[Cite as *Wanner Metal Worx, Inc. v. Hylant-Maclean, Inc.*, 2003-Ohio-1814.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
WANNER METAL WORX, INC., ET AL.	:	Hon. William B. Hoffman, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiffs-Appellants	:	Hon. Julie A. Edwards, J.
	:	
-vs-	:	
	:	Case No. 02CAE10046
HYLANT-MACLEAN, INC.	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas, Case No. 01CVC10500
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	April 7, 2003

APPEARANCES:

For Plaintiffs-Appellants	For Defendant-Appellee
DONALD W. GREGORY MELVIN D. WEINSTEIN 65 East State Street, Ste. 1800 Columbus, Ohio 43215	BRADLEY L. SNYDER KEVIN J. ZIMMERMAN 155 East Broad Street, 12 Floor Columbus, Ohio 43215

[Cite as *Wanner Metal Worx, Inc. v. Hylant-Maclean, Inc.*, 2003-Ohio-1814.]
Hoffman, P.J.

{¶1} Plaintiffs-appellants Wanner Metal Worx, Inc. and Delaware Machine Worx, Inc. (hereinafter "Wanner") appeal the September 9, 2002 Judgment Entry of the Delaware County Court of Common Pleas which granted summary judgment against them and in favor of defendant-appellee Hylant-Maclean, Inc (hereinafter "Hylant").

STATEMENT OF THE FACTS AND CASE

{¶2} On October 16, 1999, one of Wanner's plant facilities was damaged by fire. At the time of the fire, Wanner was covered by a commercial insurance policy issued by CNA. The policy included business interruption coverage in the amount of 1.9 million dollars. The policy also contained a 100% co-insurance provision. The policy did not contain an agreed value endorsement.

{¶3} Wanner purchased the policy from its insurance broker, Hylant. Wanner had done business with Hylant since 1994, each year purchasing similar policies. Wanner's account had always been handled by Craig Markos. By the time of the fire, Markos was the president of Hylant.

{¶4} As a result of the fire, Wanner suffered business losses in the amount of $1,136,364.00. However, due to the coinsurance provision in the policy, CNA would pay only $750,000.00. On October 4, 2001, Wanner filed a complaint against Hylant alleging Hylant negligently failed to obtain an agreed value endorsement negating the coinsurance provision; Hylant negligently failed to advise Wanner an agreed value endorsement should be obtained; and Hylant failed to properly advise Wanner of the impact of the coinsurance clause without an agreed value endorsement.

{¶5} Business interruption insurance generally provides coverage for lost "business income," and generally includes such items as the net profits which would have

been earned but the for the suspension of business operations, as well as those continuing normal operating expenses incurred during the period of any suspension. Coinsurance clauses are also standard provisions in business property policies. Apparently, the purpose behind the coinsurance provision is to assure the limit of insurance requested by the insured is accurate, and the insured does not underinsure the business. If the value of the company is underinsured, the coinsurance provision adjusts the payout of the claim in order to take into account the undervaluation of the company. Marcos testified a coinsurance clause would not come into play if the insured properly values the company and insures it accordingly.

{¶6} However, this coinsurance "penalty" can be avoided by obtaining an agreed value endorsement from the insurance carrier. An agreed value endorsement will only be issued after an underwriter receives and reviews a business income worksheet documenting the business' income. After an underwriter has received proper documentation, the insurance company will issue an agreed value endorsement which eliminates the coinsurance cause. Generally, a business income coverage worksheet must be completed each year and submitted to the agent, who then must submit it to the carrier.

{¶7} Markos acknowledged decisions about coinsurance and agreed value endorsements are important decisions for clients like appellants. During depositions, Markos testified he discussed the subject of coinsurance and agreed value endorsements with both Craig Wanner, the president of Wanner, and Jeff Dix, Wanner's designated contact for insurance issues. Markos claims these discussions occurred at every year during the annual policy renewal period, however Markos also testified he had neither

specific nor general recollection of what was discussed on any particular occasion.

{¶8} Craig Wanner testified Markos never discussed coinsurance or agreed value endorsements with him as such provisions related to business interruption coverage. Wanner testified that as of the date of his deposition, he still did not understand how coinsurance worked. Dix did not deny that any such discussions may have occurred with Markos, but he could not recall a specific conversation.

{¶9} Markos admitted Wanner and Dix asked him on more than one occasion to explain coinsurance. Further, Theresa Gallo, a customer service representative at Hylant who assisted Markos with the Wanner account, testified Dix had asked her for definition of coinsurance. Although Gallo has been a licensed property and casualty insurance agent for more than twelve years, she testified she did not know the definition of coinsurance, and had to ask Markos to explain it to her. After this explanation, she still did not understand the definition.

{¶10} Even though there was confusion about the issue, appellee never recommended to Wanner that it remove the coinsurance provision in its business interruption coverage through the use of an agreed value endorsement or otherwise. Markos testified it was neither his nor Hylant's practice to advise customers whether they should have coinsurance provisions or agreed value endorsement in their policies. Markos testified he did not advise commercial customers as to whether insurance coverages were adequate or inadequate for their businesses. Rather, it was Markos' standard practice to advise a client as to what coverages were available and then let the client decide what amounts and kinds of coverage they wanted. Markos testified he followed this policy with the Wanner account. At no time did Markos believe it was his duty to advise commercial

customers as to the coverage limits they should have for their coverages.

{¶11} However, earlier in the relationship, Markos did counsel Wanner not to decrease the amount of business interruption coverage. In order to save money on the premium, Wanner requested a downward deviation in business interruption coverage from $600,000 to $300,000. Markos testified he convinced Wanner this was not a good idea.

{¶12} Markos advised Dix a business interruption worksheet was to be completed each year for purposes of seeking an agreed value endorsement and for verifying the accuracy of the coverage limit being requested by Wanner. Dix testified that Markos did ask for completed business income worksheets on various occasions, and that those worksheets were needed to verify and/or arrive at the correct limit of business interruption insurance coverage. Although appellee requested completion of the business worksheets on a yearly basis, and followed up with Wanner about the worksheets, Hylant never received a completed business worksheet from appellee after August of 1995.

{¶13} Joseph Urquhart, a vice president of Berwanger Obermyer Assoc., testified Hylant's failure to recommend Wanner remove the coinsurance penalty provision in its business interruption coverage through the use of an agreed value endorsement or other similar provision, fell below the standard of care applicable to insurance agents who advise commercial clients concerning their coverage.

{¶14} Beginning with the November 1, 1995, through November 1, 1996 policy period, Wanner increased its business coverage from $600,000 to $1.9 million. The coinsurance penalty percentage also increased, from 50% to 100%. Markos testified he was following his client's request as set forth on a Business Interruption Worksheet signed by Dix on Wanner's behalf. The worksheet indicated Wanner wanted coverage totaling

$1.9 million. Below the business interruption value of $1.9 million, the worksheet had various provisions stating as follows:

{¶15} "* * * J. Amount of insurance-item 1. Take 80% or 100% of column one, column two, depending upon percentage contribution clause to be used."

{¶16} Jeff Dix wrote the number 100% in the space provided. Wanner argues this 100% notation did not mean that appellants wanted 100% coinsurance but instead wanted an amount of insurance totaling 100%.

{¶17} Further, Craig Wanner testified he wanted 100% insurance and he wanted to be entirely covered for any potential loss. Wanner also argued it relied on appellee to advise it if it was not fully insured. Wanner testified specifically he relied upon Markos to let him know if he wasn't getting any information from Dix or if once he had the information, if he had any large exposure.

{¶18} Wanner changed its carrier to CNA on January 1, 1999. Just as in the past years, appellants requested business interruption coverage in the amount of $1.9 million with 100% coinsurance. Markos completed this application based upon Dix telling him leave all coverages and limits in place "as is." Markos testified he again requested appellants complete a business income worksheet and Dix instructed he did not want to change the business income coverage limits. Appellee sent Dix a new business income worksheet to be completed, but it was never returned.

{¶19} The CNA policy was forwarded to appellants on August 26, 1999. The CNA policy explained the coinsurance provisions of the business income coverage. The coinsurance in the CNA policy included definitions, and detailed explanations, including examples of how coinsurance would work with adequate and inadequate coverage limits.

The parties do not dispute appellants received this policy prior to the fire.

{¶20} Dix received insurance binders with attached summaries of coverage from appellee at the inception of each policy period. However neither Craig Wanner nor Dix, nor anyone at Wanner ever read or reviewed the policies or binders. They did read the proposals and summaries of coverage. Both Craig Wanner and Dix testified these summaries appeared to contain language negating the existence of coinsurance. The proposals and summaries each contained a page describing appellants' business income coverage. On each of these forms, appellee stated appellants not only had coverage totaling $1.9 million with 100% coinsurance, but also stated the "valuation" for the $1.9 million in coverage was the "actual loss sustained."

{¶21} Markos did not recall ever explaining to appellants what "actual loss sustained" meant. Craig Wanner testified he understood actual loss sustained to mean he had business interruption coverage, dollar for dollar, for the actual loss sustained up to $1.9 million.

{¶22} Hylant filed its motion for summary judgment claiming it advised Wanner as to the coverage available and left to Wanner the decision as to what coverage to purchase. Hylant asserted the policy clearly set forth the impact of the coinsurance clause, therefore, it could not be blamed for appellants' failure to read and understand the contents of its insurance policy.

{¶23} Wanner presented Urquhart's affidavit opining appellee's failure to provide an agreed value endorsement fell below the standard of care.

{¶24} Appellants also argued genuine issues of material fact remained as to whether Hylant obtained the coverage Wanner actually requested. In his deposition, Craig

Wanner stated he thought he had $1.9 million in coverage, regardless of any coinsurance provision. Wanner also argued the insurance summaries Hylant provided each year indicated Wanner did have $1.9 million in coverage. Wanner asserted it reasonably interpreted the "actual loss sustained" language to mean in the event of a loss, appellants would be entitled to actual dollar value of the loss sustained.

{¶25} In a September 9, 2002 Judgment Entry, the trial court granted summary judgment in favor of Hylant, finding the resolution of the motion turned upon Wanner's failure to read its policy. It is from this judgment entry appellants prosecute their appeal, assigning the following error for our review:

{¶26} "I. THE TRIAL COURT ERRED IN CONCLUDING THAT BECAUSE APPELLANTS HAD FAILED TO READ THEIR INSURANCE POLICY, APPELLANTS' CLAIMS FOR NEGLIGENCE AGAINST APPELLEE WERE BARRED AS A MATTER OF LAW, AND IN GRANTING SUMMARY JUDGMENT TO APPELLEE, WHERE: (A) OHIO LAW REQUIRES INSURANCE AGENTS TO ADVISE THEIR CUSTOMERS WHO ARE RELYING ON THE AGENT'S EXPERTISE; (B) IT WAS UNDISPUTED THAT APPELLEE FAILED TO ADVISE APPELLANTS TO OBTAIN AN AGREED VALUE ENDORSEMENT FOR THEIR BUSINESS INTERRUPTION COVERAGE; (C) THERE WAS EVIDENCE THAT APPELLEE'S FAILURE TO SO ADVISE APPELLANTS FELL BELOW THE APPLICABLE STANDARD OF CARE; (D) THERE WAS A GENUINE ISSUE OF FACT AS TO WHETHER A RELATIONSHIP OF SPECIAL TRUST AND CONFIDENCE EXISTED BETWEEN APPELLANTS AND APPELLEE; (E) THERE WAS A GENUINE ISSUE OF FACT AS TO WHETHER APPELLEE HAD MISLED APPELLANTS ABOUT THE SCOPE OF THE INSURANCE COVERAGE THEY DID HAVE; AND (F) APPELLANTS SUFFERED

DAMAGE AS A RESULT."

I.

{¶27} In Wanner's sole assignment of error, it maintains the trial court erred in granting summary judgment against it. Wanner contends there are genuine issues of material fact relative to whether Hylant breached its standard of care in failing to advise appellants about agreed value endorsements for business interruption coverage, whether any special relationship of trust and confidence existed between Wanner and Hylant, and whether Hylant misled appellants about the scope of insurance coverage it did have. We agree. Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36.

{¶28} Civ.R. 56(C) states, in pertinent part:

{¶29} "Summary Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law....A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

{¶30} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment

bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280.

{¶31} It is based upon this standard we review appellant's assignment of error.

{¶32} In its September 9, 2002 Judgment Entry, the trial court's decision turned on the fact Wanner failed to read its insurance contracts. The trial court noted an insurance agent has a duty to exercise good faith and reasonable diligence in undertaking to acquire insurance coverage. *Slovak v. Adams* (2000), 141 Ohio App.3d 838, 845. The trial court also noted in the absence of a fiduciary relationship, an insurance sales agency has a duty to exercise good faith in obtaining only those policies of insurance which its customers request. *First Catholic Slovak Union v. Buckeye Union Ins. Co.* (1986), 27 Ohio App.3d 169.

{¶33} The trial court relied on *Craggett v. Adell Ins. Agency* (1993), 92 Ohio App.3d 443, 453, for the proposition an insurance customer has a corresponding duty to examine the coverage provided, and is charged with knowledge of the contents of his or her own insurance policy. *Craggett* held an agent or broker is not liable when the customer's loss is due to the customer's own act or omission. The trial court noted the record clearly demonstrated 1) Wanner did not read their insurance policy prior to the fire, 2) the

insurance policy contained a 100% coinsurance provision and explained the application of such provision in the event of a loss, and 3) the insurance policy stated an agreed value endorsement could be obtained if the insured completed a business income worksheet. The trial court found if Wanner had read its insurance policy, it would have noted the existence of the coinsurance provision and would have seen the need for an agreed valued endorsement. Even if Wanner did not understand the language of the contract, any misunderstanding would have prompted inquiry of Hylant. Accordingly, the trial court found the loss sustained was a result of appellants' failure to read and understand their insurance policy.

{¶34} However, the trial court also found no fiduciary relationship existed between appellants and appellee requiring a heightened duty on appellee's part.

{¶35} "When the agency knows that the customer is relying upon its expertise, the agency may have a further duty to exercise reasonable care in advising the customer." *First Catholic Slovak v. Buckeye Union Ins. Co. (1986), 27 Ohio App.3d 169.* Id. Thus, an insurance agent must not only obtain the insurance requested, but also, advise a customer who is relying on his expertise. Id.; *Bedillion v. Tri-County Ins. Agency* (Feb. 3, 1993), Summit App. No. 15722, unreported.

{¶36} Ordinarily, the relationship between an insured and the agent that sells the insurance is, without proof of more, an ordinary business relationship, not a fiduciary one. *Craggett*, 92 Ohio App.3d at 452. "A 'fiduciary relationship' is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *Stone v. Davis* (1981), 66 Ohio St.2d 74, 78. A fiduciary's role may be assumed by formal

appointment or may arise from a more informal confidential relationship, wherein "one person comes to rely on and trust another in his important affairs and the relations there involved are not necessarily legal, but may be moral, social, domestic, or merely personal. * * *" *Craggett*, 92 Ohio App.3d at 451. Such a confidential relationship cannot be unilateral, both parties must understand that a special trust or confidence has been reposed. *Slovak* at 838.

{¶37} As an initial matter, we note our disagreement with the general rule set forth in *Craggett*, *Fry,* and *The Island House Inn, Inc. v. State Auto Ins. Cos.* (2002), 150 Ohio App.3d 522, 2002-Ohio-7107.

{¶38} In *Craggett*, the insured filed a misrepresentation action against an insurance agency. The trial court granted summary judgment in favor of the agency and the insured appealed. The Eighth District held the insured had failed to prove the existence of a fiduciary relationship. Absent that relationship, her insurance agent had only a duty to exercise good faith in obtaining the insurance policy she requested. Id. at 453. The Eighth District also found a corresponding duty to examine the coverage provided and charge the insured with knowledge of the contents of his or her own insurance policies. Id.

{¶39} In *Fry*, a farmer sued his insurance agent for negligently failing to obtain the insurance coverage he requested. When a fire destroyed one of his barn buildings and the contents, the farmer reported the loss to his insurance agent and carrier. 141 Ohio App.3d 303, 306. The adjuster estimated the farmer's loss at $85,690.32. However, based upon the 80% coinsurance clause in the policy, the insurance company offered $27,215.25 as the full and final settlement.

{¶40} Reviewing the denial of summary judgment, the Sixth District analyzed the

farmer's claim that the insurance agent had breached its duty to exercise reasonable care by failing to advise him of the existence of the coinsurance clause, and failing to recommend to increase his coverage to offset the coinsurance. Id. at 310. The Sixth District reiterated that an insurance agency had a duty to exercise good faith and reasonable diligence in obtaining insurance that a customer requests. Id., citing *First Catholic Slovak* supra, at 170. Further, the appellate court noted that when an agency knows a customer is relying upon its expertise, the agency may have a further duty to exercise reasonable care in advising the customer. *Fry* at 310. The court then noted that an insurance customer has a corresponding duty to examine the coverage provided and is charged with knowledge of the contents of his or her own insurance policies. Id. citing *Craggett*, supra.

{¶41} In *Fry*, the insured could "read and write a little." Id. at 307. Further, he had the same insurance agent for forty-seven years. Although Fry asserted he could not inquire about the coinsurance clause because he did not understand the policy language and was entirely unaware it effected his coverage, the Sixth District ultimately concluded Fry was charged with the knowledge of the policy. The appellate court found there was no evidence Fry had inquired specifically about the meaning of the clause at any time during the numerous years the clause was in his policy. Id. at 311. The appellate court found absent a specific inquiry by the insured, the insurance agent had no duty to explain the coinsurance clause. The appellate court made no finding of fiduciary relationship between the parties.

{¶42} Finally, in *First Catholic Slovak*, supra, the Eighth District held sufficient evidence justified the finding the insurance agency had provided exactly the coverage

requested by the insureds. In making this determination, the appellate court noted the insured had received and held repeated policies with the same terms applied in previous years. Therefore, it could not complain the policies did not comply with its requests when it made no complaint about the policies. Id. at 171.

{¶43} In its September 9, 2002 Judgment Entry, the trial court found in the case sub judice, appellants' loss was a result of its own failure to read and understand its insurance policy. Therefore, pursuant to *Fry*, *Slovak*, *First Catholic Slovak Union*, and *Craggett* appellee cannot be liable and negligent.

{¶44} While we do not necessarily disagree an insured has a corresponding duty to examine coverage provided and may be charged with the knowledge of the contents of his insurance policies, we cannot find any such duty or breach thereof completely negates appellants' claim. To do so would be imposing strict contributory negligence when such is not the standard in Ohio. For this reason alone, we would reverse the trial court's judgment entry.

{¶45} However, we also note that we find genuine issues of material fact as they relate to whether a fiduciary relationship existed. Markos testified he would not advise clients as to the appropriate amounts or types of coverages required. Rather, he would describe the coverages available and permit the client to choose. But, this testimony is inconsistent with Markos' testimony that during their relationship he convinced appellants a reduction in overall coverage was not prudent. In essence, Markos cannot be heard to say it was appropriate to encourage his client to increase coverage in one circumstance and then state he never became involved in a business' decision as to how much coverage was necessary. We find this is a genuine issue of material fact which precludes summary

judgment on the issue of whether a fiduciary relationship existed. If a fiduciary relationship existed, appellee would owe a higher standard, requiring appellee to have further advised appellants in this incidence.

{¶46} We also find an issue of material fact existed as to what coverage appellants thought they actually had. Appellants' testimony was clear when reading the summaries of coverage issued by appellee, appellants believed they had dollar for dollar coverage for the actual loss sustained. Further, unlike *Fry*, both Wanner and Dix repeatedly requested explanations of the coinsurance clause. Because of the confusion surrounding the definition of coinsurance, we find a genuine issue of material fact exists as to whether appellee provided the actual coverage requested by appellants', i.e., dollar for dollar coverage for $1.9 million in business interruption coverage.

{¶47} Of course these potential breaches in duty must be weighed against appellants' corresponding duty to examine the coverage provided and their understanding of the contents of their own insurance policies.

{¶48} In *The Island House Inn*, supra, the inn and owner brought an action against their insurance company and insurance agent after the insurance company denied their business interruption insurance claim for interruption caused by a boiler failure at the inn. The trial court granted the insurance agent's motion for summary judgement. The Sixth District Court of Appeals held the inn and owner failed to request boiler insurance, and thus the agent did not breach its duty to obtain the requested insurance. Further, the inn and owner breached their corresponding duty by failing to read the policy, and thus the agent was not liable for any breach of duty to advise them of their insurance needs. The Island *House Inn, Inc. v. State Auto Ins. Cos*. 50 Ohio App.3d at 522.

{¶49} Nevertheless, Appellants' failure to read a policy is typically the subject of a comparative negligence defense which is generally addressed at trial and not on a motion for summary judgment. *See, Texler* v. *D.O. Summers Cleaners & Shirt Laundry Co* . (1998), 81 Ohio St.3d 677, 681, 693 N.E.2d 271 (the question as to whether plaintiffs' contributory negligence is the proximate cause of his injury is an issue of fact for the jury to decide pursuant to the comparative negligence provisions of R.C. § 2315); and *Collier v. Northland Swim Club* (1987), 35 Ohio App.3d 35, 39, 518 N.E.2d 1226 (contributory negligence is generally an issue of fact unless the evidence shows that plaintiff's negligence was so extreme as a matter of law that no reasonable person could conclude plaintiff was entitled to recover). Thus, Appellees themselves raise a factual issue that a jury ought to decide. *Gerace-Flick v. Westfield Nat. Ins. Co.*, 2002-Ohio-5222, 7th Dist. App No. 01 CO 45.

{¶50} Appellants' sole assignment of error is sustained.

{¶51} The September 9, 2002 Judgment Entry of the Delaware County Court of Common Pleas is reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion and the law.

By: Hoffman, P.J.

Farmer, J. and

Edwards, J. concur

JUDGES