insurance applies:
 - (1) To *bodily injury or property damage* only if:
 - (a) The *bodily injury or property damage* is caused by an *occurrence* that takes place in the coverage *territory*; and

(b) The *bodily injury* or *property damage* occurs during the policy period. . . .

(Emphasis in original). The policy defined “*occurrence*” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Acuity contended its CGL policy did not provide coverage for the claims asserted against Gosney because the claims against him for negligence, breach of contract and breach of warranty all flowed from a theory of faulty workmanship and therefore could not constitute an “accident” or “occurrence” under provisions of the policy.

Martin/Elias Properties and Acuity filed cross motions for summary judgment on the issue of coverage under the CGL policy issued to Gosney. On January 20, 2012, the trial court denied Acuity’s motion and granted Martin/Elias Property’s motion in part. The trial court opined Acuity’s policy provided coverage for a portion of the damages caused by Gosney’s defective work. Specifically, the trial court held “the damage done to the dwelling above the foundation would be covered by the commercial general liability policy issued by Acuity. However, the Policy would not cover damage to the basement or the foundation itself, as that would be part of the work product of the Defendant Gosney.”

The matter proceeded to a jury trial. Acuity could not participate in the trial as the claims against it had previously been stayed. Gosney did not appear or

participate in any way in defending the action at trial nor did he assist in any preparation for the trial. Counsel had, in fact, been unable to contact Gosney following his deposition given in this matter in September 2009.¹ The jury returned a verdict in favor of Martin/Elias Properties. In its verdict, the jury determined the cost of repairs of the entire home was \$700,000.00, the cost to repair only the basement and foundation was \$227,230.50, the fair market value of the property immediately prior to Gosney beginning the excavation of the basement was \$500,000.00, and the fair market value of the house immediately after the excavation was \$0.00. The parties agreed the proper measure of damages was the lesser of the cost to repair the home or the diminution in fair market value of the home caused by the defective excavation work. Therefore, the trial court entered judgment in favor of Martin/Elias Properties against Gosney in the amount of \$500,000.00.²

In post-trial motions, Acuity sought a determination of the amount of the judgment it was required to pay based on the trial court's earlier ruling on coverage, alleging its total liability should be capped at \$337,500.00. Acuity also argued Gosney's failure to defend the action constituted a breach of the policy terms sufficient to void all coverage under the terms of the CGL policy.

¹ Counsel indicated a private investigator had been hired to locate Gosney but was unsuccessful.

² It appears during the pendency of the action below, Gosney filed for bankruptcy protection and received a discharge of his debts, including any liability on the pending claims of Martin/Elias Properties. Thus, recovery by Martin/Elias Properties would be limited to amounts collectible under Acuity's CGL policy.

On July 18, 2013, the trial court entered partial judgment against Acuity—reserving judgment on Martin/Elias Property’s bad faith claims. The trial court denied Acuity’s motion seeking to void coverage based on Gosney’s absence at trial, and then set Acuity’s liability at \$472,769.50, the amount the trial court believed the jury had determined would be necessary to repair the “covered” damages above the foundation. Acuity timely appealed both the trial court’s denial of its summary judgment motion related to coverage and the July 18, 2013, partial judgment.

In *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69, 76 (Ky. 2010), the Supreme Court of Kentucky held unequivocally that “claims of faulty workmanship, standing alone, are not ‘occurrences’ under CGL policies.” In its analysis, the Supreme Court concluded “[i]nherent in the plain meaning of ‘accident’ is the doctrine of fortuity.” *Id.* at 74. “Indeed, ‘[t]he fortuity principle is central to the notion of what constitutes insurance. . . .’” *Id.* The Court observed a loss was fortuitous only when “not intended. . . .” *Id.* (citing *Aetna Cas. & Sur. Co. v. Commonwealth*, 179 S.W.3d 830, 836 (Ky. 2005)). The harm must also be caused by an event outside the insured’s control. Since a contractor controls his construction project—either directly or through the subcontractors he chooses—the Supreme Court concluded substandard construction could not be considered unintended or fortuitous. Because faulty workmanship could not be deemed to have been undertaken accidentally, the Court determined the homeowners’ claim

was not covered by the contractor's CGL policy. To hold otherwise would be tantamount to converting CGL policies into

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 footnote 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 "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), which held 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 the claims presented by Martin/Elias Properties are for faulty workmanship in Gosney's performance of the excavation of the residence and despite the language used by our Supreme Court, Martin/Elias Properties distinguishes its allegations from those presented in *Cincinnati Ins. Co.* It argues the CGL policy provides coverage where there is damage to otherwise non-defective components and not defective construction standing alone. This argument is based on the Court's final footnote acknowledging "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)). The trial court apparently agreed with Martin/Elias Properties' position when it ruled Martin/Elias Properties could only recover for damages done to the structure above the foundation. Martin/Elias Properties emphasizes its argument that the damages to the remainder of the home were an accidental by-product of Gosney's negligent digging under the foundation.

The Supreme Court's holding in *Cincinnati Ins. Co.* governs the issue before us. Martin/Elias Properties misinterprets the holding of that case. Gosney had control of and contracted to construct a new foundation under the entire home. Gosney's stabilization of the home, excavation of the basement floor, underpinning and construction of a new concrete foundation were all within the scope of work and, therefore, were his work product. Likewise, Gosney's decision to undertake the project without consulting an engineer was part of Gosney's work.

Martin/Elias Properties alleged it suffered collateral injury to its property by Gosney's improper excavation of the basement floor and removal of material from beneath the structure's foundation. Martin/Elias Properties did not allege there had been an accident. It likewise did not allege Gosney intentionally performed shoddy work or inflicted damage upon the structure. It merely alleged Gosney's substandard workmanship had caused damage throughout the structure.

Interpretation of a contract is ordinarily a matter of law for a court's determination. *See Cantrell Supply, Inc. v. Liberty Mutual Ins. Co.*, 94 S.W.3d 381 (Ky. App. 2002). Since the allegedly substandard workmanship undertaken in this case cannot be considered unintended or fortuitous as a matter of law, there are no material facts in dispute. Based on the current state of the law, we conclude there was no "occurrence" which would trigger coverage under the CGL policy for the claims asserted against Gosney by Martin/Elias Properties. Consequently, Acuity was entitled to summary judgment, and the trial court erred in failing to grant

judgment in its favor. Thus, we are constrained to reverse and remand this matter for entry of an appropriate judgment consistent with this Opinion.

Based on our determination that coverage under the CGL policy was not triggered by an “occurrence,” we need not reach Acuity’s argument related to Gosney’s failure to participate in defending the action and whether such failure constituted a breach of the CGL policy terms. We also need not discuss Acuity’s contentions of error regarding the trial court’s decision in its partial judgment related to the proportion of damages Acuity was required to pay. We take no position and make no comment as to the accuracy or viability of either of these arguments.

Finally, we realize our decision is likely to lead to the complete financial burden of repairing the substantial damages to this historical residence resting on Martin/Elias Properties, especially in light of Gosney’s bankruptcy and ultimate disappearance. Such result may seem harsh and unjust. Nevertheless, we are constrained by the language of the CGL policy and the precedents interpreting this precise language. It is the law that leads us to this lamentable result.

For the foregoing reasons, the judgment of the Kenton Circuit Court is reversed and remanded for entry of a judgment in favor of Acuity.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Judd R. Uhl
Katherine L. Kennedy
Ft. Wright, Kentucky

BRIEF FOR APPELLEE:

Paul R. Boggs III
David A. Schulenberg
Fort Mitchell, Kentucky