2013 IL App (1st) 120375-U

FIFTH DIVISION
June 28, 2013

No. 1-12-0375

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHATHAM CORPORATION,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellant-Cross-Appellee,	)	of Cook County
	)	
v.	)	05 L 09886
	)	
DANN INSURANCE,	)	Honorable
	)	Patrick Lustig,
Defendant-Appellee-Cross-Appellant.	)	Judge Presiding

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Palmer concurred in the judgment.

O R D E R

HELD: Plaintiff failed to meet high standard for judgment notwithstanding $0 damage award or new trial and, in the cross-appeal, defendant was not entitled to advisory opinion on pre-trial arguments which would not reduce $0 damage award.

¶ 1 The plaintiff corporation appeals the denial of its post-trial motion for either a judgment not withstanding the jury's verdict or a new trial. The plaintiff argues the combination of a verdict in its favor as to breach of contract but a $0 damage award is contrary to the manifest weight of evidence and that even one of the defense experts testified to a minimum amount of damages of $768,353. The defendant corporation counters that the jury understood the facts and

reached the right conclusions. The defendant also cross-appeals, arguing that although it prevailed on the facts, it should have prevailed on the legal arguments in its motion to dismiss and motion for summary judgment before the trial got underway, and also on its motion *in limine* to bar certain testimony. The plaintiff responds that precedent supports the denial of those three motions.

¶ 2 The plaintiff-appellant is Chatham Corporation, which we will refer to as Chatham. This is Chatham's third appeal involving an insurance policy that was written in 1996. Chatham is a holding company based in Chicago Heights, Illinois, with about 40 subsidiary corporations, including an entity in Richmond, Virginia known as Sterilization Services of Virginia, Inc., or SSV. SSV uses ethylene oxide (a flammable gas) to sterilize things like kits used in surgical procedures. In 1989, SSV contracted to process medical kits for Maxxim Medical, Inc., or Maxxim. The initial term of the SSV-Maxxim contract was 7-years, with a 5-year renewal term, and it required Maxxim to send as many as 76 "chamber loads" of its products to SSV during every four-week period. A chamber load fills a standard tractor trailer. Maxxim's products were sufficient to keep SSV's two sterilization chambers running at capacity and although SSV eventually added a third chamber to garner more customers, Maxxim remained SSV's most significant customer. In 1997, during the coverage period of the insurance policy at issue, SSV purchased and installed a catalytic oxidizer in order to keep its facility in compliance with environmental laws regarding the release of hazardous air pollutants. The new equipment exploded on June 13, 1997. The damage to the facility was significant enough to shut down SSV's operations for 7 months and trigger its contractual obligation to find Maxxim an alternate

sterilization provider, which SSV did. Although the SSV and Maxxim facilities were in close proximity to each other, the alternate provider was not, and so shipping costs were increased and became a point of contention. SSV and Maxxim sued each other in the federal district court in Richmond regarding those costs and other contractual obligations. Their contract expressly stated SSV was responsible for getting Maxxim's unsterilized products *to* the alternate provider, but the contract was silent about liability for shipping *from* the alternative provider to Maxxim's purchasers and Maxxim's distribution facilities. In 2002, the federal judge sitting in Richmond ruled that SSV was contractually liable for Maxxim's inbound shipping expenses, which totaled about $1 million, but was not liable for Maxxim's outbound shipping expenses, which also totaled about $1 million. *Sterilization Services of Virginia v. Maxxim Medical, Inc*., No. 3:01CV787, slip order at 18 (E.D. Va. June 24, 2002). Maxxim paid for its own outbound shipping expenses and has never been reimbursed by SSV or SSV's insurer.

¶ 3 The conclusion reached by the federal judge was the same conclusion that Chatham and SSV's insurer, Zurich American Insurance (Zurich), had reached. When Zurich read the SSV-Maxxim contract together with its insurance policy extending coverage to "necessary expenses that you [the insured] incur during a 'period of restoration,' [of the Virginia facility,]" Zurich had denied reimbursement for Maxxim's outbound freight expenses. Chatham sued Zurich, but in 2003, the circuit court of Cook County rejected Chatham's contention that the Zurich policy encompassed Maxxim's outbound shipping costs, and in 2004, we affirmed the entry of summary judgment against Chatham and in favor of the insurer. *Chatham Corporation v. Dann Insurance*, 351 Ill. App. 3d 353, 812 N.E.2d 483 (2004) (*Chatham I*).

¶ 4 Chatham also sued its insurance broker, Dann Insurance, Inc. (Dann) in the circuit court of Cook County. Dann has been Chatham's insurance broker since 1979, and it helped Chatham choose the policy at issue and then navigate the claim for insurance proceeds in the aftermath of the 1997 explosion. In its complaint, Chatham contended Dann described the policy's "Extra Expense" coverage as coverage that would reimburse every atypical expense that Maxxim/SSV's customer incurred during the facility shutdown, because an "Extra Expense" is one that is "necessary to maintain *** good will, going concern value, and customer relationships." Chatham further alleged that Maxxim terminated its relationship with SSV because Zurich would not pay for the outbound shipping. Chatham contended the loss of SSV's primary customer diminished the value of the Virginia sterilization facility, diminished the value of SSV, and deprived it of future profits, and that Dann should be held liable for these losses. Chatham sought damages for the broker's conduct during the procurement of the policy and for the broker's "negligent misrepresentation in the [insurance claim] adjustment process." *Chatham Corporation v. Dann Insurance*, 1-04-2745 (Aug. 1, 2005) (*Chatham II*). After giving Chatham multiple opportunities to plead, the trial judge granted Dann's motion to dismiss the latter claim with prejudice and then Chatham voluntarily dismissed the rest of its complaint so it could take an appeal. In a 2005 order, we affirmed the judge's dismissal of the count regarding Dann's assistance with the insurance claim where there was no indication Dann's duties extended beyond negotiating and procuring an insurance policy and no indication of any of the other elements of a negligent misrepresentation claim, such as a false statement. *Id.* Notably, in that order, we stated that no "reasonable person would believe and rely on the [purported] statement that after

an insured property loss, all unusual expenses incurred and documented by an entity that was not even a party to the insurance contract [Maxxim] would be reimbursable under the contract" and that if Chatham had "placed any reliance on Dann's supposed representation about coverage, it would have been unjustifiable reliance." *Id.*

¶ 5 After that ruling, Chatham refiled the claims it had voluntarily dismissed and it proceeded to the jury trial we described at the outset of this order. Thus, the current and third appeal to this Illinois court concerns Chatham's claim that Dann failed to obtain the expected type of coverage and that this failure ultimately caused the loss of SSV's primary customer. On the verdict form, the jury answered "YES" to the question, "On Count II, (breach of contract) did Chatham Corporation prove Dann Insurance was required under the contract to procure extra expense coverage that would cover expenses necessary to maintain the good will, going concern value and customer relationships which would otherwise be damaged in the event of a casualty loss by the impairment of Chatham Corporation's capacity to serve its customer." The jury also answered "YES" to the question of whether Dann breached that contractual duty. However, when asked, "Did Chatham Corporation prove it sustained damages," the jury answered "NO." When the jury returned with the verdict, the trial judge questioned the foreman about the jury's intent:

> "[THE COURT:] Number 4, did Chatham Corporation prove its sustained damages? No is checked.
>
> And then none of the remaining questions are answered, and it is signed by each of the jurors. Number 7, there's no amount filled in for the value of lost

profits.

So if I understand this correctly, then you're finding in favor of the defendants and against the plaintiff in terms of money damages. There's no damages that you want to award, correct?

THE FOREPERSON: That is correct.

THE COURT: That is correct. All right."

¶ 6 Chatham now appeals from the denial of its post-trial motion for judgment notwithstanding the verdict (JNOV) or a new trial. Chatham's main contention for JNOV or a new trial is that once the jury answered "YES" to the questions on the verdict form as to whether Dann breached a contract to procure extra expense coverage which would reimburse Maxxim's outbound freight expenses, the jury should have awarded damages. Chatham contends Dann's expert witness Mary O'Connor opined in a written report that damages in this matter were $768,353, and that she later testified, "Based upon my analysis, it is my opinion that the damages in this matter are $768,353.00." Chatham characterizes these statements as judicial admissions and cites *Mitsias v. I.-Flow Corporation*, 2011 IL App (1st) 101126, ¶ 55, 959 N.E.2d 94, and *Adelman-Tremblay v. Jewel Companies, Inc.*, 859 F.2d 517, 521 (7th Cir., 1988), for the proposition that O'Connor's "unequivocal statements of fact" entitled Chatham to a minimum award of $768,353. Dann responds that Chatham has taken O'Connor's statements out of context and attempts to use them to trump ample trial evidence to the contrary.

¶ 7 The following additional facts regarding the procurement of the policy in 1996 and Maxxim's dissatisfaction in 2001 are pertinent. (We have omitted witnesses and testimony that

had no apparent affect on the verdict.) During the summer of 1996, Thomas Morthorst, VP and CFO of Chatham, met with Anna Lively, an account executive at Dann, to discuss the annual renewal of Chatham's insurance coverage effective October 3, 1996. Lively testified before the jury that she and Morthorst decided to renew coverage with Zurich, rather than switching insurers, and that she negotiated a $159,142 reduction in Zurich's premium from the prior policy year. Even with the discount, Chatham's premium was $562,740. The reduced premium reduced Dann's commission, so Lively asked for and received a $20,000 flat fee from Chatham. Chatham's expert witness on the subject of insurance procurement, Bryan Tilden, conceded that the Zurich policy was "the best business income [with] extra expense coverage available at the time." Charles Schramm, who was Dann's expert on insurance procurement, also testified that Dann produced the best policy available in 1996.

¶ 8 Lively testified she delivered the insurance contract in person so that she and Morthorst could "go through the policy literally page-by-page and discuss the coverage," including "all the terms and conditions, [and] exclusions." She would have described the business income with extra expense coverage as coverage that "allow[s] greater flexibility in the adjustment of a loss." Also:

> "[B]efore a loss, nobody really knows exactly how they are going to handle *** that claim ***.
>
> You don't know *** [in advance] what the magnitude of the loss is, what the state of their industry is at that time, how big the loss is. So you don't know whether you are going to want to try to stay in business at that time or what you

are going to do.

So this gives you the flexibility. After the loss, you have that full limit to apply to any one loss. So you have the flexibility to either stay in business and pay the extra expenses; or, you know, stop production, or stop trying to serve your clients and go ahead and do the restoration as quickly as you can and get back in business. You have the flexibility to do what's necessary for you at that time.

* * *

That's exactly the intent of it, to pay all of their necessary expenses over and above your ordinary expenses that you incurred to stay in business[.]"

Morthorst testified that he recalled discussing the purpose of business income and extra expense coverage at the pre-renewal meeting, not the subsequent policy-delivery meeting, but he corroborated Lively's recollection of her description of the coverage. Lively had explained to him that the extra expense endorsement would "provide coverage to allow us to do what was necessary over and above business interruption – what was necessary to retain our customers." Dann's expert, Schramm, testified that Lively's statements were not misleading, were merely a description of the policy in a manner that the client would readily understand, and were within the standard of care for describing business income with extra expense coverage.

¶ 9 We point out that neither Lively nor Morthorst said that in 1996 they believed the coverage extended to any third parties and we reiterate that (1) the Zurich policy defined "Extra Expense" as "necessary expenses that *you* incur during the 'period of restoration' that *you* would not have incurred if there had been no direct physical Loss or damage to [covered] property."

(emphasis added), and that in one of the earlier appeals, we found that "necessary expenses" were ones that Chatham and SSV were contractually obligated to incur during a period of restoration of SSV's facilities. See *Chatham I*, 351 Ill. App. 3d at 358-59, 812 N.E.2d at 668-69.

¶ 10 Lively testified that she helped Chatham claim insurance proceeds from Zurich. Early on, she notified SSV that Zurich had agreed "that Maxxim could ship its products directly to the alternate sterilization facility, and that Zurich would consider these inbound expenses to have been incurred by SSV and thus, covered under the policy." Maxxim sent its freight invoices to Morthorst, who forwarded them to Lively, who forwarded them to Zurich, and Zurich paid documented inbound expenses that were within coverage as well as some documented outbound expenses that Zurich considered to be outside the scope of coverage.

¶ 11 The jury also heard from experts on the value of business lost when Maxxim ended its association with SSV. Chatham claimed $17 million in damages based on the testimony of its expert, Nicholas Burke, who said that he used the lost-profits methodology and calculated profits lost between 2001 and 2009. On cross-examination, Burke acknowledged that he chose to add $35 per chamber load per year to his calculations, which was not based on any agreement between SSV and Maxxim, and that he used pre-tax income figures. Dann's expert, Mary O'Connor, critiqued Burke's damage analysis and stated that his reasoning was "simply flawed," because it was based on the wrong methodology and the wrong timeframe. O'Connor testified that Burke should have calculated only the value of the business that "went away" when Maxxim terminated the contract, 15 months before the contract expired on its own terms in 2002, and that the net economic value of those few months was $768,353. She saw no reason for Burke to

continue the calculations through to 2009, other than that a trial was anticipated.

¶ 12 O'Connor also read from portions of her written report dated May 24, 2011, which was prefaced by a summary of her qualifications and the statement that she had been retained in part to refute Burke's conclusions and in part to "provide expert testimony regarding the amount of damages in this case *should* liability be proven." (Emphasis added.) O'Connor's written and oral testimony did not concede any liability. However, her written calculations ended with the statement, "Based on my analysis, it is my opinion that the damages in this matter are $768,353." This concluding remark is the basis for Chatham's contention that a minimum amount of damages were conceded.

¶ 13 O'Connor's testimony also suggested that Maxxim's decision to terminate was attributable to SSV's or Chatham's conduct after the accident, rather than anything that Zurich or Dann did or did not do at any point in time. More specifically, she testified that Maxxim's own calculation of its unreimbursed freight expenses was only $977, 682. She stated that one could look at the situation with "common sense" or as a "prudent businessman," and "I know that if a prudent businessman had to write a check for say a million dollars [the approximate amount Maxxim still wanted for its outbound shipping] to receive $15 million [in continuing or future business from Maxxim according to Chatham's calculations], he'd do it." O'Connor concluded, "And if he didn't write the check, I would think he had come to the conclusion that that business wasn't worth $977,682.00." O'Connor also remarked that "effect of suing your client" is "generally negative," "I try never to sue my clients," and that SSV had sued Maxxim in federal court in 2001 when there were 13 months remaining on the multi-year contract.

¶ 14 The trial exhibits included two letters about the termination of the SSV-Maxxim relationship. The first letter, dated June 5, 2001, was written by Paulee C. Day, Maxxim's Corporate Vice President, General Counsel, and Secretary, to Morthorst at SSV. Day stated that she understood some of the companies' personnel were discussing the possibility of entering into a new contract after the natural lapse of the original 1989 agreement. Continuing:

> "As you know, the expenses incurred by Maxxim in connection with the shipment of product to alternate facilities following the June 13, 1997 explosion at SSV's facility have not yet been repaid to Maxxim, as required by the [1989] Agreement. The total amount due to Maxxim pursuant to the Agreement as of today's date, with interest, is two million five hundred twenty-six thousand, one hundred thirty-six dollars ($2,526,136).
>
> *** Until such time as the outstanding debt is repaid, I have instructed our Operations Department to discontinue discussions of a future contractual relationship with SSV following the expiration of the Agreement.
>
> We look forward to hearing from you at your earliest convenience with a plan to resolve this issue."

The second letter was written about four months later, on October 1, 2001, by Maxxim's lawyer Laura E. Prather, who was employed by the Florida lawfirm known as Trenam Kemker. Prather wrote that SSV was in breach of its 1989 agreement with Maxxim. Further:

> "Sterilization Services breached the written agreement by, but not limited to 1) failing to reimburse Maxxim Medical for the cost of shipping *to* [(emphasis

added)] your alternate facility; and 2) failing to meet performance specifications as set forth in the written agreement. Accordingly, Maxxim Medical is hereby terminating the agreement effective today.

All product submitted to Sterilization Services that has not been completed, as well as all completed product, shall be shipped to Maxxim Medical immediately."

¶ 15 We do not, on the basis of this record, agree with Chatham's contention that the $0 damage award is flawed. Chatham bore the burden of proving its allegation that Dann's conduct in 1996 is what led Maxxim to terminate its association with SSV in 2001. Chatham had to connect the 1996 conversations with the 2001 decision. Chatham had to prove the element of causation. It seems Chatham proved it became disappointed by the scope of coverage, but it did not prove that Dann's "breach of duty" in 1996 caused the 2001 breakup. Not even Maxxim attributed its decision in 2001 to the insurance broker's conduct some six years earlier. Rather, Maxxim's two letters to SSV attribute the derailment to differing conclusions about their 1989 contract to do business together, and specifically about which party bore contractual liability for the outbound shipping costs after the explosion at SSV's facility shut down operations for seven months. Maxxim remained steadfast in its incorrect belief that it was contractually entitled to reimbursement from SSV. As O'Connor's testimony suggested, "common sense" or the "prudent businessman rule" probably should have led SSV to shoulder those expenses in order to maintain the good will and ongoing business of a primary customer, but instead, SSV chose to sue Maxxim. Furthermore, Chatham has taken expert O'Connor's "768,353" statement out of

context. She did not concede liability or a minimum amount of damages. O'Connor discredited Chatham's allegations that Dann caused Maxxim to stop doing business with SSV and she attacked the basis of Chatham's damage calculations.

¶ 16 In order to prevail on its post-trial motion for JNOV, Chatham needed to show that " 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly [favored Chatham's damage award] *** that no contrary verdict could ever stand.' " *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178, 854 N.E.2d 635, 652 (2006) (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510, 229 N.E.2d 504 (1967). The standard for granting a JNOV " 'is a high one.' " *Id*. (quoting *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 106, 854 N.E.2d 607, 626 (2006). It is inappropriate for a reviewing court to ever "usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried and determined from the evidence which did not greatly preponderate either way. [Citations]." *Id*. (quoting *Maple v. Gustafson*, 151 Ill. 2d 445, 452-53, 603 N.E.2d 508 (1992). We have reviewed *de novo* the trial court's decision to deny Chatham's motion for JNOV (*Id.*) and conclude that the evidence in this case is not so one-sided on the issue of damages that Chatham was entitled to judgment notwithstanding the jury's $0 award.

¶ 17 Chatham also requested a new trial, either one that was limited to the issue of damages only, or an entirely new trial. Such a request is properly granted only when the verdict is contrary to the manifest weight of the evidence. *Id*. A verdict is considered contrary to the manifest weight of the evidence only "when the opposite conclusion is clearly evident or when the jury's findings prove to be unreasonable, arbitrary and not based on any of the evidence

[Citations.]" *Id*. A reviewing court will reverse a trial judge's ruling on a motion for a new trial only if the ruling was an abuse of discretion. *Id*. In our opinion, Chatham's argument regarding O'Connor's testimony is wholly unpersuasive and does not rise to the standard that would have entitled Chatham to a favorable ruling from the trial judge.

¶ 18 Having reviewed the record and arguments on appeal, we affirm the trial judge's decision to deny Chatham's motion for JNOV or a new trial.

¶ 19 On cross-appeal, Dann contends the trial judge should not have allowed the case to go to trial and should have instead granted Dann's motion to dismiss Chatham's complaint or Dann's motion for summary judgment. Dann also contends it was entitled to a favorable ruling on its motion for an order *in limine* to bar Chatham from eliciting certain trial testimony. All three of these motions were based on our statements in *Chatham I*, 351 Ill. App. 3d 353, 812 N.E.2d 483, which Dann argued had a preclusive effect on Chatham's refiled action. Dann refers to these three requests as "dispositive motions" which would have steered the case to a quicker resolution. Dann, however, does not want to vacate the jury's findings or the judgment that was entered in Dann's favor. Dann asks only that we confirm that Dann's arguments were correct and that the trial judge erred by rejecting them.

¶ 20 Chatham responds to the merits of Dann's cross-appeal, but we will not. Even if we were to agree that Dann's "dispositive motions" had merit, our determination would not affect the outcome of this case. Dann is asking us to render an advisory opinion, which is not our function. Illinois reviewing courts do not issue advice, they do not address abstract or moot questions, and they do not render decisions merely to establish precedent that will guide future litigants.

Oliveira v. Amoco Oil Co., 201 Ill. 2d 134, 157, 776 N.E.2d 151, 165 (2002) (after affirming dismissal of complaint for failure to state a claim, supreme court declined to reach question of class certification and vacated rulings of the trial and intermediate court on this question, because "Advisory opinions are to be avoided"); *Banister v. Partridge*, 2013 IL App (4th) 120916, ¶ 39, 984 N.E.2d 598 (after deciding appeal regarding manifest weight of evidence, court declined to address cross-appeal about procedural question that would not affect outcome of the case); *Bluthardt v. Breslin*, 74 Ill. 2d 246, 251, 384 N.E.2d 1309, 1311 (1979) ("If it becomes apparent that an opinion on a question of law cannot affect the result as to the parties or the controversy in the case before it, the court should not resolve the question[.]"); *Condon v. American Telephone & Telegraph Co.*, 136 Ill. 2d 95, 99, 554 N.E.2d 206, 208 (1990) (stating that reviewing courts do not issue advisory opinions, address moot or abstract questions, or render decisions merely to establish precedent); *Wheeler v. Aetna Casualty & Surety Co.*, 57 Ill. 2d 184, 189, 311 N.E.2d 134, 147 (1974) (stating that reviewing courts do not consider issues that are not essential); *City of Chicago v. Cohen*, 49 Ill. App. 3d 342, 344, 364 N.E.2d 335, 337 (1977) (stating that reviewing courts do not consider issues that do not affect the outcome of a case). Based on this authority, the cross-appeal is dismissed.

¶ 21 Affirmed; cross-appeal dismissed.