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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

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Brenda Gustin and James Gustin

v.

Vulcan Termite and Pest Control, Inc., and Fred Smith

Appeal from Shelby Circuit Court
(CV-15-901042)

PARKER, Chief Justice.

Brenda Gustin and James Gustin appeal from a summary judgment entered by the Shelby Circuit Court in favor of Vulcan Termite and Pest Control, Inc. ("Vulcan"), and its

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general manager, Fred Smith. We reverse the judgment in part and affirm it in part.

I. Facts

In 1998, Vulcan was hired by a construction company to pretreat a house in Shelby County for termites. The house was three stories tall, with three concrete decks overlooking a lake. The decks were supported by 18 wooden columns. Additionally, to the left of the front door was a porte cochere -- a covered entrance for vehicles to pass through on their way up the driveway. The exterior of the house was entirely covered in faux-stone cladding. The house was purchased by the Gustins in 2006.

In 2009, the Gustins entered into a contract with Vulcan for termite-damage inspection, treatment, and repair. The contract provided that Vulcan would periodically inspect the house for termites and would "provide remedial service and/or treatment as deemed necessary by Vulcan so as to control said termites. Such service and/or treatment will be performed in accordance with requirements of federal and state regulations" The contract also provided that Vulcan would repair any

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damage caused by termites but excluded "damage[] resulting from wood in direct contact with the soil."

In 2015, the Gustins hired a decorating company to renovate one of the rooms in the house. The company removed several sections of beadboard from the porte cochere, revealing extensive termite damage. The Gustins continued to investigate, removing the faux-stone cladding from the facade of the house. Under the cladding, the Gustins discovered active termites and severe damage to all levels and all sides of the house, as well as damage to a deck. The Gustins hired an expert, who estimated that it would cost roughly \$950,000 to repair the house.

Several days after the damage was discovered, Vulcan's general manager, Smith, went to the house to inspect. Smith observed active termites, but Vulcan did not repair the house.

The Gustins sued Vulcan and Smith in the Shelby Circuit Court, alleging that Vulcan had breached the contract in multiple respects and that Vulcan had been negligent and wanton in multiple respects. After extensive discovery, Vulcan and Smith moved for a summary judgment. The court granted the motion. The court ruled that some of the Gustins'

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claims were barred by a class-action settlement. Further, regarding the breach-of-contract claims, the court ruled: "[T]here is no evidence that Vulcan breached the contract by failing to discover hidden termites. The Gustins presented no evidence that the annual inspections were not performed in accordance with the regulations or industry standards." With respect to the negligence and wantonness claims, the court ruled: "The Gustin[s'] negligence/recklessness/wantonness claim[s] ... also revolve around the inspections and treatment of the home. There is no evidence that [Vulcan and Smith] did not perform their duties in accordance with the regulations or industry standards." The Gustins appeal.

II. Standard of Review

This Court reviews a summary judgment de novo, "apply[ing] the same standard of review as the trial court." Slay v. Keller Indus., Inc., 823 So. 2d 623, 624 (Ala. 2001). "In order to enter a summary judgment, the trial court must determine: 1) that there is no genuine issue of material fact, and 2) that the moving party is entitled to a judgment as a matter of law." Williams v. Ditto, 601 So. 2d 482, 484 (Ala. 1992). This Court must view the evidence in the light most

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favorable to, and draw all reasonable inferences in favor of, the nonmoving party. Nationwide Prop. & Cas. Ins. Co. v. DPF Architects, P.C., 792 So. 2d 369, 372 (Ala. 2001).

III. Analysis

A. The Class-Action Settlement

The Gustins argue that the trial court incorrectly ruled that a 2005 class-action-settlement agreement between Vulcan and the previous owners of the Gustins' house barred some of the Gustins' claims. In the summary-judgment order, the court wrote: "The Gustins are ... barred [from] asserting any claims [that arose] prior to their April 2006 purchase[,] due to a class action settlement that the previous owners entered into with Vulcan." On appeal, the Gustins concede that, in the trial court, they were not attempting to assert any claims that arose before their purchase of the house. Therefore, the trial court's ruling on this issue did not affect the viability of any of the Gustins' claims. Hence, the correctness or incorrectness of that ruling is irrelevant to the outcome of the case and cannot be a basis for reversal of the summary judgment.

B. Contractual Duty-to-Repair Claim

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The Gustins argue that the trial court erred by entering a summary judgment on their breach-of-contract claim involving Vulcan's duty to repair termite damage because, they assert, there was a genuine issue of material fact regarding whether Vulcan breached that duty. Vulcan and Smith respond that the termite damage came within the exclusion in the contract of "damages resulting from wood in direct contact with the soil." Vulcan and Smith assert that W. Bruce Alverton, Vulcan's termite expert, testified in a deposition that some of the wood framing of the house was "below-grade," that is, below ground level. Vulcan and Smith also argue that Alverton identified several instances of "wood-to-ground contact."

However, as the Gustins point out, Alverton's testimony was not clearly evidence of the condition required to meet the exclusion: "wood in direct contact with the soil" (emphasis added). Rather, in the context of Alverton's whole testimony, his statements can reasonably be interpreted as meaning that, although the wood was below ground level and in contact with the concrete foundation, it was shielded from direct contact with the soil by the faux-stone cladding and the foundation. For example, Alverton testified that "the level of the

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[concrete foundation] slab to the edge of the outside grade is almost even" and that "on the ... outside perimeter of that concrete slab there is a faux-stone installation that rests below grade that allowed the termites to enter from the outside foundation up behind the faux stone into the stud wall." Alverton also indicated that the "outside grade" (presumably including the soil) had been in contact with the faux stone before it was removed and that "the faux stone came to the ground and came to the top of the concrete all the way around the property." Although Alverton's testimony is not a model of clarity, it appears to indicate that the wood-stud walls of the house rested on the concrete foundation and were covered on the exterior by the faux-stone cladding. Thus, a genuine issue of material fact remains as to whether the wood was in direct contact with the soil.

Moreover, even assuming wood-to-soil contact existed, there was a genuine issue of material fact regarding whether the damage to the house "result[ed] from" that contact, as required by the exclusion. In his deposition, Alverton discussed at least four causes of the termite infestation, including (1) moisture intrusion caused by the angle of a

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portion of the roof, which allowed rain to "continually wet[] the [front] foundation wall, causing wood rot and decay and subterranean termite damage"; (2) a roof leak that, coupled with the lack of a "footer" or concrete barrier against the ground, allowed a moisture intrusion that permitted termites to enter from the ground; (3) the angle of the roof over the deck columns, which allowed rainwater to enter an "envelope" between the faux stone and the columns, which "made a situation where it was possible for subterranean termites to survive without wood-to-ground contact"; and (4) decaying wood in the framing around a basement window. Alverton did not explain which of these causes, if any, were related to direct wood-to-soil contact. Therefore, genuine issues of material fact existed as to whether the wood-to-soil exclusion applied and thus whether Vulcan breached its duty to repair. Accordingly, we reverse the summary judgment as to the Gustins' breach-of-contract claim regarding the duty to repair.

C. Negligence and Wantonness Claims

The Gustins also argue that the trial court erred by determining that there was not substantial evidence that

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Vulcan was negligent or wanton. The Gustins identify a number of duties they assert that Vulcan breached. Specifically, the Gustins assert that Vulcan was negligent or wanton in the following ways:

- Vulcan did not report conditions conducive to termites when it inspected the house at the time of the Gustins' purchase; Vulcan thereby failed to perform its work in a good and workmanlike manner.
- Vulcan never informed the Gustins that it could not perform an adequate inspection.
- Although aware that it could not perform a visual inspection in certain areas, Vulcan did not "sound or probe" anywhere on the Gustins' house.
- Vulcan never inspected portions of the house not amenable to visual inspection to determine whether there were construction defects or deficiencies that created conditions conducive to termites or that hindered Vulcan's ability to perform a meaningful inspection.
- Vulcan never sought information about the construction materials used in the house.
- Vulcan never re-treated the house, even though it knew the earlier-applied termiticide was no longer effective.
- Vulcan never re-treated the house, even though it knew the spot treatment it performed in 2009 did not cover the front of the house.

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The Gustins' tort claims were predicated exclusively on duties, actions, and omissions related to Vulcan's performance of its termite-treatment contract. "[A] mere failure to perform a contractual obligation is not a tort." Barber v. Business Prods. Ctr., Inc., 677 So. 2d 223, 228 (Ala. 1996). The Gustins have cited no legal authority in support of their position that a negligence or wantonness claim can be predicated merely on a defendant's failure to properly perform under a contract, nor have they cited any authority or provided any reasoning in support of their implicit argument that Vulcan's acts and omissions were somehow extracontractual. Thus, we affirm the trial court's summary judgment on all the negligence and wantonness claims.

D. Other Breach-of-Contract Claims

In opposition to the motion for a summary judgment and in their appellate briefs, the Gustins advanced numerous other breach-of-contract arguments related to the allegations that were also included in their tort claims:

"Vulcan breached its duties to use reasonable care and perform its work in a workman-like manner in 6 ways: (1) during the seven ... years it inspected the home for the Gustins, Vulcan never inspected or treated the rear posts/columns and only inspected/treated the porte cochere once; (2) Vulcan

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knew of previous termite activity at the home but never investigated to see if additional activity was present at the home; (3) Vulcan knew it was incapable of adequately inspecting behind the home's exterior cladding for areas conducive to termite activity but never performed any tests, other than site evaluations, and never advised the Gustins that it could not adequately inspect the property; (4) Vulcan was aware of areas of the home's exterior faux-stone cladding that extended below grade but never alerted the Gustins that such condition was conducive to termites; (5) Vulcan knew the termiticide it used in 1998 was ineffective for long periods of time and failed to retreat the property with another chemical until over ten ... years later in 2009; (6) Vulcan improperly treated areas of the home's foundation by drilling application holes over twelve ... inches apart, contrary to applicable labels and regulations; and (7) even after being advised to properly treat the home by the [Alabama Department of Agriculture and Industries] in 2015, Vulcan failed to use the proper amount of termiticide."

(Gustins' brief, pp. 25-26.) With respect to these breach-of-contract claims, the trial court's summary-judgment order stated:

"[T]here is no evidence that Vulcan breached the contract by failing to discover hidden termites. The Gustins presented no evidence that the annual inspections were not performed in accordance with the regulations or industry standards. Summary judgment is granted as to the breach of contract claims."

Notably, the alleged acts and omissions that underlay the Gustins' breach-of-contract claims quoted above were not tied

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to any duty Vulcan had to find hidden termites or to comply with inspection regulations or standards. In particular, the Gustins' breach-of-contract claims were predicated on Vulcan's alleged failure to report conditions conducive to termites in accordance with industry standards; Vulcan's alleged failure to adequately advise the Gustins of termite activity and of Vulcan's inability to inspect certain areas; and Vulcan's alleged failure to properly treat the house.

Moreover, there was substantial overlap between the evidence and arguments that the Gustins advanced in support of these breach-of-contract claims and those they advanced in support of their tort claims. Although the trial court assessed in detail this evidence and these arguments in relation to the Gustins' tort claims, the court did not indicate that it assessed the overlapping evidence and arguments in relation to the breach-of-contract claims. This inconsistency indicates either that the trial court did not recognize that the evidence that supported the tort claims also supported the breach-of-contract claims or that it incorrectly concluded that the evidence that was insufficient to support the tort claims was therefore insufficient to

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support the related breach-of-contract claims. Regardless, the trial court's judgment was incorrect. Our review of the record indicates that the Gustins submitted substantial evidence that Vulcan committed the acts and omissions underlying each of the seven breach-of-contract claims listed above. That evidence created a genuine issue of material fact regarding whether Vulcan breached its duty to "perform all services in a workmanlike manner," as the contract required.

The determination whether a defendant has committed a material breach of contract is "typically for a [fact-finder] to make," and summary judgment is appropriate only when ""the question is so clear as to be decided only in one way."" LNM1, LLC v. TP Props., LLC, 296 So. 3d 792, 797 (Ala. 2019) (quoting Harrison v. Family Home Builders, LLC, 84 So. 3d 879, 890 (Ala. Civ. App. 2011), quoting in turn Birmingham News Co. v. Fitzgerald, 222 Ala. 386, 388, 133 So. 31, 32 (1931)). Therefore, the trial court erred in entering a summary judgment on these other breach-of-contract claims.

IV. Conclusion

For the foregoing reasons, we reverse the summary judgment with respect to the Gustins' breach-of-contract

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claims. We affirm the judgment in all other respects, and we remand the case for proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Bolin, Wise, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.

Bryan, J., concurs in the result.

Shaw, J., concurs in the result and dissents in part.

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SHAW, Justice (concurring in the result and dissenting in part).

I concur in the result reached by the main opinion. I dissent, however, as to Part III.D.