

IN THE SUPREME COURT OF IOWA

Supreme Court No. 15-1344
Polk County District Court No. LACL122849

SAMIR M. SHAMS,)
Plaintiff/Appellee,)
vs.)
SONA HASSAN,)
Defendant/Appellant.)
_____)
SONA HASSAN,)
Counterclaimant/Appellant,)
vs.)
SAMIR M. SHAMS,)
Counterclaimant Defendant/)
Appellee.)

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE JEANIE KUNKLE VAUDT

**APPELLANT'S FINAL BRIEF AND
REQUEST FOR ORAL ARGUMENT**

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Iowa R. Civ. P. 1.924

ROUTING STATEMENT

This case should be transferred to the Court of Appeals because no basis exists for the Supreme Court to retain this case for appellate review, as provided by Iowa Appellate Procedure Rule 6.1101. Further, this case should be transferred because it involves questions that can be resolved by applying existing legal principles. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from the Iowa District Court for Polk County on error by such court in its refusals to give jury instructions on an affirmative defense of Iowa's statute of limitations, under Section 614.1 of the Code of Iowa and adverse judgment against Sona Hassan on claims of Samir Shams.

STATEMENT OF THE FACTS

On July 26, 2011, the Appellee-Plaintiff, Samir M. Shams, filed a petition in the Iowa District Court for Polk County against his sister, Sona Hassan, Appellant-Defendant. (Petition and Demand for Jury Trial, filed 07/26/11, pp. 1-5). Samir Shams with his petition demanded a jury trial. (Petition and Demand for Jury Trial filed 07/26/11, pp. 1-3). In his petition, Samir M. Shams alleged that there was an oral agreement between himself and his sister wherein he would put money in a checking account and Sona Hassan would draw money out of his account upon his direction while he was in Iraq. (Petition and Demand for Jury Trial filed 07/26/11, pp. 1-3). Samir alleged the agreement began in January, 2003, and concluded when Samir returned from Iraq. (Petition and Demand for Jury Trial filed 07/26/11, pp. 1-2). In the trial Samir Shams stated he returned to United States, specifically Maryland, in May, 2006. (Trial Transcript Volume 2, p. 85, lines 14-20, p. 114, lines 7-24,

p. 115, lines 1-25, p. 116, lines 1-25, p. 117, lines 1-25, p. 139, lines 1-8, p. 144, lines 1-25; Trial Transcript Volume VII, p. 928, lines 7-25, p. 929, line 1).

The petition of Samir Shams alleged that when he returned from Iraq he asked for his money back and Sona Hassan did not return his money. (Petition and Demand for Jury Trial filed 07/26/11, pp. 1-3). Samir Shams alleged in his petition against Sona the following counts: Breach of Oral Agreement; Conversion, Fraud, Breach of Fiduciary Duty and Bad Faith. (Petition and Demand for Jury Trial filed 07/26/11, pp. 1-6).

Sona Hassan, who lived in and resides in Maryland, in response to Samir Hassan's petition, filed a Motion to Dismiss for Lack of Jurisdiction pursuant to Rule 1.421. (Trial Transcript Volume 2, p. 57, lines 12-20; Motion to Dismiss). The Iowa District Court for Polk County granted the Motion to Dismiss for Lack of Personal Jurisdiction, from which Samir appealed. (Shams vs. Hassan, 822 N.W.2d 746 (Iowa App. 2012)). The Iowa Court of Appeals affirmed the decision of the District Court, but upon review, the Supreme Court of Iowa reversed the District and the Court of Appeals and remanded the case back to the Iowa District Court for Polk County. (Shams v. Hassan, 829 N.W.2d 848 (Iowa 2013)).

Subsequently, an Answer was filed by Sona Hassan, denying material allegations of the petition and asserting affirmative defenses of statute of

limitations of Iowa, estoppel, waiver, laches and lack of mutuality of contract. (Answer of Defendant, filed 05/15/13, pp. 1-6).

After discovery, Sona Hassan filed on July 7, 2014, her Motion for Summary Judgment asserting that Samir Shams, in his deposition, admitted he returned to Maryland, residence of Sona Hassan, from Iraq in May, 2006. (Sona's Motion for Summary Judgment with deposition excerpts attached to such Motion filed July 7, 2014). In such, Sona Hassan stated Samir Shams declared he was a resident of Maryland, and that Iowa's statute of limitations barred his action filed in Iowa District Court on July 26, 2011. (Sona's Motion for Summary Judgment with deposition excerpts attached to such Motion filed July 7, 2014). The presiding District Court Judge on September 12, 2014, denied Sona Hassan's Motion for Summary Judgment and stated that "opposing statement [of the parties] assert genuine issues of material fact that a jury must sort out." (Judge's Order denying Sona's Motion for Summary Judgment, filed 09/12/14).

On September 12, 2014, such District Court granted Sona Hassan's written Motion to Amend her Answer to include the affirmative defenses that Samir failed to mitigate any damages and to add Sona's counterclaims of slander and libel against Samir. (Judge's Order granting Sona's Motion to Amend, p. 3).

On March 30, 2015, the jury trial on Samir's claims and the claims of Sona was commenced. (Trial Transcript, Volume 1, p. 1).

Sona submitted to the Court proposed jury instructions on the affirmative defense of Iowa's statute of limitation, Section 614.1 of the Code of Iowa and supporting authority to the counts of oral contract, conversion, fraud and breach of fiduciary duty. (Court's Exhibit "A"). Instructions on a claim of bad faith was not submitted by any party or the Court. (Statement of the Case and Instructions of the Court, filed April 13, 2015). The District Court refused to submit any jury instructions on Iowa's statute of limitations. (Trial Transcript Volume X, p. 1284, lines 23-25, p. 1285, lines 1-10). The Court denied request of Sona to submit jury instructions on the defense of statute of limitation because none was contained in the Iowa Civil Jury Instructions of the Iowa State Bar Association, though Sona's counsel proposed alternative draft for consideration in formation by the trial court for instructions to the jury. (Trial Court Exhibit "A").

On April 13, 2015, the jury returned a verdict against Sona on Samir's claims of conversion, breach of fiduciary duty and breach of oral contract and a verdict against Samir on Sona's claim of libel per se by Samir. (Jury Verdict filed April 13, 2015). Samir has not appealed from the findings and subsequent judgment against him on Sona's claim of libel per se by Samir.

On April 27, 2016, Sona filed with the District Court for Polk County, separate motions for judgment notwithstanding the verdict against her and a motion for a new trial on the specific ground that the trial court declined to give instructions to the jury on Iowa's statute of limitations under Section 614.1 of the Code of Iowa on the counts of oral contract, conversion, common law fraud and breach of fiduciary duty to be used by the jury in their deliberations. (Defendant's Motion for Judgment Notwithstanding Verdict and Request for Hearing filed April 27, 2015, pp. 1-4; Defendant's Motion for New Trial and Request for Hearing filed April 27, 2015, pp. 1-3).

On May 13, 2015, the trial court entered judgment entry against the parties, in which judgment was entered in favor of Sona Hassan against Samir Shams in the sum of \$14,566.25 in compensatory damages and \$15,000.00 in punitive damages plus interest and 17% of the court costs. (Judgment Entry filed May 13, 2015, pp. 1-3). By such order, the District Court entered judgment in favor of Samir Shams against his sister, Sona Hassan, in the sum of \$148,501.60 plus interest and 83% of the court costs. (Judgment Entry filed May 13, 2015, pp. 1-3).

On July 14, 2015, by order the Court denied both Samir's and Sona's separate Motions for New Trial and for Judgment Notwithstanding the Verdict. (Order filed July 14, 2015, pp. 1-6).

Samir did not file a Notice of Appeal to the judgment and rulings of the Iowa District Court for Polk County.

Sona filed and served her Notice of Appeal on August 11, 2015, from the final order of the trial court on July 14, 2015. (Notice of Appeal filed August 11, 2015).

ARGUMENT

I. STANDARD OF REVIEW AND PRESERVATION OF ERROR BY TRIAL COURT'S FAILURE TO GIVE INSTRUCTION TO THE JURY.

A. Standard of Review

The failure of a trial court to give a proper jury instruction is generally a review for error at law. Mulhern v. Catholic Health Initiatives, 799 N.W.2d 104, 110 (Iowa 2011); Summy v. City of Des Moines, 708 N.W.2d 333, 340 (Iowa 2006).

As stated in State of Iowa v. Ambrose, 861 N.W.2d 550, 554 (Iowa 2015): “We review challenges to jury instructions for correction of errors at law.’ State v. Frej, 831 N.W.2d 70, 73 (Iowa 2014); see *also* Iowa R. App. P. 6.907. ‘Error in jury instructions is reversible only if the error is prejudicial.’ Condon Auto Sales & Serv., Inc. v. Crick, 604 N.W.2d 587, 593 (Iowa 1999). ‘Errors in jury instructions are presumed prejudicial unless ‘the record affirmatively establishes there was no prejudice.’ Asher v. Ob-Gyn Specialists,

P.C., 846 N.W.2d 492, 496 (Iowa 2014) (quoting *State v. Murray*, 796 N.W.2d 907, 908 (Iowa 2011)).”

B. Preservation of Error

Sona raised the issues of Iowa’s statute of limitations specifically, Iowa Code Section 614.1(4), after her previous motion for summary judgment by motion for directed verdict after Samir rested his case in chief (Trial Transcript Volume 3, p. 271, lines 9-25, p. 272, lines 1-5, p. 273, lines 1-25, p. 274, lines 1-5) and at the conclusion of the testimony in the case in chief (Trial Transcript Volume VIII p. 1065, lines 20-25, p. 1066, lines 1-25, p. 1067, lines 1-25, p. 1068, lines 1-25, p. 1069, lines 1-8) which motions were denied by the trial court.

Sona requested at the trial, a jury instruction on her affirmative defense that the claims of Samir were barred by Iowa’s statute of limitations, specifically 614.1 which the court refused to instruct on such defense (Trial Transcript Volume X, p. 1284, lines 23-25, p. 1285, lines 1-10).

Sona, in her post-trial motions for a new trial and judgment notwithstanding the verdict, timely raised and renewed again the error of law by the trial court. There has been preservation of the error at law for appellate review.

II. IOWA STATUTE OF LIMITATION 614.1 OF THE CODE OF IOWA IS APPLICABLE TO IOWA CLAIMS OF BREACH OF ORAL CONTRACT, CONVERSION, FRAUD, AND BREACH OF FIDUCIARY DUTY.

Section 614.1 of the Code of Iowa, operable at all times material to this case states:

Actions may be brought within the times herein limited, respectively, after their causes, accrue, and not afterwards, except when otherwise specifically declared:

* * * *

4. *Unwritten contract – injuries to property – fraud – other actions. Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years, except as provided by subsections 8 and 10.*

Claims of alleged fraud and breach of oral contract filed more than five (5) years from the alleged breach of duty are barred by such statute.

In Hallet Construction Company vs. Meister, 713 N.W.2d 225, 231 (Iowa 2006), the Supreme Court of Iowa held that claims of alleged fraud and breach of oral contract were barred by the statute of limitations, Section 614.1(4) of the Code of Iowa, and stated “*a claimant can be on inquiry notice without knowing the details of the evidence by which to prove the cause of action.*”

The statute of limitations for an alleged breach of fiduciary duty is five years under Iowa Code Section 614.1(4). Kendall/Hunt Publishing Company

v. Rowe, 424 N.W.2d 235, 243 (Iowa 1988). The statute of limitations for a claim of fraud is five years. Hallet Construction v. Meister, 713 N.W.2d 225, 230-233 (Iowa 2006). See also Harvey v. Leonard, 268 N.W.2d 504, 515 (Iowa 1978). The statute of limitations for an oral contract is five years as clearly set forth in Iowa Code Section 614.1(4). As for a claim of conversion of one's property the statute of limitations is five (5) years. Section 614.1 of the Code of Iowa (2011). All other claims of Samir are barred after five years of breach under Section 614.1(4) of the Code, which states: "*and all other actions not otherwise provided for in this respect, within five years, except as provided by subsections 8 and 10.*"

Samir at trial testified in May, 2011 he returned to Maryland from Iraq to Sona's residence and requested an accounting of the money disbursed from his checking account. (Petition and Demand for Jury, pp. 1-3). Samir further testified that in June, 2006, he traveled to his brother's residence in Arizona where he picked up his bank statements and had access to cancelled checks from his Bankers Trust Co. checking account, the checking account which is the subject of the suit by him against Sona. (Trial Transcript Volume 2, p. 114, lines 7-24, p. 115, lines 1-25, p. 116, lines 1-25, p. 117, lines 1-25, p. 139, lines 108, p. 144, lines 1-25).

The record clearly shows that Samir, no later than June, 2006, was on notice if there were any unauthorized disbursements by Sona, his sister, which

would be the alleged basis for his claims. (Trial Transcript Volume 2, p. 144, lines 1-25).

Samir did not file his petition in the Iowa District Court for Polk County until July 26, 2011, clearly more than five (5) years after he was on notice of the alleged breaches. (Petition and Demand for Jury Trial filed 07/26/11, p. 1).

Parties to lawsuits are entitled to have their legal theories submitted to a jury if they are supported by the pleadings and substantial evidence in the record, as stated in Sonnek v. Warren, 522 N.W.2d 45, 47 (Iowa 1994); citing Sanders v. Ghrist, 421 N.W.2d 520, 522 (Iowa 1988).

It is the trial court's duty to see that a jury has a clear and intelligent understanding of what is to decide. When weighing sufficiency of evidence to support a requested instruction, the Court should construe the evidence in a light most favorable to the party seeking submission. Coker v. Abell-Howe Co., 491 N.W.2d 143, 150-151 (Iowa 1992).

As stated in Nicholas v. Schweitzer, 472 N.W.2d 266, 274 (Iowa 1991):
“The test is whether there is substantial evidence to support the instruction submitted. The possibility that two inconsistent conclusions might be drawn from the same evidence does not prevent a finding from being supported by substantial evidence. Peoples Memorial Hosp. v. Iowa Civil Rights Comm'n., 322 N.W.2d 87, 91 (Iowa 1982). Evidence is substantial when a reasonable

mind could accept it as adequate to reach a conclusion. Dubuque Community School Dist. v. PERB, 424 N.W.2d 427, 431 (Iowa 1988).”

As Justice Wiggins said in his concurring opinion in State v. Ambrose, 861 N.W.2d 550, 562 (Iowa 2015):

“The court does not have to give an instruction just because it appears in the Iowa State Bar Association’s instruction manual. The court must guarantee defendants a fair trial and not overemphasize the State’s case.

I also disagree with the statement that “[n]ormally, we are slow to disapprove of the uniform jury instruction.” First, we do not have a “uniform jury instructions” approved by our court. A committee of the Iowa State Bar Association writes the instructions. The president of the bar association appoints the committee members. We do not have any oversight over the process. Second, we never intended the bar association’s instructions to have a presumption of correctness. As we said in a resolution regarding the instructions,

“Under Iowa law any jury instructions might be challenged in the usual manner on appeal to this court. That right of review on the part of future litigants precludes us from considering the Plain English Redraft Instructions for official approval or disapproval. We nevertheless note this newest contribution of the committee with a deep sense of appreciation and satisfaction.”

Iowa Supreme Ct. Resolution, *In the Matter of the Iowa State Bar Association Uniform Court Instruction Committee* (May 6, 1987).

Conversely, just because there is not located a stock jury instruction such does not obviate the duty of the trial court to instruct the jury on the theories of the parties.

As stated in Iowa R. Civ. P. 1.924:

“The court shall instruct the jury as to the law applicable to all material issues in the case”

“It is reversible error for a court to refuse to give a requested instruction that defines a critical term necessary for resolution of the case,” as stated in Hobbiebrunken v. G & S Enterprises, Inc., 470 N.W.2d 19, 21 (Iowa 1991); citing Dotts v. Bennett, 382 N.W.2d 85, 90 (Iowa 1986).

CONCLUSION

This Court should reverse the district court’s judgment for its failure to give required jury instructions and remand for a new trial and/or further proceedings.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant respectfully requests to be heard in oral argument upon submission of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies a copy of this Appellant's Proof Brief and Request for Oral Argument was served by EDMS day on October 10, 2016.

/s/ Steven R. Reed

Steven C. Reed

ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost of printing the foregoing Appellant's Brief was the sum of \$ N/A.

/s/ Steven R. Reed

Steven C. Reed

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS,
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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 2,843 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(3) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft in 14 point Garamond Font.

/s/ Steven C. Reed
Signature

October 10, 2016
Date