

IN THE SUPREME COURT OF IOWA

Supreme Court No. 15-1344

SAMIR M. SHAMS,)	
)	
Applicant/Appellee,)	
)	
vs.)	S.C. No. 15-1344
)	
SONA HASSAN,)	
)	
Resister/Appellee.)	

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

**RESISTANCE TO APPELLEE'S APPLICATION FOR FURTHER
REVIEW OF THE COURT OF APPEALS' RULING**

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TABLE OF CONTENTS

Table of Authorities iii

Resistance for Further Review..... 1

Argument..... 5

THE SUPREME COURT OF IOWA HAS PREVIOUSLY
HELD THAT IT IS A QUESTION FOR THE JURY TO
DECIDE WHETHER IOWA’S STATUTE OF LIMITATIONS
WAS APPLICABLE WHEN FINDING OF FACTS IS
DETERMINATIVE..... 5

THE DISTRICT COURT ERRED IN NOT GIVING TO THE
JURY INSTRUCTION ON IOWA’S STATUTE OF
LIMITATIONS, SPECIFICALLY SECTION 614.1(4) OF THE
CODE OF IOWA..... 7

Request for Oral Argument 10

Certificate of Service..... 11

Certificate of Compliance with Type-Volume Limitation, Typeface
Requirements, and Type-Style Requirements..... 11

TABLE OF AUTHORITIES

<i><u>Cases</u></i>	<i><u>Page</u></i>
<u>Broughton v. Nicholson</u> , 124 N.W. 814, 150 Iowa 119 (1911).....	8
<u>Coker v. Abell-Howe Co.</u> , 491 N.W.2d 143, 150 (Iowa 1992).....	6
<u>Dubuque Community School District v. PERB</u> ,424 N.W.2d 427, 431 (Iowa 1988)	7
<u>Gabelmann v. NFO, Inc.</u> 571 N.W.2d 476, 484 (Iowa 1997)	9
<u>Hobbiebrunken v. G & S Enterprises, Inc.</u> , 470 N.W.2d 19, 21 (Iowa 1991)	6
<u>Meier v. Senecaut III</u> , 641 N.W.2d 532 (Iowa 2002).....	3
<u>Nicholas v. Sweitzer</u> , 472 N.W.2d 266, 274 (Iowa 1991).....	6
<u>Sanders v. Ghrist</u> , 421 N.W.2d 520, 522 (Iowa 1988).....	6
<u>Sonnek v. Warren</u> , 522 N.W.2d 45, 47 (Iowa 1994).....	6, 7

<i><u>Statutes & Rules</u></i>	<i><u>Page</u></i>
Iowa Code Section 614.1.....	5, 6, 10
Iowa Court Rule 6.904(3)q.....	9

<i><u>Other Authorities</u></i>	<i><u>Page</u></i>
54 C.J.S. Limitations of Action § 437 (2014)	7
54 C.J.S. Limitations of Action § 438 (2014)	7

Resistance to Application for Further Review

COMES NOW the Appellant, Sona Hassan, and in resistance to Appellee's Application for Further Review of Court of Appeals' Ruling, filed January 25, 2017, states:

1. The parties tried the case in Polk County, presided by District Court Judge Jeannie Vaudt from March 30, 2015, through April 13, 2015, based on Shams claims Appellant/Defendant, Sona Hassan, for conversion, fraud, breach of oral contract and breach of fiduciary duty (App. at 173-176, 199-201). Upon the jury's verdict, the Court entered judgment for Shams against Hassan on conversion, oral contract and breach of fiduciary but not fraud, and entered a separate judgment against Shams on Hassan's counterclaim of libel, which judgement against Shams was not appealed by him. Hassan appealed the judgement against her in the sum of \$148,501.60 on the grounds that the district court did not instruct the jury on Iowa's statute of limitation, specifically 614.1 of the Code of Iowa, though requested at trial, and further preserved by Defendant's motion for new trial and for judgment notwithstanding the verdict (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).

2. The argument of the Appellee in essence is that because the proffered jury instruction by the Appellant may not be precise, even though there was substantial evidence that by May, 2006, and no later than June, 2006, Samir knew or was put on notice that Hassan may not have followed instructions on disbursement of his money, that the trial court was excused from giving any instruction to the jury on Iowa's applicable statute of limitations, to wit: Section 614.1 of the Code of Iowa, even though Samir's petition was not filed with the district court until July 26, 2011.
3. When there is substantial issue of fact, to which the law may apply, it is the duty of the trial court to instruct on what is the law, if the affirmation defense of statute of limitations has been raised.
4. The Court of Appeals after reviewing the record, has not entered a decision in conflict of the decision of the Supreme Court of Iowa on its own on an important matter.
5. Shams contends that Hassan never raised the issue of Iowa statute of limitations at the district court or an appeal and there was a failure to preserve error and that the Court of Appeals entered a decision in

conflict with the case of Meier v. Senecaut III, 641 N.W.2d 532

(Iowa 2002). In that case, this Court said at 641 N.W.2d 540:

We now apply the preservation of error rule to this case. The rule requires a party seeking to appeal an issue presented to, but not considered by, the district court to call to the attention of the district court its failure to decide the issue.^[1] Benavides, 539 N.W.2d at 356; 19 James Wm. Moore et al., Moore's Federal Practice § 205.05[1], at 205-55 (Matthew Bender 3d ed.2001) [hereinafter Moore's Federal Practice]. The claim or issue raised does not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it. 19 Moore's Federal Practice § 205.05[1], at 205-55; see Linge v. Ralston Purina Co., 293 N.W.2d 191, 195-96 (Iowa 1980) (issue not preserved where it was not specifically addressed in the district court ruling and the record and ruling did not infer the issue was decided).

6. Hassan brought forward the issue of Iowa statute of limitations by her answer (Answer of Defendant, filed 05/15/2013, pp. 1-6) and by her motion for summary judgment (Hassan's Motion for Summary Judgment). The trial court did not grant Hassan's motion for summary judgement based on Iowa statute of limitations, for the trial opined that there was a factual issue whether the statute of limitations was applicable.
7. Hassan, after Samir presented his case in chief, moved for a directed verdict for Hassan based on the evidence that not all the elements were proven by Shams and Iowa statute of limitations (App. at 281:9-

284:5) and renewed in her motion for directed verdict after conclusion of all evidence submitted and received. (Tr. 1065:16-1069:8).

8. Hassan submitted a proposed jury instruction on Iowa's statute of limitations based on the substantial evidence. (Court Exhibit "A").
9. The trial court refused to give any instruction to the jury on Iowa's statute of limitations, even though in the trial record, as the Court of Appeals noted, there was substantial evidence whereby the jury could find the affirmative defense of the Iowa's state of limitations was applicable. (Page 5 of Court of Appeals decision).
10. Hassan subsequently filed separation motion for new trial and judgement notwithstanding the verdict (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 the ground, among others, that the jury should have been instructed by the trial court on Iowa's statute of limitations.
11. Shams in his application states Hassan made no specific citations to the Court on the applicability of Iowa statute of limitations which is

not correct because repeatedly Hassan has cited Iowa case law from the moment of filing her motion for summary judgment throughout the trial and post-trial.

ARGUMENT

- I. **The Court of Appeals did not err in reversing the district court for the trial court's failure to give instruction to the jury on Iowa's statute of limitation, specifically Section 614.1 of the Code of Iowa.**

Shams is incorrect that Hassan never raised the issue at the district court level or on appeal that it was an error for the district court not to let the jury decide whether Shams' claims were time-barred by the statute of limitations. Hassan proffered to the trial court a jury instruction on Iowa's statute of limitations. (Court Exhibit "A"). Hassan filed a motion for new trial and motion for judgment notwithstanding the verdict (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), based on Iowa statutes of limitation, specifically Section 614.1 of the Code of Iowa. Motions for directed verdict; motion for new trial and motion for judgment notwithstanding the verdict on Iowa statute of limitation cannot be denied by Shams for such are referred in Appellee's Application and that the trial court was given opportunities to correct any error

as relates to Iowa statute of limitation. What is ironic that trial court ruled as a matter of law that:

The evidence presented was sufficient for the jury to conclude that [Shams] and [Hassan] entered in a new oral agreement of 2010.

Such is not the standard for denial of a jury instruction on an affirmative defense asserted by a defendant Sonneck w. Warren, 522 N.W.2d 45, 47 (Iowa 1994); citing Sanders v. Ghrist, 421 N.W.2d 520, 522 (Iowa 1988); Coker v. Abell-Howe Co., 491 N.W.2d 143, 150 (Iowa 1992); Nicholas v. Sweitzer, 472 N.W.2d 266, 274 (Iowa 1991); Hobbiebrunken v. G & S Enterprises, Inc., 470 N.W.2d 19, 21 (Iowa 1991).

Contrary to the assertion of Shams, Hassan stated at the conclusion of her Appellant's Brief that "the Court should reverse the district court's judgment for its failure to give required jury instruction." (Page 12 of Appellant's Brief). Clearly, in the context of pages 8 through 14 of Appellant's Brief that it is clear the trial court must instruct on the law as applicable to all material issues. (Iowa R.Civil P. 1.924 and referenced on pages 11-14 of Appellant's Brief). In the Reply Brief of Hassan, it is stated:

Further, the trial court by its refusal to give jury instructions on Iowa's statute of Limitations, specifically 614.1(4) of the Code of Iowa erred when there was substantial evidence in support of Hassan's affirmative defense (page 3 of the Appellant's Brief).

Parties to lawsuits are entitled to have their legal theories submitted to the jury if supported by the pleadings and substantial evidence in the record. Sonnek v. Warren, 522 N.W.2d 45, 47 (Iowa 1991).

Evidence is substantial when a reasonable mind could accept it as adequate to reach a conclusion. Dubuque Community School District v. PERB, 424 N.W.2d 427, 431 (Iowa 1988).

II. The Supreme Court of Iowa has previously held that it is a question for the jury to decide whether Iowa’s statute of limitations was applicable when finding of facts is determinative.

“If, however, the application of a statute of limitation rests on a question of fact, it is generally an issue for the jury to decide.” 54 C.J.S. *Limitations of Actions* 437 (2014).

“The determination of when a cause of action occurs, as affecting the running of the statute of limitation is frequently a question of fact to be determined by the jury or trier of fact under the evidence.” 54 C.J.S. *Limitation of Actions* 438 (2014).

It further states in 54 C.J.S. *Limitation of Actions* 438 (2014):

“The question of when a plaintiff knew or should have known of the existence of a cause of action for purposes of determining when the action occurred, is one of fact that will be decided by the trier of fact, in most instances.”

In Broughton v. Nicholson, 124 N.W. 814, 150 Iowa 119 (1911), the Supreme Court of Iowa held that was a question of fact for the jury to decide whether Iowa's statute of limitations was applicable under the evidence.

The Supreme Court of Iowa specifically said:

“[T]he question as to whether the case was taken out of the statute of limitations by that fact or by the fact that various items of claim were part of a continuous account was properly left to the jury.” Broughton v. Nicholson, 124 N.W. 814, 815; 150 Iowa 119 (1911).

In the denial of Hassan's Motion for Summary Judgment based on Iowa's statute of limitations, the trial court states in its ruling:

Sona says that the applicable statutes of limitation began to run in 2006. Samir says they did not begin to run until 2010. Sona says Samir should have known he was injured in 2006. Samir says he did not know of his injury until 2010. The Court finds that these opposing statements assert genuine issues of material fact that a jury must sort out. (Judge's Order denying Sona's Motion for Summary Judgement, filed 09/12/14).

In fact, Plaintiff said on the record before the Trial Court at trial:

“So I think we've argued the statute of limitations before. The facts have not changed. And I believe the ruling of the Court was correct before on that.” (Trial Transcript Volume III, April 1, 2015, pg.276-277).

Shams did not appeal such ruling and now takes the contrary position that the application of Iowa's statute of limitations always must be determined as a matter of law.

The Court of Appeals, upon review of the record held:

Here, we have a factual dispute whether the statute of limitations had expired or was tolled, and the jury should have been instructed on the issues in some manner such as written interrogatories. See Vertman v. Drayton, 272 N.W. 438, 440 (Iowa 1937) (“Before it could be determined whether the plaintiff’s action was barred by the statute of limitations, it was necessary that several fact questions be determined, among which are concealment by the defendant of a cause of action against him in favor of the appellant, and of facts he was bound to disclose; when plaintiff discovered the fraud, and whether there was failure on her part to use due diligence in discovering the wrong. The determination of the facts was for the jury.”); see also Dillon Cty. Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc., 332 S.E.2d 555, 561 (S.C. Ct. App. 1985) (“The question of whether a defendant’s conduct lulled a plaintiff into a false sense of security and thereby prevented the plaintiff from filing suit within the statutory period is ordinarily one of fact for a jury to determine.”), overruled on other grounds by Atlas Food Sys. & Servs., Inc. v. Crane Nat’l Vendors Div. of Unidynamics Corp., 462 S.E.2d 858 (S.C. 1995); see also Pavone v. Kirke, 801 N.W.2d 477, 496-497 (Iowa 2011) (explaining the use of general verdicts, special verdicts, and general verdicts with interrogatories). (Court of Appeals Decision filed January 25, 2017, p. 10-11).

In Gabelmann v. NFO, Inc. 571 N.W.2d 476, 484 (Iowa 1997), this Court reversed the trial court grant of judgment notwithstanding the verdict and the Court of Appeals because it was previously erroneously held that as a matter of law that the statute of limitations barred a breach of contract claim, among other errors based on concluding housing allowance did not constitute wages for purposes of Iowa Chapter 91A claim.

Furthermore, Rule 6.904(3)q states as a proposition deemed so well established that authorities need not be cited in support thereof,

Even when the facts are not in dispute or contradicted, if reasonable minds might draw different inferences from them a jury question is engendered.

The Court of Appeals upon review correctly concluded there was a factual dispute whether Iowa statute of limitations was applicable to bar Sham's claims and an instruction by the trial court on Iowa statute of limitations, specifically Section 614.1 of the Code of Iowa should have been given to the jury and it was err by the trial court not to instruct the jury on Iowa's statute of limitations, Section 614.1 of the Code of Iowa, on Sham's claims.

The trial court incorrectly refused to submit Hassan's statute of limitations defense to the jury and this Court should deny Appellee's Application for Further Review.

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

Pursuant to Iowa Appellate Procedure 6.701 and 6.901, the undersigned hereby certifies that on the 22nd day of February, 2017, the Resistance to Application for Further Review was with the Supreme Court via EDMS and electronically served on all parties of the record.

/s/ Steven R. Reed
Steven C. Reed

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE-STYLE REQUIREMENTS**

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 2,518 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

February 22, 2017
Date