

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

WHITE BROTHERS PARTNERSHIP, et al.	:	
	:	Appellate Case No. 23771
	:	
Plaintiff-Appellee	:	Trial Court Case No. 2005-CV-01543
	:	
v.	:	
	:	(Civil Appeal from
ENCON, INC., et al.	:	Common Pleas Court)
	:	
Defendant-Appellant	:	

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OPINION

Rendered on the 1st day of October, 2010.

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BROGAN, J.

{¶ 1} Encon, Inc. appeals from the trial court’s November 5, 2009 decision and entry overruling its motions for judgment notwithstanding the verdict and for a new trial after a jury ruled against it on its third-party complaint alleging a breach of

fiduciary duty.

{¶ 2} Encon advances two assignments of error on appeal. First, it contends the trial court erred in overruling its motion for judgment notwithstanding the verdict where the evidence did not support the jury's finding that appellees Wagner Insurance Agency, Robert Wagner, and Mike Wagner did not breach a fiduciary duty by failing to advise Encon to obtain proper insurance coverage. Second, Encon claims the trial court erred in denying its motion for a new trial where the weight of the evidence did not support the jury's finding of no breach of fiduciary duty.

I. Factual and Procedural Background

{¶ 3} In its November 5, 2009 ruling, the trial court summarized the evidence presented at trial as follows:

{¶ 4} "Encon is an Ohio corporation doing business in Vandalia, Ohio, where it manufactures pre-form molds for the container industry. Encon stores its inventory at various locations, including warehouses owned by Encon and others it leases from third-parties. Encon leased property located at 3540 Vance Road from the primary Plaintiff herein, White Brothers Partnership, for purposes of storing its inventory. A written lease for that property was prepared by Encon's attorney, Patricia Pickrel. Under the terms of that lease, Encon was to obtain general liability insurance insuring against any loss within or upon the property. Encon had worked for many years with Third-Party Defendant, Wagner Insurance Agency, a full-service insurance agency operating in the Dayton, Ohio, area. On or about February 4, 2003 an employee of Encon was operating a forklift at the Vance Road property and struck a support post, subsequently causing

the collapse of the roof and damage to certain inventory owned by Encon. Indian Harbor Insurance Company, the insurer of White Brothers Partnership, paid \$254,558.33 for repair to the building and White Brothers paid \$10,000 as its deductible under the terms of the Indian Harbor policy. Encon subsequently settled the claims made by Indian Harbor Insurance and White Brothers, and brought its third-party Complaint, seeking damages from the Wagner Defendants for professional negligence.

{¶ 5} “The matter proceeded to trial in December, 2008. Essentially, two claims were submitted to the jury at the time of trial, one based upon the parties’ ordinary business relationship and one based upon an allegation of a fiduciary relationship between the parties. (The parties stipulated prior to trial that Encon’s damages were in the amount of \$210,000).

{¶ 6} “At the time of trial, the following testimony was adduced:

{¶ 7} “Robert Wagner, a principal in Wagner Insurance Agency, testified. Mr. Wagner stated that he was responsible for conducting annual reviews of the insurance portfolio of Encon. Mr. Wagner stated that he or his employees would often ask representatives of Encon for copies of their leases. However, Encon did not provide those leases. Mr. Wagner had a specific recollection of asking representatives of Encon for over twenty years for a copy of a lease for a property in Englewood, to no avail. He also testified that, at the time [Encon’s] Debra Doyle contacted the Wagner Agency about coverage for the Vance Road property, he had recently conducted a review of the insurance needs of Encon with Ms. Doyle and that he had discussed with her issues relating to insurance coverage and leases at the time of that review. Mr. Wagner also testified that he had had numerous conversations with Debbie Doyle over the years

regarding the fact that Encon was not insured for their own employees' acts of negligence on leased premises. At all times prior to this litigation, Encon had foregone legal liability coverage for its leased premises.

{¶ 8} “Mike Wagner, also a principal in the Wagner Insurance Agency, testified at trial. He testified that the Wagners were hampered and frustrated in their ability to advise Encon because Encon employees did not respond when asked for copies of leases. Mr. Wagner also admitted that it was part of Wagner’s responsibility, as a part of their relationship with Encon, to assess risk and give advice, which can be accomplished by reviewing lease requirements.

{¶ 9} “Sandra Jones, an employee of Wagner, testified at the time of trial. She spoke with Debra Doyle of Encon about coverage on the Vance Road warehouse. Doyle had specifically told her that Encon did not need insurance on the building. However, on other occasions, when asked about insurance on other properties, Doyle would advise Jones that coverage was needed on the building. Further, during the conversation that occurred on January 15, 2003 between Doyle and Jones, at no time did Debra Doyle tell nor request of Ms. Jones that broad form all risk legal liability coverage was requested on the Vance Road warehouse, nor that Encon had a desire or interest in changing any other property policy to that type of coverage.

{¶ 10} “Debra Doyle, the Encon employee responsible for obtaining insurance coverage for the company, also testified at trial. She acknowledged that she met with either Mike or Robert Wagner on January 7, 2003. She also acknowledged that at that time she was provided with a detailed summary from the Wagner defendants regarding the coverage that Encon had in place at that time and the coverage that was

recommended by the Wagners. However, she did not request any change in the coverage Encon had, in spite of those recommendations. She also admitted that it was her responsibility to request coverage from the Wagner Insurance Agency. Still further, Ms. Doyle admitted that, when asked by Ms. Jones whether she wanted the Vance Road warehouse covered, she responded that she did not.

{¶ 11} “At trial, Dr. John Fitzgerald, Jr., testified as an expert witness on behalf of Encon. Dr. Fitzgerald has spent the bulk of his professional career in education and has not been engaged in the practice of insurance since the early 1960s. He is not a licensed agent or broker in the State of Ohio. Dr. Fitzgerald testified that the Wagners breached the standard of care by failing to obtain the lease on the Vance Road property and recommend the proper coverage under the terms of the lease. Dr. Fitzgerald also testified that in the annual review completed by Robert Wagner just a few short weeks before the loss at the Vance Road warehouse, he [Wagner] recommended ‘legal liability’ coverage for Encon and that such coverage was available to be written by the Wagners. Dr. Fitzgerald also testified that if such coverage was written, the loss sustained at the Vance Road warehouse would have been covered. As to any fiduciary relationship existing between the Wagners and Encon, Dr. Fitzgerald opined that the standard of care required the Wagners to advise Encon of exposures ‘that should be identified and should be handled. And should be covered, assuming they can be covered.’ Dr. Fitzgerald summarized the standard of care as being one where ‘best efforts’ were required. He also opined that the Wagners should ha[v]e obtained a copy of the lease between Encon and the lessor. Generally speaking, Dr. Fitzgerald was of the opinion that the Wagners should have recommended broad form legal liability

coverage. * * * Coverage was obtained on the Vance Road warehouse on January 15, 2003, and the lease on the property was effective January 16, 2003. The loss occurred nineteen days later on February 4, 2003. Dr. Fitzgerald agreed with defense counsel's suggestion that the decision to purchase insurance is always the decision of the insured, and not the insurance agent. He also was aware that Debra Doyle of Encon told Sandy Jones of Wagner Insurance Agency that Encon did not need insurance coverage on the Vance Road warehouse building.

{¶ 12} “Mr. Rick Bersnak testified at trial as an expert witness on behalf of the Wagner defendants. Bersnak is a commissioned insurance broker and agent and has been in the insurance business for thirty-six years. He has been licensed to sell insurance in Ohio since 1972. He holds a bachelor’s degree from Ohio University and an M.B.A. from Ohio State University. Mr. Bersnak opined that the Wagners wrote the insurance requested by Encon, thereby satisfying their duty under the standard of an ordinary relationship between an insurance agent and a client. Bersnak agreed with Dr. Fitzgerald that the Wagners should have asked for a copy of the lease for the Vance Road property, although it is the insured’s responsibility to provide the lease. However, Bersnak testified that the Wagners could have relied on the statements by Debra Doyle that no insurance coverage was needed on the building, particularly since the customer makes the final decision on whether insurance coverage is purchased. Other than failing to ask for the lease, Mr. Bersnak did not believe that the Wagner defendants breached any duty that they had to Encon.” (Doc. #308 at 2-5).

{¶ 13} After reviewing the evidence, the trial court noted that the jury had found a fiduciary relationship between Encon and the Wagner Insurance Agency, Robert

Wagner, and Mike Wagner. The trial court further noted, however, that the jury had responded negatively to an interrogatory asking whether any of the Wagner defendants had breached their fiduciary duty by failing to advise Encon to obtain proper insurance coverage for the Vance Road warehouse. Given that response, the jury did not proceed to interrogatories relating to proximate cause and damages.

{¶ 14} The trial court next reviewed the law governing motions for judgment notwithstanding the verdict and for a new trial. It also discussed the law pertaining to an insurance agent's duty to an insured. The trial court then turned to Encon's central argument that the evidence compelled a finding of a breach of fiduciary duty by the Wagner defendants. The trial court disagreed, reasoning:

{¶ 15} "The jury found that the relationship between the parties was a fiduciary one. Therefore, the court's inquiry then turns on whether the Wagners breached the standard of care applicable to such a relationship. There is no dispute that there was no request made by Encon for coverage for this loss. Therefore, the court's inquiry centers on whether the Wagners failed to advise Encon about its insurance needs. The evidence was clear that the Wagners conducted an annual review of Encon's insurance needs. Approximately eight days prior to Deborah Doyle's contact with the Wagners relating to the Vance Road warehouse, Robert Wagner had spent more than an hour with Ms. Doyle reviewing Encon's insurance coverage and answering Ms. Doyle's questions. Robert Wagner testified at trial that he had previous discussions with Ms. Doyle about broad form legal liability insurance coverage, coverage that Ms. Doyle had previously declined. Furthermore, when Ms. Doyle contacted Sandra Jones of the Wagner Insurance Agency on January 15, 2003 to obtain insurance coverage related to

the Vance Road property, she did not request any change to the type of coverage that Encon previously had carried. Perhaps more importantly, during their conversation on January 15, 2003, Sandra Jones, an agent with the Wagner Insurance Agency, specifically asked Debra Doyle if Encon needed insurance coverage on the Vance Road property, to which Ms. Doyle re[p]lied, 'no.' To summarize, Encon had previously turned down the type of coverage it now claims that the Wagners should have recommended. The jury could have determined that the Wagners had met their duty by previously advising Encon of the need for that insurance, but that any further mention of the coverage would be futile given Encon's unwillingness to obtain the insurance in the past. The court cannot consider Debra Doyle's conversation with Sandra Jones of the Wagner Insurance Agency on January 15, 2003 without considering Robert Wagner's insurance review with Debra Doyle in early January of the same year. While the two were separate events, the two relate to whether the Wagners complied with their fiduciary duties to Encon. Robert Wagner advised Debra Doyle of what was necessary to insure the risks to Encon in early January; Debra Doyle made no change in Encon's coverage at that time. A few days later, Doyle requested coverage on the Vance Road property and specifically stated that she did not need coverage on the warehouse. Since it is the decision of the insured as to the scope and amount of coverage it desired, even in light of the agent's duty to advise the insured of appropriate coverages, the jury could have found that the Wagners met their duty through the annual insurance review that took place in early January between Robert Wagner and Debra Doyle. Furthermore, it was within the jury's province to determine the credibility or believability of the witnesses." (Id. at 10-11).

II. Analysis

{¶ 16} In its first assignment of error, Encon contends its motion for judgment notwithstanding the verdict should have been sustained because the record lacks any evidence that the Wagner defendants did not breach their fiduciary duty by failing to recommend proper insurance coverage for the Vance Road warehouse.

{¶ 17} Encon stresses that the Wagner defendants never specifically advised it of a gap in its coverage concerning the Vance Road warehouse. Encon contends that if the Wagner defendants had requested and obtained a copy of the Vance Road lease, they could have evaluated the risk and recommended appropriate coverage. Encon cites Mike Wagner's admission that one way to assess Encon's risk would have been to review the lease. Encon further notes that several witnesses, including the Wagners, agreed that Sandra Jones should have requested a copy of the Vance Road lease from Debra Doyle. Encon also cites testimony from both expert witnesses, Richard Bersnak and John Fitzgerald, who agreed that the Wagner defendants breached the applicable standard of care by not requesting a copy of the lease. Therefore, Encon contends the evidence does not support the jury's finding that the Wagner defendants did not breach their fiduciary duty by failing to recommend proper insurance coverage.

{¶ 18} Encon also insists that the Wagner defendants' failure to recommend proper coverage proximately caused the loss in this case.¹ In support, Encon cites undisputed trial testimony that there were ways for the coverage gap to be filled. Encon

¹Because the jury found no breach of fiduciary duty, it never reached the issue of causation.

further cites testimony from its representatives, Debra Doyle and Karin Gaiser, that if they had been made aware of the coverage gap, they would have purchased insurance to fill it. Encon contends there “was no evidence to dispute that the proper insurance could have been recommended and would have been purchased by Encon if recommended.” Therefore, Encon claims reasonable minds necessarily would find causation in this case. As a result, it urges us to reverse the trial court’s denial of judgment notwithstanding the verdict.

{¶ 19} Upon review, we find Encon’s arguments to be unpersuasive. “The standard of review for a motion for judgment notwithstanding the verdict is the same as that for a directed verdict: Construing the evidence most strongly in favor of the party against whom the motion is directed, the motion must be overruled unless reasonable minds could reach no other conclusion but that, under the applicable law, the movant is entitled to judgment in his favor.” *Butler v. Stevens*, Montgomery App. No. 22822, 2009-Ohio-2775, ¶25.

{¶ 20} As a preliminary matter, we note that the Wagner defendants did not cross appeal the jury’s finding that a fiduciary relationship existed in this case. Encon’s expert witness, John Fitzgerald, described the Wagner defendants’ fiduciary duty as follows: “The standard of care is to advise an insured of exposures that should be identified and should be handled * * * [an]d should be covered, assuming they can be covered.” Applying that standard, the trial court properly overruled Encon’s motion for judgment notwithstanding the verdict because the record contains evidence from which the jury reasonably could have found that the Wagner defendants satisfied their fiduciary duty by recommending proper insurance coverage for the Vance Road

warehouse.

{¶ 21} While virtually everyone at trial agreed that the Wagner defendants should have requested a copy of the Vance Road lease, the jury reasonably could have found that the Wagner defendants breached that duty but still fulfilled their fiduciary duty to recommend proper insurance coverage. In other words, it was not unreasonable for the jury to find that the Wagner defendants recommended proper insurance coverage, which was the particular fiduciary duty at issue, despite not seeing the Vance Road lease. We reach this conclusion based largely on the testimony of Robert Wagner, which the jury was entitled to believe.

{¶ 22} It was undisputed at trial that Encon leased space in several warehouses, and Robert Wagner testified about having had “numerous conversations” with Debra Doyle regarding “Encon not being insured for their own employees’ acts on leased premises * * *.” (Certified trial transcript, Wagner testimony at 15). Although Wagner could not recall each specific conversation, he explained that the issue “came up continually” during annual insurance reviews with Encon and that it had been discussed many times. (Id. at 16-17). He testified that “[t]hose conversations had been going on, ongoing for 20 plus years.” (Id. at 14).

{¶ 23} Wagner was able to recall one such conversation with specificity. He described a discussion with Doyle in the mid-1990s involving leased warehouse space on Executive Road. At that time, he explained to Doyle that a tenant could be liable for damage to a leased space. He gave her an example of an employee driving a forklift into a gas tank and causing an explosion in the building. (Id. at 20). He testified that Doyle declined to purchase the necessary coverage. (Id.). Wagner did not suggest that

his conversation with Doyle in the 1990s satisfied the insurance agency's fiduciary duty for all time. Rather, he cited it as one example, while stressing that he had engaged in similar conversations through the years where the type of insurance at issue, broad form all-risk coverage, would have filled a coverage gap but had been rejected by Encon. (Id. at 22-23, 38-40).

{¶ 24} Given that he had explained to Encon numerous times how it could fill the coverage gap at issue, Wagner opined that his insurance agency was not obligated to provide the same explanation again when Encon leased the Vance Road property. As Wagner put it at trial: "We had just done an annual review, we just, you know, talked about those types of things in the annual review. And every time someone has a new situation you don't go out and review the entire complex insurance matter with them, describe the whole situation to them, I mean it's just not the practical thing to do." (Id. at 12).

{¶ 25} On appeal, Encon contends the trial court erred in focusing on events that occurred prior to its acquisition of the Vance Road warehouse—specifically Robert Wagner's prior advice about obtaining broad form coverage—to support the jury's finding that the Wagner defendants satisfied their fiduciary duty regarding that warehouse. According to Encon, "[t]he proper evidentiary focus * * * is not on what Wagner may or may not have done in terms of advising Encon about its insurance needs *before* Encon leased the Vance Road warehouse, but rather, should focus on what Wagner did or did not do in terms of advising Encon about its insurance needs as those needs specifically related to its lease of the Vance Road warehouse."

{¶ 26} We disagree. In light of Robert Wagner's testimony, the jury reasonably

could have concluded that he repeatedly had advised Encon to purchase broad form all-risk insurance to fill the precise type of coverage gap that existed in this case. Although that advice admittedly pertained to leases involving warehouses other than the one on Vance Road, the jury reasonably could have determined that Wagner was not obligated to repeat himself each and every time an analogous lease situation arose.² In short, Wagner's testimony provided the jury with an evidentiary basis to find that Encon adequately had been advised of its need to purchase insurance to cover the type of loss that occurred at the Vance Road warehouse. Construing the evidence most strongly in favor of the Wagner defendants, reasonable minds could find that they did not breach their fiduciary duty to Encon by failing to advise Encon to obtain proper coverage for the Vance Road warehouse. Accordingly, the trial court did not err in overruling the motion for judgment notwithstanding the verdict. The first assignment of error is overruled.

{¶ 27} In its second assignment of error, Encon contends the trial court erred in overruling its motion for a new trial on the basis that the jury's verdict was not supported by the evidence. Encon incorporates by reference the arguments raised under its first assignment of error and asserts that the trial court improperly relied on Robert Wagner's prior advice to support a finding that he did not breach his fiduciary duty with regard to the Vance Road warehouse.

{¶ 28} We review the trial court's denial of Encon's motion for a new trial for an

²We recognize that Encon's expert witness, John Fitzgerald, disputed whether Robert Wagner's act of previously advising Encon to purchase broad form coverage absolved the insurance agency of its obligation to recommend the coverage again when the Vance Road lease arose. But the jury had the discretion to reject Fitzgerald's opinion and to agree with Wagner that he was not obligated to repeat his advice each time a new lease materialized. *Butler*, supra, at ¶39 (recognizing that a "trier of fact is not required to credit any expert, even if the expert's testimony is unrefuted").

abuse of discretion. *Miller v. Remusat*, Miami App. No. 07-CA-20, 2008-Ohio-2558, ¶32. For the reasons set forth above, we find no abuse of discretion. Where the evidence reasonably supports a jury's verdict and no manifest injustice is shown, a trial court properly denies a motion for a new trial. *McMullin v. Johnsman*, Darke App. No. 07CA1720, 2008-Ohio-3488, ¶10-12. We find that to be the case here. Accordingly, the second assignment of error is overruled.

{¶ 29} The judgment of the Montgomery County Common Pleas Court is affirmed.

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FAIN and GRADY, JJ., concur.

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