STATE OF MICHIGAN

COURT OF APPEALS

BRIAN FORD,

Plaintiff-Appellant/Cross-Appellee,

v

ARCHITECTURAL DOOR & MILLWORK, INC.,

Defendant/Third-Party Plaintiff-Appellee/Cross-Appellant,

and

BLACKWELL-CONWAY COMPANY, a/k/a PATTERSON BUCK DIVISION,

Defendant/Third-Party Plaintiff/Third-Party Defendant-Appellee/Cross-Appellee,

and

NORTHLAND INSURANCE COMPANY, SCARLETT ASSOCIATES CORPORATION, a/k/a SCARLETT MACHINERY, INC., and MICHAEL WEINIG, INC.,

Third-Party Defendants.

UNPUBLISHED
December 28, 2004

No. 248021
Oakland Circuit Court
LC No. 00-020012-CK

BRIAN FORD,

Plaintiff/Third-Party Defendant/Appellee,

v

ARCHITECTURAL DOOR & MILLWORK, INC.,

Defendant/Third-Party Plaintiff/Appellee,

No. 248024
Oakland Circuit Court
LC No. 00-020012-CK

and

BLACKWELL-CONWAY COMPANY, a/k/a PATTERSON BUCK DIVISION,

Defendant/Third-Party
Plaintiff/Third-Party
Defendant/Appellant,

and

NORTHLAND INSURANCE, SCARLETT ASSOCIATES CORPORATION, a/k/a SCARLETT MACHINERY, INC., and MICHAEL WEINIG, INC.,

Third-Party Defendants.

BRIAN FORD,

Plaintiff/Third-Party Defendant,

v

No. 250414
Oakland Circuit Court
LC No. 00-020012-CK

ARCHITECTURAL DOOR & MILLWORK, INC.,

Defendant/Third-Party Plaintiff,

and

BLACKWELL-CONWAY COMPANY, a/k/a PATTERSON BUCK DIVISION,

Defendant/Third-Party
Defendant/Third-Party
Plaintiff/Appellant,

and

NORTHLAND INSURANCE COMPANY,

Third-Party Defendant/Appellee,

and

SCARLETT ASSOCIATES CORPORATION, a/k/a SCARLET MACHINERY, and MICHAEL WEINIG, INC.,

Third-Party Defendants.

Before: Murray, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

These appeals arise out of a judgment of no cause of action rendered by a jury on plaintiff's claims against the supplier of woodwork for his house. We affirm in part and remand in part.

Plaintiff acted as his own general contractor in building a new residence for himself. Defendant Architectural Door and Millwork (ADAM) supplied the doors for the house. Plaintiff inquired of ADAM to recommend a supplier for the interior trim and ADAM recommended defendant Blackwell-Conway (Blackwell). Plaintiff, through ADAM, ordered the wood trim from Blackwell. The woodwork was delivered to the construction site in the same packaging as it was shipped in from Blackwell with no additional preparation or other work by ADAM. The trim was installed by a carpenter hired by plaintiff and painted by a painter hired by plaintiff.

After the painting of the trim, plaintiff alleges that defects in the wood, known as "chattering," became apparent in the window and door casings. Those defects were not visible prior to installation and painting. Plaintiff was dissatisfied with the woodwork and, after being unable to resolve the situation, commenced the instant action against ADAM as the supplier. Plaintiff later amended his complaint to add a count of negligence against Blackwell. Additionally, ADAM filed a third-party action against Blackwell as the manufacturer seeking indemnification. Blackwell in turn looked to its liability insurance carrier, Northland Insurance, for coverage and commenced a third-party action against Northland when Northland denied coverage.

Before trial, ADAM brought a motion for partial summary disposition, which was granted in part and denied in part. Specifically, the trial court granted summary disposition as to plaintiff's claims for negligence and implied warranty of fitness, but denied summary disposition as to plaintiff's claims for breach of contract and violation of the consumer protection act. In the same order, the trial court also dismissed ADAM's third-party claim against Blackwell for common-law indemnity. After trial, the jury returned a verdict of no cause of action on plaintiff's contract and consumer protection act claims.

Plaintiff first argues that the trial court erred in granting summary disposition on the negligence and implied warranty claims. Grants of summary disposition are reviewed de novo. *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). But we agree with ADAM that, even if summary disposition was improper, the error was harmless beyond a reasonable doubt. To be viable, plaintiff's claims require that the woodwork be defective. But the jury found that the woodwork was not defective. Specifically, Question 13 of the jury verdict form asked whether Blackwell was negligent in the manufacture of the door and window casings and the jury answered, "no." Accordingly, we must agree with ADAM that, even had the two

dismissed claims been submitted to the jury, there is no reasonable doubt that the jury would have returned a verdict of no cause of action on those counts as well. Therefore, reversal is not appropriate. MCR 2.613(A).

Plaintiff next argues that the verdict was against the great weight of the evidence and that the trial court erred in denying the motion for judgment NOV or new trial. We disagree. The Supreme Court explained the standard of review for such claims in *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000):

> The appellate court is to review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted.

The only evidence to which plaintiff points as compelling a verdict in his favor is that a witness, Patrick Conway, a Blackwell Vice-President, testified that the woodwork was, in fact, defective. That, however, to some extent mischaracterizes Conway's testimony and certainly takes it out of context. Conway did testify that there were machine marks on the wood from the milling process. Conway's "admission" that it was a defect, however, came in response to plaintiff's counsel insisting that it was a defect and Conway saying that if counsel wanted to categorize it as a defect, that was fine. Conway went on to testify later that any wood product is going to have natural defects and marks will be left on the wood during the milling process and that it is necessary to properly prepare the wood prior to installation and painting. In short, wood products are never delivered in perfect condition and appropriate preparation by the installer is necessary and appropriate. It was Conway's contention that the product that was delivered was not properly prepared by plaintiff's subcontractors. This testimony is not inconsistent with the jury's verdict that Blackwell was not negligent in the manufacture of the product.

Conflicting evidence was presented at trial regarding the source of the problem and who was responsible for it. Additionally, the jury had the opportunity to view the product. In short, it was reasonable for the jury to conclude that the product was delivered in acceptable condition and that either the finished product was within the range of imperfection that one must accept from a wood product or that there was a problem but that the problem was due to plaintiff's subcontractors failing to properly prepare the casings for installation and painting. In any event, the verdict was not against the great weight of the evidence.

Plaintiff's final argument is that the trial court erred in denying his motion to amend the complaint to add a claim against Blackwell alleging a breach of implied warranty. The decision to allow an amendment to the pleadings is entrusted to the trial court's discretion. *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 658; 213 NW2d 134 (1973). The motion came on the sixth day of trial and the trial court denied it as being "tardy." We are not persuaded that the trial court abused its discretion in denying the motion. First, the motion was extremely untimely. Second, despite plaintiff's arguments to the contrary, there is inherent prejudice to a party in adding a legal theory part way through trial. How a case is tried is dependent upon the claims that are made. Changing those claims necessitate a change in strategy. Plaintiff points to no reason why the claim could not have been made before trial commenced. Indeed, plaintiff's explanation in his brief on appeal for seeking to add the claim is that he did so "upon conducting further research and discovering that a tort-based claim against Blackwell-Conway is unavailable pursuant to the 'economic loss doctrine.' " Plaintiff should have done his further research before the sixth day of trial. In short, it is true that delay alone is not grounds to deny a motion to

amend. *Fyke, supra* at 663-664. But delay "is an especially pertinent factor on the eve of, during, or after trial. *Id.* at 663. We are not persuaded that the trial court abused its discretion.

Moreover, even if the trial court should have allowed the amendment, any error is harmless. This claim would have required a finding that Blackwell was negligent in the manufacture of the casings and, as noted above, the jury determined that it was not. There is no reason to believe that this theory would have been any more successful than those that were presented to the jury. Accordingly, reversal is not required even if the denial was erroneous. MCR 2.613(A).

Turning to ADAM's cross appeal, ADAM argues that the trial court erred in denying summary disposition on the remaining two claims by plaintiff that were submitted to the jury and in dismissing the third-party claim against Blackwell. In light of our affirmance of the jury's verdict, however, those issues are moot and we need not address them.

Next, we turn to Blackwell's appeal of the grant of summary disposition to Northland Insurance. Blackwell sought coverage, including providing a defense, from its insurance company, Northland. An insurer has a duty to defend if the allegations in the underlying complaint arguably fall within the coverage of the policy. *Radenbaugh v Farm Bureau General Ins Co of Michigan*, 240 Mich App 134, 137; 610 NW2d 272 (2000). The duty to defend is broader than the duty to indemnify. *Id.* at 138.

The parties brought cross-motions for summary disposition. The trial court concluded that, while there was an "occurrence" under the policy, exclusion j(6) applied and excluded the claim from coverage. We are persuaded that the trial court erred in concluding that exclusion j(6) applied.

The insurance policy at issue includes the following provision:

> This insurance does not apply to:
>
> * * *
>
> j. Damage to Property
>
> "Property damage" to:
>
> * * *
>
> (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.
>
> * * *
>
> Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

The policy defines the "products-completed operations hazard" as follows:

> 16. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contactor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

The trial court concluded that the "products-completed operations hazard" exception to the exclusion does not apply:

> The products-completed operations hazard however, does not apply because this claim does not involve "property damage" that occurred away from their premises. The damage at issue was in the quality of Blackwell-Conway's product and it occurred while the product was in Blackwell-Conway's premises. While it was not discovered until the finish was applied to it, it was nevertheless damaged upon installation. As such, the coverage sought is excluded under Exclusion j(6).

The trial court erroneously concluded that the "property damage" claimed in this case occurred at Blackwell's premises. The claim against Blackwell was not just for damage to the product supplied by Blackwell. Rather, the claim involved damage caused by the Blackwell product to the house that was being constructed. Therefore, the claim made against Blackwell was for "property damage" occurring away from Blackwell's premises arising out of Blackwell's product. Accordingly, the "products-completed operations hazard" exception to the exclusion does apply and the trial court erred in concluding that exclusion j(6) applied to the case at bar.

Northland also argues that the trial court erred in determining that an "occurrence" occurred within the meaning of the policy. If so, then the trial court reached the correct result, albeit for the incorrect reason. But we are not persuaded that the trial court erred in its determination. We believe that this case is controlled by *Radenbaugh, supra*. The definition of "occurrence" in the policy at issue here is exactly the same as the definition of "occurrence" in *Radenbaugh.* The *Radenbaugh* Court looked to, and adopted the reasoning of, the opinion in *Calvert Ins Co v Herbert Roofing & Insulation Co*, 807 F Supp 435 (ED Mich, 1992). After considering the opinions in *Hawkeye-Security Ins Co v Vector Const Co*, 185 Mich App 369; 460 NW2d 329 (1990), and *Bundy Tubing Co v Royal Indemnity Co*, 298 F2d 151 (CA 6, 1962), *Calvert, supra* at 438, concluded as follows:

> The holdings in *Bundy* and *Vector* can be reconciled by focusing on the property damage at issue in each case. In *Vector*, the insured's defective workmanship resulted only in damage to the insured's work product. In *Bundy*, the insured's defective workmanship resulted in damage to the property of others. Taken together, these cases stand for the proposition that when an insured's defective workmanship results in damage to the property of others, an "accident" exists within the meaning of the standard comprehensive liability policy.

As discussed above, the allegations raised by plaintiff in this case includes claims of damage done to his house because of Blackwell's defective product. Accordingly, the allegations in the underlying complaint come within the definition of "occurrence."

Northland also argues that exclusion "m" under the policy also applies. But the trial court did not base its ruling on exclusion "m" and we decline to consider the issue. Northland, however, is free to raise that issue on remand.

Finally, we turn to Blackwell's appeal as to plaintiff and ADAM in which Blackwell argues that the trial court erred in denying the award of case evaluation sanctions to Blackwell under MCR 2.403(O). We disagree. Turning first to whether Blackwell is entitled to sanctions against plaintiff, the trial court concluded that Blackwell was not entitled to sanctions because plaintiff's claim against Blackwell was not filed until after the case evaluation. We agree. At the time this case was submitted for evaluation, the only claims in plaintiff's complaint were against ADAM. Blackwell's involvement at that point was limited to ADAM's claim for indemnity against Blackwell. Accordingly, the case evaluation award of $50,000 in favor of plaintiff could only represent the evaluation of plaintiff's claims against ADAM.

Blackwell argues that the trial would have been avoided had plaintiff accepted the award. To some extent that is true, but it is irrelevant. First, a trial between plaintiff and Blackwell would not necessarily have been avoided if plaintiff nevertheless filed a claim directly against Blackwell. That is, plaintiff may have accepted an award as to ADAM and then pursued a claim against Blackwell for additional money. Second, once the claim was added, Blackwell could have raised the issue with the trial court that the claim had not been evaluated and request that the new claim be submitted to case evaluation or Blackwell could have made an offer of judgment. In any event, the trial court was correct that the claim was not submitted to evaluation and, therefore, cannot be the basis for an award of mediation sanctions.

Blackwell next argues that it was entitled to sanctions against ADAM. The case evaluators awarded $40,000 against Blackwell and in favor of ADAM on ADAM's indemnity claim. Both ADAM and Blackwell had filed conditional acceptances of the award, the condition being acceptance by all parties. The trial court denied sanctions against ADAM because there was, in fact, no verdict on ADAM's claim against Blackwell to provide the basis for an award. We agree with the trial court.

The verdict form in the case at bar directed the jury to consider ADAM's claim against Blackwell only if it had awarded damages to plaintiff against ADAM. Because the jury did not award damages to plaintiff, it never answered the questions regarding ADAM's claim against Blackwell. MCR 2.403(O)(1) provides for sanctions only if the case evaluation award is rejected and "the action proceeds to verdict." Under MCR 2.403(O)(2), a "verdict" is defined as a jury verdict, a judgment by the trial court following a non-jury trial, or a judgment entered as the

result of a ruling on a motion. None of those situations fit the case at bar. The claim was rendered moot by the jury's verdict of no cause of action on the main claim and, therefore, the indemnity claim never went to verdict. Because the action did not proceed to verdict, neither party is entitled to sanctions.

We remand to the trial court for further proceedings on Blackwell's claim against Northland to provide a defense under the terms of the insurance policy. In all other respects, we affirm. Defendant ADAM may tax costs in Nos. 248021 and 248024. Plaintiff may tax costs in No. 248024. Blackwell may tax costs in No. 250414. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Michael R. Smolenski