**[Cite as *Wallace v. Ohio Cas.*, 2012-Ohio-6071.]**

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

| | |
|---|---|
| Karena Wallace | Court of Appeals No. L-12-1017 |
| Appellant | Trial Court No. CI0201001459 |
| v. | |
| Ohio Casualty, et al. | **DECISION AND JUDGMENT** |
| Appellees | Decided: December 21, 2012 |

* * * * *

Joanna E. Baron, for appellant.

William H. Harter, for appellees.

* * * * *

**YARBROUGH, J.**

## I. Introduction

**{¶ 1}** Appellant, Karena Wallace, appeals the judgment of the Lucas County Court of Common Pleas, following a bench trial, in favor of appellee, Peerless Indemnity Insurance Company. For the reasons that follow, we affirm.

## A. Facts and Procedural Background

**{¶ 2}** On April 4, 2008, Wallace purchased a home located at 915 Alldays in Toledo, Ohio. Wallace purchased the home using a loan, secured by a mortgage, from Bank of America. The note and mortgage were subsequently assigned to Countrywide.

**{¶ 3}** In addition to purchasing the home, Wallace, through her independent insurance agent Cathy Jenkins, applied to Peerless for a homeowner's insurance policy. On April 15, 2008, Peerless issued a policy to Wallace for the home on 915 Alldays. Prior to purchasing the home, Wallace was living with her grandmother at 1419 Sherman Street in Toledo, Ohio. On her insurance application, Wallace used 1419 Sherman Street as her mailing address. The policy issued by Peerless also listed Wallace's mailing address as 1419 Sherman Street.

**{¶ 4}** The policy had an effective date of April 2, 2008, and an expiration date of April 2, 2009. Ordinarily, the policy would have been renewed prior to the expiration date of the initial one-year term. However, the policy provided for non-renewal upon written notice mailed to the policyholder at the address shown in the declarations at least 30 days before the expiration date.

**{¶ 5}** On October 18, 2008, Peerless sent an underwriting memo to Jenkins requesting information on the condition of the home's roof. The memo indicated that Peerless had made three prior requests for the information without a response. The memo further provided that failure to provide the information would result in non-renewal of the policy.

**{¶ 6}** After Jenkins received the memo, she made two attempts to fax a copy to Wallace in order to obtain the requested information. Despite having communicated via facsimile on prior occasions without incident, Wallace stated that she never received the faxes from Jenkins informing her of Peerless' requests for information.

**{¶ 7}** As a result of Wallace's failure to provide the information, Peerless decided it would not renew the policy. Thus, on January 18, 2009, Peerless printed a letter captioned "Notice of Nonrenewal" and addressed it to Wallace at 1419 Sherman Street, Toledo, Ohio. Copies of the letter were also addressed to Countrywide and Jenkins. In the letter, Peerless notified Wallace that her policy would expire on April 2, 2009, and that it would not be renewed. The letters were handled by Peerless' mailroom clerk, Vivian Greeson.

**{¶ 8}** On January 19, 2009, Martin Luther King Jr. Day, Greeson prepared the letter for mailing in accordance with routine mailroom procedures. Thereafter, a courier service picked up the mail prepared by Greeson, including the letters of non-renewal addressed to Wallace, Countrywide, and Jenkins. The mail included a certificate of bulk mailing, which was subsequently returned with what Greeson testified was a postal stamp and signature of a postal representative affixed.

**{¶ 9}** Both Countrywide and Jenkins received the notice from Peerless informing them that the policy would expire on April 2, 2009. After receiving the notice, Countrywide mailed a letter dated April 16, 2009, to Wallace advising her of the policy's expiration. Wallace claimed she never received the letter from Countrywide until after

May 2, 2009. Further, Wallace claimed she never received the initial notice from Peerless regarding the cancellation of the policy.

**{¶ 10}** On May 2, 2009, Wallace's home and all of her personal belongings were destroyed by a fire. Wallace contacted Jenkins and informed her of the fire in an effort to submit a claim to Peerless under the homeowner's policy. At that time, Jenkins explained to Wallace that the insurance policy had expired. As a result, Wallace filed suit for, inter alia, breach of contract and bad faith.

**{¶ 11}** Although Wallace filed suit against several parties, only her claims against Peerless proceeded to trial. After Wallace's case-in-chief, the trial court granted Peerless' motion to dismiss several claims pursuant to Civ.R. 41(B), including Wallace's bad faith claim. On December 11, 2011, the Lucas County Court of Common Pleas entered judgment in favor of Peerless on the remaining claims. This timely appeal followed.

### B. Assignments of Error

**{¶ 12}** Wallace assigns the following errors for our review:

1. The judgment of the trial court is against the manifest weight of the evidence.

2. The trial court erred when it held that appellee effectively cancelled its insurance contract with appellant.

3. The trial court erred when it allowed appellee's Exhibit HH into evidence.

4. The trial court erred when it admitted Exhibits MM and NN into evidence based upon the testimony of Steve Grzeskowiak.

5. The trial court erred in its findings of fact when it held that the mailroom clerk supplied information onto a U.S. Postal Service certificate of bulk mailing.

6. The trial court erred in granting judgment against the plaintiff on the bad faith claim.

## II. Analysis

**{¶ 13}** For ease of discussion, we address Wallace's assignments of error out of order.

### A. Trial Court's Admission of Exhibit No. HH

**{¶ 14}** In Wallace's third assignment of error, she argues that the trial court improperly admitted exhibit No. HH in violation of Evid.R. 802. Because Wallace's fifth assignment of error also challenges the admissibility of exhibit No. HH, we address the third and fifth assignments of error together. Exhibit No. HH is the certificate of bulk mailing that Greeson completed and delivered to the courier along with the letters of non-renewal sent to Wallace, Countrywide, and Jenkins.

**{¶ 15}** Although the certificate also allegedly contains a post office stamp and the signature of a postal service employee, the trial court concluded that only the certificate itself was admissible and disregarded the stamp and signature. Therefore, we examine only those portions of the certificate that were admitted by the trial court.

**{¶ 16}** Peerless agrees that exhibit No. HH constitutes hearsay, but argues that it is admissible as a business record under Evid.R. 803(6). In *State v. Richcreek*, 196 Ohio App.3d 505, 964 N.E.2d 442 (6th Dist.2011), we stated that "challenged hearsay is subject to de novo review under the applicable hearsay rule, rather than the more deferential review employed for discretionary rulings." *Id.* at ¶ 32.

**{¶ 17}** Although generally inadmissible, hearsay evidence may be admitted if it qualifies under the exceptions contained in the Rules of Evidence. *State v. Sorrels*, 71 Ohio App.3d 162, 165, 593 N.E.2d 313 (1st Dist.1991). One such exception is made for business records under Evid.R. 803(6), which provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * * A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

**{¶ 18}** The Fifth Appellate District has stated that "[t]he rationale behind Evid.R. 803(6) is that if information is sufficiently trustworthy that a business is willing to rely on it in making business decisions, the courts should be willing to as well." *John Soliday Fin. Group, L.L.C. v. Pittenger*, 190 Ohio App.3d 145, 150, 2010-Ohio-4861, 940 N.E.2d 1035, ¶ 30 (5th Dist.).

**{¶ 19}** The following analytical framework under this rule was succinctly stated by Judges Richard Markus and Clair Dickinson:

> The current formulation of this exception * * * include[s] virtually any data compilation by any commercial or charitable entity or enterprise, so long as:
>
> (1) the entity's participants assembled that data;
>
> (2) at or near the events it reports;
>
> (3) from information that the entity's participants personally observed or received rather than from some outsider's report of those events or conditions;
>
> (4) the entity routinely made and retained that data for its own operating purposes;
>
> (5) an entity participant with regular access to the data confirms those requirements in testimony subject to cross-examination; and
>
> (6) nothing about surrounding circumstances denies its reliability.

Markus & Dickinson, *Ohio Trial Practice*, Section 26:13 (2012).

**{¶ 20}** Here, the certificate of bulk mailing clearly fits within the business records exception. The certificate was prepared by Greeson, Peerless' mailroom clerk, in accordance with routine mailing procedures. Peerless' mailing procedures include automatic printing of non-renewal letters when triggered by the input of a specific code. After printing is complete, Greeson runs the letters through an envelope machine, checks the addresses on the envelopes against the computer-generated list, prepares a certificate of bulk mailing, and hands the mail over to a courier for delivery of the mail to the postal service.

**{¶ 21}** Here, the certificate was prepared at or near the events it reports. In fact, the certificate was prepared immediately after Greeson stuffed the envelopes for the day and checked them against the list of names of people receiving non-renewal letters. The daily mail did not go out until the certificate was prepared.

**{¶ 22}** Additionally, Greeson personally prepared the information on the certificate based on the information she gleaned from her review of the mailing list and the envelopes containing the letters. The record also reflects that Peerless routinely prepares and retains certificates of bulk mailing such as the one presented as exhibit No. HH. Greeson testified that she fills out a certificate of bulk mailing each and every time she mails out non-renewal letters.

**{¶ 23}** Nonetheless, Wallace argues that the certificate fails to qualify as a business record under Evid.R. 803(6) because the certificate of bulk mailing admitted at trial was a photocopy of the original and did not qualify under Evid.R. 1003. Evid.R.

1003 provides: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

**{¶ 24}** Wallace argues that she raised a genuine question as to the original's authenticity at trial. In support of her argument, she points to the fact that there were postage mistakes on the certificate and the date of the certificate was a federal holiday on which the post office would have been closed. Although it may be true that the amount of postage indicated on the certificate was higher or lower than the postage necessary for the number of mailings sent out, that fact alone does not raise a genuine question as to the authenticity of the original certificate. Rather, it merely reflects a potential mathematical error. Further, Greeson's testimony clarified that Peerless' mailroom was open on Martin Luther King Jr. Day, which would explain the date stamped on the certificate.

**{¶ 25}** Because the certificate of bulk mailing falls under the hearsay exception contained in Evid.R. 803(6), the trial court was within its discretion to admit it. Accordingly, Wallace's third and fifth assignments of error are not well-taken.

**B. Trial Court's Admission of Exhibit Nos. MM and NN**

**{¶ 26}** In Wallace's fourth assignment of error, she argues that the trial court erred when it admitted exhibit Nos. MM and NN into evidence.

**{¶ 27}** Exhibit Nos. MM and NN are correspondence that were sent to Wallace by Bank of America and Countrywide. These exhibits were authenticated by Steven Grzeskowiak, an employee of Newport Management Corporation. Grzeskowiak was

previously employed with Bank of America and Countrywide, where he performed the function of tracking all insurance matters relevant to the loans given by those lenders. Countrywide and Bank of America subsequently decided to hire Newport to perform the insurance tracking services and, as a result, Grzeskowiak began working for Newport.

**{¶ 28}** Wallace argues that Grzeskowiak was not qualified to authenticate the records in exhibit Nos. MM and NN since he was not a custodian of the records nor an employee of Bank of America at the time of his testimony. Regarding authentication, Evid.R. 901(A) states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

**{¶ 29}** Peerless argues that Grzeskowiak's testimony was sufficient to authenticate the exhibits under Evid.R. 901. Specifically, Peerless points to an illustration contained in Evid.R. 901(B), which provides in relevant part:

> By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> (1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

**{¶ 30}** Here, Grzeskowiak's testimony properly authenticated the exhibits. The trial court admitted the exhibits for the limited purpose of demonstrating the type of letters ordinarily sent out by Bank of America and Countrywide. Grzeskowiak testified

that he personally recognized the exhibits as letters identical to those that he would send out when he worked for the two lenders. He further testified that the exhibits were true and accurate copies of correspondence sent out by Newport Management Corporation on behalf of Bank of America and Countrywide.

**{¶ 31}** Grzeskowiak's testimony was sufficient to persuade the trial court that the exhibits were what Peerless claimed them to be. In other words, the exhibits were properly authenticated under Evid.R. 901. Accordingly, Wallace's fourth assignment of error is not well-taken.

### C. Sufficient Evidence of Proof of Mailing

**{¶ 32}** In Wallace's second assignment of error, she argues that Peerless failed to provide sufficient evidence to establish proof of mailing.

**{¶ 33}** "An insufficiency of the evidence claim raises a question of law that an appellate court reviews de novo." *Maumee v. Kriner*, 6th Dist. No. L-06-1001, 2007-Ohio-2146, ¶ 15. "When applying a sufficiency-of-the-evidence standard, a court of appeals should affirm a trial court when the evidence is legally sufficient to support the [judgment] as a matter of law." *Bryan-Wollman v. Domonko*, 115 Ohio St.3d 291, 2007-Ohio-4918, 874 N.E.2d 1198, ¶ 3. (Internal citations and quotations omitted.)

**{¶ 34}** Under the terms of the insurance policy, Peerless was required to provide notice of non-renewal at least 30 days prior to the policy's expiration date. The policy further provided for a presumption of sufficient notice where Peerless secured a proof of mailing. Wallace argues Peerless did not provide sufficient evidence to establish proof of

mailing. Specifically, Wallace claims that the evidence does not establish that the letter of non-renewal was ever actually placed in the mail.

**{¶ 35}** Peerless responds by arguing that it provided sufficient evidence to establish proof of mailing. In particular, Peerless points to Greeson's testimony concerning Peerless' system of mailing and her compliance with that system in this case. Further, Peerless argues that exhibits FF and HH provide further evidence to establish proof of mailing.

**{¶ 36}** Proof of mailing can be established with testimony "of one who personally mailed the letter and saw the address and postage on it." *Simpson v. Jefferson Std. Life Ins. Co.*, 465 F.2d 1320, 1324 (6th Cir.1972). Further, "proof of a business system of preparing and mailing letters, and compliance with such a custom in the particular instance, is sufficient to establish proof of mailing." *Id*.

**{¶ 37}** Here, Greeson testified specifically that she prepared the correspondence for mailing, placed the postage on the certificate of bulk mailing, and reviewed the list of names and addresses against those names and addresses on the envelopes. Further, Greeson testified that she actually saw the certificate of bulk mailing after it had been returned from the post office, which would indicate that the courier service actually delivered the mail to the post office. Greeson also testified concerning Peerless' standard business practices relating to mailing non-renewal letters. Finally, she testified that she had followed that process in this case.

**{¶ 38}** Upon examination of the record, we conclude that Peerless presented sufficient evidence to establish proof of mailing. Accordingly, Wallace's second assignment of error is not well-taken.

### D. Manifest Weight of the Evidence

**{¶ 39}** In Wallace's first assignment of error, she argues that the trial court's judgment was against the manifest weight of the evidence.

**{¶ 40}** "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), paragraph one of the syllabus. When reviewing a civil manifest weight claim, the appellate court has the obligation to presume the findings of the trier of fact are correct because the trial judge had the opportunity to assess the witnesses' demeanor and credibility. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 24. Therefore, "[a] reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court." *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 81, 461 N.E.2d 1273 (1984).

**{¶ 41}** Wallace argues that Greeson's testimony contains inconsistencies and is insufficient to establish proof of mailing or that the non-renewal letter was even deposited in the mail. In addition, Wallace points out that the postage on the certificate

of bulk mailing was incorrect. Finally, Wallace argues that Peerless failed to establish proof of a business system of mailing because it did not show the system to be effective.

**{¶ 42}** Contrary to Wallace's argument, our review of the record reveals that the testimony of Greeson provides ample evidence to survive a manifest weight challenge. The evidence presented in this case is similar to the evidence that was sufficient to survive a manifest weight challenge in *City of Toledo v. Schmiedebusch*, 192 Ohio App.3d 402, 2011-Ohio-284, 949 N.E.2d 504 (6th Dist.). In *Schmiedebusch*, we stated:

> In this case, [the mail clerk] testified that she personally prepared, addressed, and placed the notice into an envelope, that she put it out for postage and mail, and that she was familiar with and followed routine office procedures for the mailing of such notices. It is undisputed that the notice, which was admitted into evidence, contains appellants' correct address. This testimony is sufficient to establish proof of mailing and a rebuttable presumption of due delivery.

**{¶ 43}** As we stated above, Greeson prepared the letter for mailing, checked it several times to ensure accuracy, delivered it to the courier along with the certificate of bulk mailing, and verified its delivery to the post office via the returned certificate. Further, Greeson testified that the address on the envelope was in fact the address Wallace provided to Peerless on her application for the policy. Here, as in *Schmiedebusch*, the evidence sufficiently establishes proof of mailing.

**{¶ 44}** Based on our review of the record, we conclude that the judgment of the trial court is not against the manifest weight of the evidence. Accordingly, Wallace's first assignment of error is not well-taken.

### E. Civ.R. 41(B)(2) and Wallace's Bad Faith Claim

**{¶ 45}** Finally, in Wallace's sixth assignment of error, she argues that the trial court erred when it granted Peerless' motion to dismiss her bad faith claim pursuant to Civ.R. 41(B)(2).

**{¶ 46}** Under Civ.R. 41(B)(2), the trial court does not view the evidence in a light most favorable to the plaintiff as it does under a Civ.R. 50 motion for directed verdict; rather, the court actually determines whether the plaintiff has proven the necessary facts by the appropriate evidentiary standard. *L.W. Shoemaker, M.D., Inc. v. Connor*, 81 Ohio App.3d 748, 752, 612 N.E.2d 369 (10th Dist. 1992).

**{¶ 47}** In other words, to the extent that a trial court's determination rests on findings of fact, those findings will not be overturned unless they are against the manifest weight of the evidence. *Ford v. Star Bank N.A.*, 4th Dist. No. 97CA39, 1998 WL 553003 (Aug. 27, 1998). Thus, we must affirm the court's decision on the Civ.R. 41(B)(2) motion and the resulting judgment where it is supported by some competent, credible evidence. *C.E. Morris Co.*, 54 Ohio St.2d at paragraph one of the syllabus, 376 N.E.2d 578.

**{¶ 48}** In asserting her bad faith claim, Wallace argues that Peerless maliciously denied her insurance claim in violation of its duty to act in good faith in the processing

and payment of insurance claims. However, the evidence in the trial court at the time it granted Peerless' motion to dismiss lacked any indication of malice on the part of Peerless.

**{¶ 49}** The Ohio Supreme Court has stated that "an insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor." *Staff Builders, Inc. v. Armstrong*, 37 Ohio St.3d 298, 303, 525 N.E.2d 783 (1988). The trial court, in dismissing the bad faith claim, pointed to the fact that Peerless denied Wallace's claim based on its belief that the policy had expired and had not been renewed.

**{¶ 50}** The evidence Wallace put forward arguably called into question whether Peerless had effectively notified Wallace of its intention not to renew the policy. Wallace testified that she never received the notice, which created a question whether the policy was still in effect. However, the record is clear that Peerless' refusal to pay Wallace's claim was based on its belief that Wallace received the letter of non-renewal and that, therefore, the policy had expired at the time of the fire.

**{¶ 51}** Wallace argues that the bad faith claim should not have been dismissed since the contract was never cancelled. Notwithstanding that argument, the issue was whether Peerless had a reasonable justification for denying the claim. Since Peerless had complied with the terms of the policy by mailing the letter of non-renewal several months prior to the policy's expiration date, Peerless had a reasonable basis to believe that the

policy was no longer in effect. It logically follows that if the policy had expired, Peerless was not obligated to process a claim under it.

**{¶ 52}** Upon our review of the record, we conclude that the trial court's dismissal of Wallace's bad faith claim pursuant to Civ.R. 41(B)(2) was supported by competent, credible evidence and was not against the manifest weight of the evidence. Accordingly, we find Wallace's sixth assignment of error not well-taken.

## III. Conclusion

**{¶ 53}** Having found Wallace's assignments of error not well-taken, we hereby affirm the judgment of the Lucas County Court of Common Pleas. Costs are assessed to Wallace in accordance with App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE