

IN THE SUPREME COURT OF THE STATE OF IOWA

CASE NO. 16-2148

ROBERT W. MILAS, M.D.,
Plaintiff-Appellant,

v.

SOCIETY INSURANCE and ANGELA BONLANDER,
Defendants-Appellees.

DECISION OF IOWA COURT OF APPEALS
FILED DECEMBER 20, 2017

DEFENDANTS-APPELLEES' RESISTANCE TO
PLAINTIFF-APPELLANT'S APPLICATION FOR FURTHER REVIEW

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STATEMENT IN RESISTANCE OF FURTHER REVIEW

This Application poses *no* substantial question of constitutional law, important unsettled area of law, nor does it implicate changing legal principles. Instead, Plaintiff-Appellant Dr. Milas's Application for Further Review asserts this case is a case of broad public importance for the Iowa Supreme Court to ultimately determined. *See* Iowa R. App. P. 6.1103(1)(b)(4). Dr. Milas asserts that the Court of Appeals decision is contrary to the current state of the law in Iowa. The district court and the Iowa Court of Appeals correctly found the facts of this case do not satisfy the factual requirements to justify Dr. Milas recovering under a fraudulent misrepresentation claim against Society Insurance. The courts were also correct in finding there was no evidence to support giving punitive damages instructions to the jury.

The Court of Appeals's affirmance of the district court's ruling is consistent with well-established Iowa law on the requirements for fraudulent misrepresentation and when punitive damages should be submitted to a jury.

Dr. Milas's Application for Further Review should be denied.

BRIEF IN RESISTANCE OF FURTHER REVIEW

I. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT AND REFUSAL TO SUBMIT THE FRAUDULENT MISREPRESENTATION INSTRUCTION TO THE JURY.

A. Society Insurance Did Not Make A False Material Misrepresentation.

In order to prove Society Insurance engaged in fraudulent misrepresentation, Dr. Milas must prove each of the following elements: “(1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent to deceive, (6) reliance, and (7) resulting injury and damage.” *Van Sickle Constr. Co. v. Wachovia Commercial Mortg., Inc.*, 783 N.W.2d 684, 687 (Iowa 2010). These elements must be proven by “a preponderance of clear, satisfactory, and convincing proof.” *Id.* (quoting *Lloyd v. Drake Univ.*, 686 N.W.2d 225, 233 (Iowa 2004)). The Court of Appeals correctly affirmed the district court in finding Dr. Milas failed to prove fraudulent misrepresentation. As the Court of Appeals stated:

The fact that Society Insurance’s employee, Angela Bonlander, knew the claim would be submitted to a bill review company does not by itself show a misrepresentation because, notwithstanding a contract obligation to pay a sum certain, there is no harm in later asking if a contract obligee is willing to take a lower payment.

Milas v. Society Insurance, No. 16-2148, 2017 WL 6513067, at *2

(Iowa Ct. App. Dec. 20, 2017).

Society Insurance did not make a false material representation. To prove the statement was false, Dr. Milas must show it was false *at the time he relied upon it*. See *Hagarty v. Dysart-Geneseo Cmty. Sch. Dist.*, 282 N.W.2d 92, 95 (Iowa 1979) (emphasis added). Even though Society Insurance did not pay Dr. Milas the amount on the authorization following the submission of the bill for the completed surgery, that alone is not enough to show the Society's earlier representation was false. See *Magnusson Agency v. Pub. Entity Nat'l Co.*, 560 N.W.2d 20, 28 (Iowa 1997) ("Even though PENCO later offered its bid to the second applicant, that fact alone is not enough to show that the earlier representation was false.").

Dr. Milas points to the fact that Angela Bonlander intended to negotiate Dr. Milas's fees and send the bill to HSI. Prior to performing the surgery, Dr. Milas sent two forms to Angela Bonlander listing the estimated charges for Fitzgerald's cervical surgery. These forms specifically indicate the signature requested provides authorization for Dr. Milas to proceed with the surgery. Angela Bonlander testified she understood the form requesting her authorization for Dr. Milas to perform the procedure. App. 338. Angela Bonlander did not believe she was agreeing to pay the exact estimate listed on the form. App. 348. At the time of the material representation, it was

unknown which of the two procedures Dr. Milas would perform. Because she did not believe she was entering into a contract paying Dr. Milas the amount listed on the authorization, she could not falsely represent she would pay the bill. In its ruling, the Court of Appeals noted Dr. Milas's reliance on Angela Bonlander's testimony in support of his claims. The Court found the testimony to be consistent with Angela Bonlander's belief that she was authorizing the surgery but not agreeing to the fee.

B. Society Insurance Did Not Intend to Deceive Dr. Milas.

The Court of Appeals also correctly found that no evidence was presented at trial to establish scienter and intent to deceive. A fraudulent misrepresentation claim requires scienter and intent to deceive. *Magnusson*, 560 N.W.2d at 28. Dr. Milas did not and cannot show either element.

In the district court's original ruling, the court found no evidence to support Dr. Milas's claim. The district court found "[Dr.] Milas has failed to point out to the Court any evidence in the record that would support an inference that Ms. Bonlander or Society had an intent to deceive him other than Milas's own allegations." App. 102.

In ruling on Dr. Milas's motion to amend to conform to proof, the district court again held the evidence, viewed in the light most favorable to Dr. Milas, was "not sufficient to establish the elements of scienter and intent

to deceive.” App. 141. The fact that Society did not pay the amount sought by the plaintiff is not enough to support an intent to deceive claim.

Lamasters v. Springer, 99 N.W.2d 300, 303 (Iowa 1959) (“[t]he fact the agreement was not performed does not alone prove the promissor did not intend keeping it when it was made.”). This Court has explained:

When a promise is made in good faith, with the expectation of carrying it out, the fact that it subsequently is broken gives rise to no cause of action, either for deceit, or for equitable relief. Otherwise any breach of contract would call for such a remedy. The mere breach of a promise is never enough in itself to establish the fraudulent intent.

Magnusson, 560 N.W.2d at 29.

At the time Angela Bonlander signed the two documents she did not believe she was entering into a contract to pay for the surgery, only that she was authorizing the surgery to take place. Angela testified she never has pre-authorized an amount for surgery and would not do so. App. 337, 348.

Because Society Insurance did not believe it was entering into a contract at the time of the signature, Dr. Milas cannot show a genuine issue of material fact that Society Insurance intended to deceive him. *See Grefe v. Ross*, 231 N.W.2d 863, 867 (Iowa 1975) (“A false statement innocently but mistakenly made will not establish intent to defraud.”).

Both the Court of Appeals and the district court viewed the evidence in the light most favorable to Dr. Milas and found the evidence supported

granting Society Insurance's motion for summary judgment. Dr. Milas's argument that a jury could find there is a difference between representing a certain sum will be paid for services rendered and intending to discount and negotiate acceptance of a lower sum after performance is not represented by the facts of this case and solely based on his own allegations and speculation. As this Court has stated, "[s]peculation is not sufficient to generate a genuine issue of fact." *Hlubek v. Pelecky*, 701 N.W.2d 93, 96 (Iowa 2005).

C. Society Insurance Did Not Speak With Reckless Disregard.

Dr. Milas argues Society Insurance spoke with reckless disregard because he alleges Angela Bonlander knew her representation that Society Insurance would pay Dr. Milas's fees may not be true, thus a jury could reasonably find the Angela Bonlander acted in reckless disregard. This argument is different from the argument Dr. Milas set for in his brief but is still as unsuccessful. Angela Bonlander did not believe she was agreeing to the price listed on the surgery authorization, instead only that she was authorizing the surgery to go forward. Dr. Milas's claim that Angela Bonlander knew the bill would be sent to a cost-containment vender is not evidence of a reckless disregard and does not show reckless disregard as, by his own admission, several medical providers were paid the full billed

amount. There was no intent to deceive by Angela Bonlander because at the time of the representation, she did not believe she was agreeing to the price on the authorization. The district court found “[Dr.] Milas has failed to point out to the Court any evidence in the record that would support an inference that Ms. Bonlander or Society had an intent to deceive him other than Milas’s own allegations.” App. 102. His own allegations are not enough to generate a genuine issue of material fact.

D. The District Court Did Not Err In Denying To Give Jury Instructions On Fraudulent Misrepresentation.

Similarly, the Court of Appeals applied the correct legal standard to the facts of this case in affirming the district court’s refusal to submit this question to the jury. The district court cannot give a jury instruction “on an issue having no substantial evidential support.” *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997) (citations omitted).

Even viewing the evidence in the light most favorable to Dr. Milas, the record does not contain sufficient support for the requested instruction. At the time Dr. Milas relied on the Society Insurance signature, Society Insurance had made no false representation and did not intend to deceive him. Society Insurance did not speak with a reckless disregard for the truth or falseness of the authorization. Instead, Society Insurance believed it was entering into a contract to authorize the surgery only. Without supporting

evidence, the district court was correct in denying the requested jury instruction.

Because Society Insurance did not speak with reckless disregard, Dr. Milas has failed to show a genuine issue of material fact on the required element of scienter and his claim must fail.

II. THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE DISTRICT COURT'S DECISION TO NOT GIVE THE JURY PUNITIVE DAMAGES INSTRUCTIONS AS THOSE INSTRUCTIONS WERE NOT SUPPORTED BY THE EVIDENCE.

The purpose of punitive damages are not compensatory, but serve as a punishment or deterrence for future bad conduct. *Miranda v. Said*, 836 N.W.2d 8, 34 (Iowa 2013).

“Generally, a breach of contract, even if intentional, is insufficient to support a punitive damage award.” *Magnusson*, 560 N.W.2d at 29 (citing *White v. Nw. Bell Tel. Co.*, 514 N.W.2d 70, 77 (Iowa 1994)). “Considerable logic supports Justice Holmes’ observation that ‘[i]f a contract is broken, the measure of damages generally is the same, whatever the cause of the breach.’” *Pogge v. Fullerton Lumber Co.*, 277 N.W.2d 916, 919 (Iowa 1979) (quoting *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 544, (1903)).

To be awarded punitive damages for a breach of contract, Dr. Milas must show the breach constituted an intentional tort, and was committed maliciously, in a manner that meets the standards of Iowa Code section 668A.1. *Seastrom v. Farm Bureau Life Ins. Co.*, 601 N.W.2d 339, 347 (Iowa 1999). The Court of Appeals found Society Insurance using a “third-party audit service to advise on fees and negotiate fee payment does not constitute an independent tort.” *Milas*, No. 16-2148, 2017 WL 6513067, at *3 (Iowa Ct. App. Dec. 20, 2017). Dr. Milas cites no case that using that type of service is an independent tort.

Even if there were an intentional tort, Dr. Milas failed to prove Society Insurance acted maliciously. There must be some form of malice, actual or legal, to support an award of punitive damages. *Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 743 N.W.2d 525, 529 (Iowa 2007). “Actual malice may be shown by such things as personal spite, hatred, or ill-will and legal malice may be shown by wrongful conduct committed with a willful or reckless disregard for the rights of another.” *Id.* (citations omitted).

Dr. Milas argues Society Insurance acted with actual malice towards him by paying other medical professionals more than Society Insurance paid him. The district court was correct in stating “[t]here is nothing from the evidence that the Court could even glean that there was a malicious act by

the Defendants in this case.” App. 441. Angela Bonlander testified she followed Society Insurance’s standard operating procedure in processing the request for surgery and the approval of that surgery and payment. App. 337. Society Insurance submitted Dr. Milas’s bill to its third-party bill reviewer, HSI. Like all bills sent to HSI from Society Insurance, HSI reviewed the bill and returned with an amount Society Insurance should pay. App. 341. Society Insurance then paid Dr. Milas that amount. App. 370. Angela Bonlander testified Dr. Milas was treated like all other authorized doctors. App. 328. There was no actual malice towards Dr. Milas on the part of Society Insurance. Instead, the matter was handled in accordance with the policies and practices of Society Insurance. App. 378.

Dr. Milas contends Society Insurance acted with legal malice. The Court of Appeals found the decision to negotiate fees “is not evidence of legal malice.” “Legal malice is shown by wrongful conduct committed or continued with a willful or reckless disregard for another’s rights.” *McClure v. Walgreen Co.*, 613 N.W.2d 225, 231 (Iowa 2000). Society Insurance did not act with a willful or reckless disregard for Dr. Milas’s rights.

Angela Bonlander testified she did not know at the time of reviewing Dr. Milas’s bill that she could bypass the bill review process. App. 329. Dr. Milas argues Society Insurance was focused solely on year-end bonuses

instead of Mr. Fitzgerald's surgery. This is unsupported in the record and not true. Dr. Milas was authorized to perform the surgery. If a medical provider has concerns over the amounts they have been paid, there are processes to address any concerns. App. 346-47. Society Insurance does not prevent patients from receiving prompt medical care, as authorized treating doctors do not need Society's permission to engage in treatment. App. 364.

Because the summary judgment on Dr. Milas's fraudulent misrepresentation claim was properly granted, there can be no award of punitive damages. Society Insurance did not act with actual or legal malice towards Dr. Milas.

CONCLUSION

In summary, the Court of Appeals examined the applicable appellate case law, and applied it to the facts in this case. The resulting ruling is consistent with prior appellate decisions and supported by the evidence. The fact that Dr. Milas does not agree with the Court of Appeals decision does not suddenly create an issue of public importance that warrants this Court's attention on further review.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 18, 2018, I electronically filed the foregoing Defendant-Appellee's Resistance to the Application for Further Review with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System (EDMS), which will send notice of electronic filing to the following:

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Per Iowa Rules of Appellate Procedure 6.1103 and 6.701 and Iowa Rule of Electronic Procedure 16.315, this constitutes service for purposes of the Iowa Court Rules.

/s/ Guy R. Cook
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CERTIFICATE OF COMPLIANCE

This resistance complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

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Dated: January 18, 2018

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