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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2012-2013

1100009

Town & Country Property, L.L.C., and Town & Country Ford, L.L.C.

v.

Amerisure Insurance Company and Amerisure Mutual Insurance Company

Appeal from Jefferson Circuit Court, Bessemer Division (CV-07-1417)

On Application for Rehearing
Following Opinion on Return to Remand

STUART, Justice.

The opinion of June 29, 2012, is withdrawn, and the following is substituted therefor.

Town & Country Property, L.L.C., and Town & Country Ford, L.L.C. (hereinafter collectively referred to as "T&C"), appealed the summary judgment entered by the Jefferson Circuit Court in favor of Amerisure Insurance Company and Amerisure Mutual Insurance Company (hereinafter collectively referred to as "Amerisure") holding that Amerisure was not obligated to pay a $650,100 judgment entered on a jury verdict in favor of T&C and against Amerisure's insured, Jones-Williams Construction Company, because, the trial court reasoned, the faulty construction of the T&C facility upon which the judgment was based was not an "occurrence" covered under the commercial general-liability ("CGL") insurance policy Amerisure had issued Jones-Williams. On October 21, 2011, we affirmed in part the judgment entered by the trial court, agreeing that faulty construction did not in and of itself constitute an occurrence for CGL-policy purposes and that, accordingly, "Amerisure was not required to indemnify Jones-Williams for the judgment entered against it insofar as the damages represented the costs of repairing or replacing the

faulty work." Town & Country Prop., L.L.C. v. Amerisure Ins. Co., [Ms. 1100009, October 21, 2011] ___ So. 3d ___, ___ (Ala. 2011) ("Town & Country I"). However, we further recognized in Town & Country I that if damages had been awarded T&C to compensate it for damage the faulty construction later caused to personal property or some otherwise nondefective portion of the T&C property, then "[t]hat damage would constitute 'property damage' resulting from an 'occurrence,' and it would be covered under the terms of the Amerisure policy ...." __ So. 3d at ___. 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."). Accordingly, we remanded the case for the trial court to review the record and to determine if any

portion of the awarded damages could be justified on that basis.

On remand, the parties filed briefs with the trial court taking predictable positions: T&C argued that the vast majority of the $650,100 judgment should be attributed to covered damage, while Amerisure argued that the damages T&C sought for the repair and/or replacement of defective construction exceeded the amount of the verdict and thus none of the judgment should be attributed to covered damage to personal property or other portions of the T&C property. In its order resolving the issue on remand, the trial court identified $257,500 in damages claimed by T&C at trial as representing the repair or replacement of faulty construction. It therefore subtracted that amount from the $650,100 awarded by the jury and awarded T&C $392,600, plus interest and costs.

Upon a review of the record, it is evident that the $392,600 judgment entered by the trial court is not supported by the evidence. In its brief on return to remand, T&C argues that the trial court's judgment entered on remand is justified as follows:

> "The record evidence showed that -- because of the faulty construction -- water would leak into the

> building through doors, windows, walls, and floors. In addition, the parking lot, retaining wall, and other areas of the building suffered damage from settlement and erosion. Consequently, the water intrusion, settlement, and erosion caused extensive damage to several parts of the structure and to items that were otherwise sound.[4]
>
> _____
>
> "[4]These intrusions caused damage to floors, floor coatings, walls, carpet, hallways, furniture, computers, ceiling tiles, insulation, the electrical box, paint of interior and exterior walls, and caused foul odors and stains. Soil settlement and erosion caused by water infiltration have caused widespread damage throughout the T&C facility, causing floor cracks and peeling in the showroom, the parts and service department, the lobby, 'alligator cracks' to the vehicle display pad, and failure of the outer retaining walls. The floors in some areas of the building have become 'mushy' because of the repeated water intrusion caused by faulty construction, and are arguably unstable. Wind and storm damage caused cracks to the building structure itself."

T&C's brief on return to remand, pp. 6-7 (citations to record omitted). However, it is apparent that much of the damage itemized by T&C in this regard is itself faulty workmanship for which Amerisure is not obligated to indemnify Jones-Williams. Moreover, although there was testimony indicating that carpet, computers, furnishings, and certain fixtures were also damaged -- which damage might be attributable to an occurrence and thus be covered under the CGL policy -- no

evidence was presented of the cost required to repair that damage, and, accordingly, no portion of the awarded damages may be considered compensation for that damage.[1] See Parsons v. Aaron, 849 So. 2d 932, 949 (Ala. 2002) ("[D]amages may not be awarded where they are remote or speculative. A jury must have some reasonable basis for the amount of its award.").

In Town & Country I, we held that the cost of repairing faulty or defective construction itself was not covered by the terms of the CGL policy. With one minor exception discussed below, our review of the materials submitted to the trial court in the present case indicates that no evidence was introduced in the underlying trial as to the cost of repairing anything other than the defective construction itself. To the contrary, the only evidence as to the monetary amount of any damage suffered by the insured was the testimony of T&C's own

[1]It appears that T&C did not focus on proving this property damage at trial, instead emphasizing the larger amount of damages it sought to repair and/or replace the faulty construction that led to the damaged furnishings, etc. See Town & Country I, ___ So. 3d at ___ n. 5 ("Amerisure acknowledges that there was some testimony at the trial of T&C's action against Jones-Williams regarding damaged furnishings but states that T&C's counsel did not ask the jury for any damages related to those claims, instead asking for an award equal to the amount T&C's expert testified it would take to replace and repair the faulty work.").

construction-defect expert who testified in the underlying trial that it would cost $751,346 to repair or replace the defective work at issue. Moreover, T&C's argument to the jury in the underlying trial was that this amount was the amount the jury should award in damages. The jury awarded just over $650,000 in damages.

The only evidence of specific property damage caused by an occurrence identified by either the parties or the trial court and accompanied by evidence of a specific cost associated with repairing or replacing that damage concerns certain ceiling tiles. Amerisure concedes that there was testimony that nondefective ceiling tiles damaged by roof leaks had to be replaced at a cost of $600. The damage to the ceiling tiles is property damage caused by an occurrence, and, accordingly, T&C is entitled to damages in the amount of $600. The judgment entered by the trial court on remand is accordingly reversed, and the cause is again remanded for the trial court to enter a final judgment in favor of T&C for $600.

APPLICATION FOR REHEARING OVERRULED; OPINION OF JUNE 29, 2012, WITHDRAWN; OPINION SUBSTITUTED; REVERSED AND REMANDED.

Malone, C.J., and Woodall, Bolin, Parker, Shaw, Main, and Wise, JJ., concur.

Murdock, J., concurs specially.

MURDOCK, Justice (concurring specially).

I.

The main opinion states that "[t]he only evidence of specific property damage caused by an occurrence identified by either the parties or the trial court and accompanied by evidence of a specific cost associated with repairing or replacing that damage" is $600 worth of damage to certain ceiling tiles. ___ So. 3d at ___. I agree.

I note that the construction-defect expert offered by Town & Country Property, L.L.C., and Town & Country Ford, L.L.C. (collectively "T&C"), Mark Moore, testified on pages 254-55 of the trial transcript, Record Vol. 7, p. 1205, that the cost of replacing "the blanket insulation" in the "pre-engineered" portion of the building (the rear of the building, which housed, among other things, the parts and maintenance areas) would be $52,500. Just prior to making this particular statement, Moore had stated, on page 253 of the transcript, that "the blanket insulation" would cost $52,000 to replace. In addition to using the same term to describe the insulation at issue, this earlier statement also was made in the context of questions regarding the correction

of defects in the "pre-engineered" roof over the rear of the building.

T&C suggests that the $52,000 first referenced by Moore was intended as a separate amount, one that related to the replacement of insulation in the front portion of the building (the office and showroom area), as opposed to the replacement of insulation over the rear portion of the building. As such, according to T&C, the damage represented by that figure would represent "property damage" resulting from an "occurrence," namely rainwater damage to a part of the structure other than the defectively constructed portion of the structure (the roof) that allowed the rainwater to penetrate.

I have considered whether T&C's interpretation of Moore's testimony is appropriate, i.e., whether we can and should conclude from Moore's testimony that one of these two similar amounts may be attributed solely to the cost of replacing insulation in the front of the building that was damaged by rainwater and that was not itself part and parcel of a defectively installed roof. I cannot conclude that we can. As noted, Moore refers to both figures as the cost of replacing "the blanket insulation." Further, both statements

are made in the context of or with express reference to the "pre-engineered" rear of the building. Further still, the inclusion of an additional $52,000 would make it impossible to reconcile mathematically the sum of the individual repair and replacement costs listed by Moore throughout his testimony with the $751,346 total cost of repairs Moore himself calculates after listing the individual costs.

In other words, we have little choice but to conclude that Moore included in his final tally of damages a single amount, $52,500, attributable to the replacement of insulation. Even if we could conclude that this amount was not limited to the replacement of the insulation that was part of the defective roofing system covering the rear of the building, we have no testimony from which we could determine what portion of that cost should be attributed to the replacement of insulation in the front of the building. Without such testimony, this Court itself would have to engage in speculation to award some portion of this amount to T&C.

II.

That said, there is one additional matter I believe should be addressed in light of the arguments made by T&C and

amicus curiae Alabama Associated General Contractors, Inc., to this Court on rehearing in the present case. This additional matter concerns the caveat we recognized in our essential holding in Town & Country Property, L.L.C. v. Amerisure Insurance Co., [Ms. 1100009, Oct. 21, 2011] ___ So. 3d ___, ___ (Ala. 2011) ("Town & Country I").

The essential holding in Town & Country I was that "faulty workmanship itself is not an occurrence" within the meaning of a contractor's comprehensive general-liability ("CGL") policy. Specifically, we held as follows in our analysis in Part III of the opinion:

> "Reading 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),] 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."

___ So. 3d at ___ (emphasis added). In addition to the essential holding emphasized above, we recognized one caveat: "[F]aulty workmanship may lead to an occurrence if it subjects personal property or other parts of the structure" to an

accidental harmful condition that damages that "other part." ___ So. 3d at ___ (emphasis added).

In Part IV of our opinion in Town & Country I, we offered concluding comments and instructions to the trial court as to how to implement our decision on remand. In this portion of our opinion, we first reaffirmed the above-stated general rule by explaining that the trial court's judgment in favor of Amerisure was affirmed "to the extent the ... damages [awarded to T&C in T&C's underlying action against Amerisure's insured, Jones-Williams Construction Company,] represented the costs of repairing or replacing the faulty work itself." We then made the following statement, however, adding to the language we had earlier used in Part III to delineate the caveat to the general rule:

> "We are remanding the case to the trial court so that it may consider arguments from the parties to determine if any of the damages awarded represented compensation for damaged personal property -- e.g., computers and furnishings -- or otherwise nondefective portions of the facility."

___ So. 3d at ___ (emphasis added).

In concurring in Town & Country I, I failed to take sufficient heed of the wording of the latter phrase and to consider the difference between it and the wording of the

caveat as expressed in the analysis portion of our opinion. Concern has been expressed that the latter wording can be read as a restriction on the caveat recognized in Part III of our opinion in Town & Country I to parts of the structure completely free from any defect of their own, rather than simply to "other parts of the structure" apart from the defectively constructed portion primarily at issue. That is, concern has been expressed that the emphasized passage may be construed to mean that when one portion of a structure, such as a roof, is defectively constructed so as to allow into a building rainwater that damages some "other part of the structure," such as a floor, there is no "occurrence" if the "other part of the structure" already had any defect of its own, even if that defect would not itself have necessitated repair or replacement costs equal to those necessitated by the water damage. This specific issue was not presented by the arguments made to us in Town & Country I. Further, as it now turns out, the record before us makes it unnecessary to address this issue in order to decide this case. Accordingly, I consider the issue reserved for another day.