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ALLEMAND v. DISCOVERY HOMES, INC.

NO. 2009 CA 1565.

38 So.3d 1183 (2010)

Jody ALLEMAND, Individually and as Tutor of his Minor Child, Emily Allemand and his Wife, Renee Allemand

v.

DISCOVERY HOMES, INC., Bruce Schexnayder, Roberta Taylor Schexnayder and Audubon Indemnity Company and/or Audubon Indemnity Group.

Court of Appeal of Louisiana, First Circuit.

May 28, 2010.

Woody Falgoust, Rachael Bollinger Carothers, Cassie Rodrigue Braud, Thibodaux, Louisiana, for Plaintiffs-Appellants Jody Allemand, individually and as tutor of his minor child, Emily Allemand and Renee Allemand.

Sidney W. Degan, III, Eric D. Burt, Baton Rouge, Louisiana, for Defendant-Appellee Audubon Insurance Group.

Before PARRO, KUHN, and McDONALD, JJ.

KUHN, J.

Plaintiffs-appellants, Jody Allemand individually and in his capacity as tutor of his minor daughter, Emily, and his wife, Renee, appeal the trial court's judgment, which granted a motion for summary judgment in favor of defendant-appellant, Audubon Insurance Group (Audubon Insurance). The judgment dismissed, pursuant to the New Home Warranty Act (NHWA),¹ plaintiffs' claims for damages for bodily injuries sustained by Emily and their resulting loss of consortium. We reverse in part and affirm in part.

FACTUAL AND PROCEDURAL BACKGROUND

According to the allegations in the petition, on March 20, 2002, Jody and Renee Allemand signed a contract with Discovery Homes, Inc. (Discovery Homes) to construct a new home in Thibodaux. The Allemands moved into the newly-constructed home on August 19, 2002, with their six-day old baby, Emily. In September 2002, during a tropical storm, the interior walls of the home's three bedrooms began to leak, saturating the carpets. An inspection of the area behind the baseboards of the leaking walls revealed the presence of mold, which allegedly was toxic. Emily's immune system weakened and, on January 3, 2003, she was admitted to a hospital, where she was diagnosed with the respiratory condition known as RSV.² On January 26, 2003, Emily was admitted to another hospital for symptoms associated with Kawasaki disease. The Allemands aver that Emily has suffered personal injuries consisting of toxic mold spore inhalation, a weakened immune system, RSV, Kawasaki disease, and associated nasal symptoms, which were caused as a result of her exposure to toxic mold found behind the baseboards of the bedroom walls that leaked during the tropical storm.

The Allemands filed this lawsuit seeking damages for breach of contract and negligence from Discovery Homes, its president, Bruce Schexnayder, and his wife, Roberta, who is the corporate secretary, as well as Audubon Insurance, the insurer of Discovery Homes. On July 8, 2004, the parties settled all of the property damage claims and causes of action, expressly reserving Jody's right as tutor of Emily to pursue against defendants all her claims and causes of action for bodily injury.

Audubon Insurance subsequently moved for summary judgment contending that Jody's claims for damages as a result of bodily injuries Emily sustained, as well as his and Renee's claims for loss of consortium that are derivative of Emily's injuries, are excluded from the builder's warranties under the NHWA and, therefore, not recoverable as a matter of law. After a hearing, the trial court agreed and dismissed Audubon Insurance from the lawsuit. The Allemands lodged this appeal.

DISCUSSION

SUMMARY JUDGMENT LAW

The summary judgment procedure is expressly favored in the law, and is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by Article 969. La. C.C.P.

art. 966 A(2). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966 B.

The initial burden of proof is on the moving party. However, if the movant will not bear the burden of proof at execution, failed. Subquery returns more than 1 row

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