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# SUPREME COURT OF ALABAMA

SPECIAL TERM, 2022

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**Martha Lynne Smith and Kevin Andre Smith**

**v.**

**NIBCO, Inc.**

**Appeal from Shelby Circuit Court  
(CV-18-900232)**

MENDHEIM, Justice.

Martha Lynne Smith ("Martha") and Kevin Andre Smith purchased and lived in a house ("the house") that had a plumbing system composed

of polyethylene ("PEX") tubing manufactured by NIBCO, Inc. The PEX tubing failed, which allowed water to leak into the house, allegedly causing damage. The Smiths subsequently commenced a lawsuit in the Shelby Circuit Court against NIBCO, among others, asserting various theories of liability. Ultimately, the circuit court entered a summary judgment in favor of NIBCO and certified the judgment as final pursuant to Rule 54(b), Ala. R. App. P. The Smiths appealed.

#### Facts and Procedural History

The facts leading to the commencement of the underlying lawsuit are largely undisputed. On October 29, 2015, the Smiths purchased the house, which was constructed by D.R. Horton, Inc. ("D.R. Horton"), from Ian McDuff and Nicole McDuff. During construction of the house, PEX tubing manufactured by NIBCO was installed in the house as part of the plumbing system; NIBCO offered a limited warranty on the PEX tubing. In 2017, the PEX tubing began to fail, allowing water to leak into the house and, allegedly, causing damage to the house, the Smiths' personal property, and the physical and emotional well-being of the Smiths.

On January 14, 2018, D.R. Horton offered to replumb the house and to replace the PEX tubing manufactured by NIBCO. The Smiths declined

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D.R. Horton's offer to replumb the house because, according to an amended complaint filed by the Smiths, which is discussed below, the Smiths "were told they would be put on a 2-year waiting list. [The Smiths] could not wait two (2) years with the ongoing leaks and damage to the home." Even though the Smiths rejected D.R. Horton's offer to replumb the house, D.R. Horton and other contractors made various repairs to the plumbing system and other aspects of the house throughout 2018 and 2019.

On March 16, 2018, the Smiths commenced their lawsuit against NIBCO and several fictitiously named defendants. The Smiths asserted that the defendants had generally acted negligently or wantonly; that the defendants had specifically acted negligently or wantonly in failing to warn the Smiths about the allegedly defective PEX tubing; that the defendants had specifically acted negligently or wantonly in designing the PEX tubing; that the defendants had made fraudulent misrepresentations to the Smiths concerning the quality of the PEX tubing, which, the Smiths alleged, induced them to purchase the house; that the defendants had suppressed and concealed the alleged defects with the PEX tubing; that the defendants had breached warranties

allegedly made to the Smiths; and that NIBCO was liable under the Alabama Extended Manufacturer's Liability Doctrine ("the AEMLD"). On April 13, 2018, NIBCO filed a "motion to dismiss claims from the complaint or, in the alternative, for more definite statement." Even though NIBCO entitled that filing as a motion to dismiss, it specifically requested that its motion "be treated as one for [a] summary judgment" based on the fact that NIBCO had presented "matters outside the pleadings." On May 7, 2018, the circuit court entered an order stating that it considered NIBCO's motion to be one for a summary judgment and denying the motion. On May 14, 2018, NIBCO filed an answer to the Smiths' complaint.

On August 6, 2020, the Smiths filed an amended complaint substituting D.R. Horton for one of the fictitiously named defendants listed in the original complaint; the Smiths alleged that D.R. Horton had installed in the house the PEX tubing manufactured by NIBCO. The Smiths asserted the same claims of negligence, wantonness, fraud, and breach of warranty against D.R. Horton that it alleged against NIBCO; the Smiths' AEMLD claim was asserted against NIBCO alone. In that amended complaint, the Smiths also alleged that D.R. Horton "was guilty

of wrongful conduct ... in the installation of the original [PEX tubing] which combined and concurred with the wrongful conduct of NIBCO ... to produce the injuries and damages heretofore described in the original complaint."

On October 13, 2020, the Smiths, operating under the mistaken impression that D.R. Horton was not the entity that had constructed the house, filed a motion to dismiss, without prejudice, D.R. Horton as a defendant. On October 19, 2020, the circuit court granted the Smiths' motion and dismissed D.R. Horton, without prejudice, as a defendant in the underlying action.

On January 11, 2021, the Smiths filed an amended complaint substituting Dupree Plumbing Co., Inc. ("Dupree Plumbing"), for one of the fictitiously named defendants listed in the original complaint. The Smiths alleged that Dupree Plumbing "is the original plumbing company that installed the piping involved in the [house]." The Smiths asserted the same claims of negligence, wantonness, fraud, and breach of warranty against Dupree Plumbing that it alleged against NIBCO; the Smiths' AEMLD claim was asserted against NIBCO alone. In that amended complaint, the Smiths also alleged that Dupree Plumbing "was

guilty of wrongful conduct ... in the installation of the original [PEX tubing] which combined and concurred with the wrongful conduct of NIBCO ... to produce the injuries and damages heretofore described in the original complaint." On February 19, 2021, Dupree Plumbing filed a motion to dismiss the claims filed against it.

On June 10, 2021, NIBCO filed a second motion for a summary judgment, which was supported with extensive evidence tending to show, according to NIBCO, that there was not a manufacturing defect with the PEX tubing manufactured by NIBCO. On June 14, 2021, the circuit court entered an order setting NIBCO's summary-judgment motion for a hearing to occur on July 27, 2021. On July 26, 2021, the Smiths filed a response to NIBCO's summary-judgment motion and Dupree Plumbing's motion to dismiss, which was supported with the affidavit testimony of Martha and other documentary evidence. At the July 27, 2021, hearing, NIBCO's counsel, citing Rule 56(c)(2), Ala. R. Civ. P., requested that the circuit court strike the Smiths' response, including the evidence attached to the response that had not previously been submitted into evidence, as untimely filed. On July 30, 2021, the circuit court entered an order granting NIBCO's motion to strike Martha's affidavit testimony but

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denying NIBCO's summary-judgment motion and Dupree Plumbing's motion to dismiss.

On August 3, 2021, NIBCO filed a "motion to alter, amend or vacate the denial of the motion for summary judgment or[,] in the alternative, motion for certification for permissive appeal." NIBCO argued, among other things, that, based on the circuit court's striking of Martha's affidavit testimony, the Smiths had failed to present any evidence, let alone substantial evidence, "to refute the evidence submitted by NIBCO establishing there was not a manufacturing defect" with the PEX tubing. On August 12, 2021, Dupree Plumbing filed an answer to the Smiths' complaint.

On September 1, 2021, the circuit court entered an order granting NIBCO's "motion to alter, amend or vacate" the circuit court's July 30, 2021, order denying NIBCO's summary-judgment motion and ordered NIBCO's counsel to "submit an order for the court's review and ratification." On September 20, 2021, the circuit court entered an order granting NIBCO's summary-judgment motion. In its order, the circuit court determined that the Smiths' July 26, 2021, response to NIBCO's summary-judgment motion and Dupree Plumbing's motion to dismiss

was untimely filed and struck the response, including the evidentiary attachments, in its entirety. The circuit court concluded that NIBCO had presented substantial evidence indicating that there was no manufacturing defect with the PEX tubing and that the Smiths had failed to present any, let alone substantial, evidence to create a genuine issue of material fact as to that issue.<sup>1</sup> Accordingly, the circuit court granted NIBCO's summary-judgment motion. The circuit court also stated that "there is no just reason for delay and this order is deemed final in accordance with Rule 54(b) of the Ala. R. Civ. P. as there are no remaining issues in any claim that are so closely intertwined that separate adjudication would pose an unreasonable risk of inconsistent results." On October 19, 2021, the Smiths filed a motion to alter, amend, or vacate the circuit court's September 20, 2021, order in favor of NIBCO.

On October 21, 2021, the Smiths filed a motion for leave to amend their complaint to, once again, substitute D.R. Horton for one of the

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<sup>1</sup>The circuit court also determined that, even if Martha's affidavit testimony was considered, it did not present any evidence to refute the evidence presented by NIBCO indicating that there was no manufacturing defect with the PEX tubing. As a result, whether or not Martha's affidavit testimony is considered, the end result is that the circuit court concluded that, based on the filings of NIBCO and the Smiths, there is no manufacturing defect with the PEX tubing.



fictitiously named defendants. Specifically, the Smiths requested leave to "refile [their] August 6, 2020, amendment substituting D.R. Horton ... as a party defendant." As stated above, in their August 6, 2020, amended complaint, the Smiths alleged that D.R. Horton had installed in the house the PEX tubing manufactured by NIBCO and asserted the same claims of negligence, wantonness, fraud, and breach of warranty against D.R. Horton that it alleged against NIBCO. In that amended complaint, the Smiths also alleged that D.R. Horton "was guilty of wrongful conduct ... in the installation of the original [PEX tubing] which combined and concurred with the wrongful conduct of NIBCO ... to produce the injuries and damages heretofore described in the original complaint."

On October 25, 2021, the circuit court denied the Smiths' motion to alter, amend, or vacate the circuit court's September 20, 2021, order. On October 29, 2021, the Smiths appealed the circuit court's September 20, 2021, summary judgment in favor of NIBCO.

On January 17, 2022, the Smiths filed in the circuit court an amended complaint that "adopts all previous complaints and motions filed in this action" and asserts additional claims of breach of contract, negligence, wantonness, and fraud against D.R. Horton related to the

repair work D.R. Horton conducted on the house after the Smiths had purchased it. The claims against D.R. Horton and Dupree Plumbing are apparently still being litigated in the underlying action.

### Discussion

As noted, the circuit court certified as final, pursuant to Rule 54(b), its September 20, 2021, order granting NIBCO's summary-judgment motion. Although neither side challenges on appeal the appropriateness of the circuit court's Rule 54(b) certification, "this Court may consider that issue ex mero motu because the issue whether a judgment or order is sufficiently final to support an appeal is a jurisdictional one." Barrett v. Roman, 143 So. 3d 144, 148 (Ala. 2013) (citing Robinson v. Computer Servicers, Inc., 360 So. 2d 299, 302 (Ala. 1978)).

Rule 54(b) states, in pertinent part:

"When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

In Lighting Fair, Inc. v. Rosenberg, 63 So. 3d 1256, 1263-64 (Ala. 2010), this Court provided the following explanation of the standard for reviewing Rule 54(b) certifications:

"'If a trial court certifies a judgment as final pursuant to Rule 54(b), an appeal will generally lie from that judgment.'" Baugus v. City of Florence, 968 So. 2d 529, 531 (Ala. 2007).

"'Although the order made the basis of the Rule 54(b) certification disposes of the entire claim against [the defendant in this case], thus satisfying the requirements of Rule 54(b) dealing with eligibility for consideration as a final judgment, there remains the additional requirement that there be no just reason for delay. A trial court's conclusion to that effect is subject to review by this Court to determine whether the trial court exceeded its discretion in so concluding.'

"Centennial Assocs. v. Guthrie, 20 So. 3d 1277, 1279 (Ala. 2009). Reviewing the trial court's finding in Schlarb v. Lee, 955 So. 2d 418, 419-20 (Ala. 2006), that there was no just reason for delay, this Court explained that certifications under Rule 54(b) are disfavored:

"'This Court looks with some disfavor upon certifications under Rule 54(b).

"'It bears repeating, here, that '[c]ertifications under Rule 54(b) should be entered only in exceptional cases and should not be entered routinely.'" State v. Lawhorn, 830 So. 2d 720, 725 (Ala. 2002) (quoting Baker v. Bennett, 644 So. 2d 901, 903 (Ala.

1994), citing in turn Branch v. SouthTrust Bank of Dothan, N.A., 514 So. 2d 1373 (Ala. 1987)). "'Appellate review in a piecemeal fashion is not favored.'" Goldome Credit Corp. [v. Player], 869 So. 2d 1146, 1148 (Ala. Civ. App. 2003)] (quoting Harper Sales Co. v. Brown, Stagner, Richardson, Inc., 742 So. 2d 190, 192 (Ala. Civ. App. 1999), quoting in turn Brown v. Whitaker Contracting Corp., 681 So. 2d 226, 229 (Ala. Civ. App. 1996)) ...."

"Dzwonkowski v. Sonitrol of Mobile, Inc., 892 So. 2d 354, 363 (Ala. 2004)."

"In considering whether a trial court has exceeded its discretion in determining that there is no just reason for delay in entering a judgment, this Court has considered whether 'the issues in the claim being certified and a claim that will remain pending in the trial court "'are so closely intertwined that separate adjudication would pose an unreasonable risk of inconsistent results.'" Schlarb, 955 So. 2d at 419-20 (quoting Clarke-Mobile Counties Gas Dist. v. Prior Energy Corp., 834 So. 2d 88, 95 (Ala. 2002), quoting in turn Branch v. SouthTrust Bank of Dothan, N.A., 514 So. 2d 1373, 1374 (Ala. 1987), and concluding that conversion and fraud claims were too intertwined with a pending breach-of-contract claim for Rule 54(b) certification when the propositions on which the appellant relied to support the claims were identical). See also Centennial Assocs., 20 So. 3d at 1281 (concluding that claims against an attorney certified as final under Rule 54(b) were too closely intertwined with pending claims against other defendants when the pending claims required 'resolution of the same issue' as issue pending on appeal); and Howard v. Allstate Ins. Co., 9 So. 3d 1213, 1215 (Ala. 2008) (concluding that the judgments on the claims against certain of the defendants had been improperly certified as final under

Rule 54(b) because the pending claims against the remaining defendants depended upon the resolution of common issues)."

(Emphasis omitted.)

In the present case, the Smiths' claims against the defendants are so closely intertwined that their separate adjudication would pose an unreasonable risk of inconsistent results. As noted above, the Smiths asserted all of their claims, except for their AEMLD claim, against each of the defendants. In asserting their claims against the defendants, the Smiths specifically alleged that the conduct of D.R. Horton and Dupree Plumbing "combined and concurred with the wrongful conduct of NIBCO ... to produce the injuries and damages heretofore described in the original complaint." The theory of the Smiths' case against the defendants is that the defendants' conduct combined to cause the damage allegedly suffered by the Smiths. Of course, in presenting their defenses, the individual defendants will submit evidence indicating that their individual conduct was not the cause of the Smiths' injuries. Given the Smiths' assertion that the defendants' combined conduct caused their injuries, it is not unforeseeable that evidence tending to exonerate one defendant of liability is likely to implicate another of the defendants.

For instance, the Smiths alleged that the PEX tubing was designed, manufactured, and installed negligently or wantonly. In defending the claims against it, NIBCO presented the affidavit testimony of one of its quality-control employees, which indicated that "the failure to adhere to the mandatory installation requirements for [the] PEX [tubing] and the applicable residential and plumbing codes" was the reason the PEX tubing failed, rather than negligence in the design and manufacturing of the PEX tubing. The evidence presented by NIBCO as part of its defense does more than merely exonerate NIBCO of liability; it implicates D.R. Horton and Dupree Plumbing, the entities that allegedly constructed the house and installed the PEX tubing. In its September 20, 2021, order granting NIBCO's summary-judgment motion, the circuit court specifically concluded that the Smiths had "failed to dispute the admissible evidence submitted by NIBCO establishing there was not a manufacturing defect" with the PEX tubing. If this Court affirms the circuit court's September 20, 2021, summary judgment in favor of NIBCO, we would be affirming the circuit court's holding that there is no genuine issue of material fact as to whether there was a design or manufacturing defect with the PEX tubing as a result of NIBCO's

potential negligence or wantonness. However, it is foreseeable that D.R. Horton and Dupree Plumbing may present evidence in their defense indicating that the PEX tubing was installed correctly but was designed or manufactured negligently. Deciding on the propriety of the summary judgment in favor of one defendant that is currently before us would produce an unreasonable risk of inconsistent results given the Smiths' closely intertwined claims against all the defendants.

#### Conclusion

The Smiths' claims against NIBCO, the judgment on which was certified as final under Rule 54(b), and the Smiths' claims against D.R. Horton and Dupree Plumbing that remain pending in the circuit court are so closely intertwined that separate adjudication of those claims would pose an unreasonable risk of inconsistent results. Accordingly, we conclude that the circuit court exceeded its discretion in certifying the September 20, 2021, order granting NIBCO's summary-judgment motion as final. We therefore dismiss the appeal.

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APPEAL DISMISSED.

Parker, C.J., and Shaw, Wise, Bryan, Sellers, Stewart, and  
Mitchell, JJ., concur.

Bolin, J., concurs in the result.