IN THE COURT OF APPEALS OF IOWA

No. 0-164 / 09-0655
Filed May 26, 2010

STEPHANIE COPPOCK and LPL, INC.,
Plaintiffs-Appellees,

vs.

THOMAS LUSTGRAAF and WELTEL, L.L.C.,
Defendants-Appellants.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

Defendants, Thomas Lustgraaf and Weltel, L.L.C., appeal from the jury verdict and award of damages in favor of the plaintiffs. **AFFIRMED.**

Stephen A. Rubes, Council Bluffs, for appellants.

M. Brett Ryan of Willson & Pechacek, P.L.C., Council Bluffs, for appellees.

Heard by Sackett, C.J., and Eisenhauer and Mansfield, JJ.

SACKETT, C.J.

Stephanie Coppock, owner of LPL, Inc., filed suit against Thomas Lustgraaf and Weltel, L.L.C. claiming Thomas was in breach of an oral partnership agreement and that she was entitled to damages on numerous grounds. Thomas and Weltel denied any partnership agreement existed, asserted affirmative defenses, and filed a counterclaim. The issue of whether a partnership agreement existed was tried to the court and the remaining claims were tried before a jury. The court determined there was no partnership agreement. The jury returned a verdict in favor of Stephanie, finding she was entitled to restitution, awarding her actual and punitive damages. In ruling on Thomas and Weltel's motion for a new trial, the court set aside the award of punitive damages, finding there was not substantial evidence to support the conclusion Thomas acted with malice toward Stephanie. Thomas and Weltel appeal challenging, among other things, the jury's restitution award. We affirm.

I. BACKGROUND AND PROCEEDINGS. Thomas Lustgraaf and his brother, Walter, formed Weltel, L.L.C. Weltel purchased property consisting of a bar, a nearby parking lot, and a couple of surrounding homes. The bar was named LPL's and operated by Walter. Walter was the sole owner of LPL, Inc., the bar business, although Weltel, owned jointly by Thomas and Walter, owned the bar premises. Weltel leased LPL, Inc. the premises for $3125 per month.

Walter grew tired of running the bar and moved out of state. A bar employee, plaintiff Stephanie Coppock, was interested in running LPL's. In May

2003, Walter sold all of the LPL, Inc. stock to Stephanie for $10,000 and she took over the LPL, Inc.'s lease with Weltel.

In addition to paying Weltel according to the lease, Stephanie agreed to make separate additional payments to Thomas and to Weltel. Stephanie agreed to make a monthly payment of $2000 directly to Thomas and agreed to make a monthly "building payment" to Weltel. The building payment began at $1500 per month and increased over time to $2500 per month. From May 2003 to May 2006, Stephanie paid Weltel $112,500 under the lease, $72,000 directly to Thomas, and $72,000 in "building payments" to Weltel.

The lease was scheduled to expire on May 31, 2006, and according to its terms, Stephanie, on behalf of LPL, Inc., had to give six months prior notice to renew the lease. She did not give notice to renew the lease. In May 2006, Thomas informed Stephanie that she owed $12,000 in real estate taxes and that payment was LPL Inc.'s responsibility under the lease. Stephanie did not know about the taxes because the tax statements were mailed to Thomas and he did not provide them to her. Stephanie decided to leave town for a few days. Thereafter, Thomas terminated the lease between Weltel and LPL, Inc., took control of the bar, and began running LPL's. Stephanie filed suit on February 6, 2007, contending she and Thomas had an agreement they would become co-owners after she made the additional payments described above for five years.

The agreement to make payments to Thomas and the "building payments" to Weltel is the subject of this dispute. Stephanie claims Thomas's termination of the lease and demand for her to vacate the premises was in breach of their

agreement to be partners. She felt she would act as Thomas's partner for five years and make the additional payments. After the five-year period, she believed they agreed that one of them would buy the other out or they would jointly sell the business. Thomas denies the allegations, claiming there was no agreement to become partners or co-owners. He contends Stephanie agreed to make these additional payments, as sole owner of LPL, Inc., to himself and Weltel, and in exchange, she was permitted to keep all profits. He viewed these as merely additional terms and conditions to Stephanie's operation of the bar.

Stephanie sought to recover the payments she made to Thomas and the "building payments" to Weltel. She contended she was entitled to damages for, among other things, breach of contract and unjust enrichment. Thomas denied the allegations, asserted affirmative defenses, and filed a counterclaim. The matter came on for trial on March 10 and 11, 2009. After the close of the evidence, Thomas and Weltel moved for a directed verdict asserting there was no evidence of a partnership agreement, a fiduciary relationship between the parties, or intentional conduct to support punitive damages. They also objected to certain jury instructions. The court overruled these objections and noted counsel for Thomas and Weltel did not submit alternative proposed instructions in a timely or proper manner.

The jury found Weltel did not breach the lease with LPL, Inc. but determined Stephanie was entitled to restitution. The jury awarded $72,000 in actual damages and $20,000 in punitive damages.

Thomas and Weltel filed a motion for a new trial and judgment notwithstanding the verdict. The district court ruled there was not substantial evidence to support the jury's finding that Thomas's conduct was with actual malice and set aside the punitive damages. It sustained the verdict in all other respects and entered judgment against Thomas and Weltel in the amount of $72,000 plus interest. Thomas and Weltel appeal claiming, among other things, (1) the jury instructions on restitution and unjust enrichment were improper, (2) the court erred in not submitting instructions on Thomas and Weltel's affirmative defenses, and (3) there was insufficient evidence to support instructing the jury on restitution.

II. JURY INSTRUCTIONS. Thomas and Weltel claim two errors with respect to the jury instructions. First, they assert that the instructions concerning restitution and unjust enrichment were misstatements of the law. Second, they argue the court erred in refusing to submit instructions on their affirmative defenses.

Instructions 15, 16, and 17 addressed recovery for restitution and unjust enrichment. Counsel's objection to the instructions were,

> With regard to Instruction No. 15, the Defendants would simply object to this instruction even being given because it's not a Uniform Jury Instruction, and it doesn't reflect the law of the State of Iowa. The only restitution of the Defendant or its accounts we are familiar with is the restitution sometimes ordered in a criminal case, and it's not even a cause of action as recognized in Iowa. And any time we get away from Uniform Jury Instructions, there's real potential problems.
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> And we would make the same objection with regard to Instruction No. 16 and Instruction No. 17.

Our review of claimed jury instructional error is for correction of errors at law. *Koenig v. Koenig*, 766 N.W.2d 635, 637 (Iowa 2009); *Banks v. Beckwith*, 762 N.W.2d 149, 151 (Iowa 2009). Objections to jury instructions should be sufficiently definite to alert the trial court to the particular error so that it may correct it. *See* Iowa R. Civ. P. 1.924 (stating that objections to jury instructions must "specify[] the matter objected to and on what grounds."); *Grefe & Sidney v. Watters*, 525 N.W.2d 821, 825 (Iowa 1994) (noting that an objection to certain instructions as "not the law of Iowa" is not sufficiently definite to alert the court to claimed error). "The objection that the court did not accurately state the law is not sufficiently definite to preserve error; the objection must point out the error, so that the trial court may correct it." *Taylor Enter., Inc. v. Clarinda Prod. Credit Ass'n*, 447 N.W.2d 113, 116 (Iowa 1989). An objection on the ground that a jury instruction is not a uniform instruction also does not adequately present to the court why an instruction is not a correct statement of the law. *See Estate of Hagedorn ex rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 90-91 (Iowa 2004); *Winckel v. Von Maur*, *Inc.*, 652 N.W.2d 453, 458 (Iowa 2002) (*abrogated on other grounds by Barreca v. Nickolas*, 683 N.W.2d 111, 121 (Iowa 2004)).

Counsel objected to the instructions on restitution asserting only that the instructions were incorrect statements of law and not uniform instructions. The objection did not adequately tell the district court why the instructions were not a correct statement of the law. Error was not preserved on this claim.

Thomas and Weltel also contend the district court erred in failing to instruct the jury on their affirmative defense of unclean hands. In ruling on the objections to jury instructions, the court stated,

> [T]here was a Scheduling Order that was filed in this case on September 26, 2008, and that Scheduling Order required Proposed Jury Instructions to be submitted 7 days before trial. I got the Defendant's requested instructions, which is a single sheet with just a list of numbers that refer to Uniform Instructions on the 10th. Actually, I think it might have been handed to me on the 9th, but the proof of service says the 10th. No requests as far as marshalling instructions or verdict forms or anything else was submitted by the Defendant, certainly not in time, but not even by now.

Under the scheduling order, counsel for Thomas and Weltel was required to submit proposed instructions by March 3. They did not submit proposed instructions by the due date and the instructions proposed were not in proper form. Counsel's requested instructions were a list of uniform jury instructions. None of the uniform jury instructions requested specifically address the affirmative defense of unclean hands. Accordingly, this issue is not preserved for our review. *See Anderson v. Wilcox*, 189 N.W.2d 541, 545 (Iowa 1971) (providing that error on a claim that a certain instruction should have been given to the jury was not preserved when counsel did not request a specific instruction and did not specifically object to its exclusion).

Thomas and Weltel also assert that the verdict form overemphasized Stephanie's restitution theory by asking in one question whether Stephanie was entitled to restitution due to mistake, and in another question simply asking whether Stephanie was entitled to restitution. Again this alleged error was not raised before the district court and therefore also was not preserved for our

review. *See* Iowa R. Civ. P. 1.924 (noting that all objections to jury instructions must be made before closing argument to the jury during the time permitted by the court for the objections and that "[n]o other grounds or objections shall be asserted thereafter, or considered on appeal."); *Olson v. Sumpter*, 728 N.W.2d 844, 848 (Iowa 2007) (explaining that error in instructions is generally waived if not raised before closing arguments).

III. SUFFICIENCY OF EVIDENCE. Thomas and Weltel further claim there was insufficient evidence to submit restitution to the jury. Our scope of review on a ruling on a motion for a new trial depends upon the grounds of error asserted. *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2003). If a motion for a new trial is based on a legal question, our review is for the correctness of the court on the legal issue. *Ladeburg v. Ray*, 508 N.W.2d 694, 696-97 (Iowa 1993). A claim that the evidence is insufficient to support a finding is a legal question and therefore our review of the court's ruling on this issue is for correction of errors at law. *Smith v. Haugland*, 762 N.W.2d 890, 900 (Iowa Ct. App. 2009).

A motion for a new trial may be granted when a verdict is not sustained by sufficient evidence or is contrary to law. Iowa R. Civ. P. 1.1004(6). In an action at law, "findings of fact are binding on us if supported by substantial evidence." *Blackford v. Prairie Meadows Racetrack & Casino, Inc.*, 778 N.W.2d 184, 187 (Iowa 2010). "Evidence is substantial when 'reasonable minds would accept the evidence as adequate to reach the same findings.'" *Deboom v. Raining Rose, Inc.*, 772 N.W.2d 1, 5 (Iowa 2009) (quoting *Easton v. Howard*, 751 N.W.2d 1, 5

(Iowa 2008)). We view the evidence in the light most favorable to Stephanie, as the nonmoving party, and take into account all reasonable inferences that could be made by the jury. *Felderman v. City of Maquoketa*, 731 N.W.2d 676, 678 (Iowa 2007). Our role is to discover "whether the trial court correctly determined there was sufficient evidence to submit the issue to the jury." *Easton*, 751 N.W.2d at 5.

The pertinent jury instruction is:

> INSTRUCTION 15
>
> In regard to plaintiffs' claim for restitution, the plaintiffs must prove the following propositions by a preponderance of the evidence:
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> 1. Defendants, Thomas Lustgraaf and Weltel, L.L.C., received money from plaintiff.
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> 2. The circumstances surrounding defendant's receipt of this money makes it inequitable for the defendants to retain the money.
>
> 3. The amount of damage.
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> If the plaintiffs have failed to prove any of these propositions, the plaintiffs cannot recover damages for restitution. If the plaintiffs have proved all of these propositions, the plaintiffs are entitled to recover damages in some amount.

Thomas and Weltel did not challenge the first and third elements of the restitution instruction. It is undisputed that Thomas and Weltel received at least $72,000 in payments from Stephanie, which represented the jury's damage award. Thomas and Weltel appear to challenge the evidence on the second element, claiming there is no evidence to show that their receipt of the money makes it inequitable for them to retain the funds. There is substantial evidence to support this finding. While there was evidence that the parties had different

understandings as to why the payments were made, the jury was free to accept or reject either position. We affirm on this issue.[1]

IV. CONCLUSION. We have considered all issues raised by Thomas and Weltel and find that either error was not preserved or there was no error. We therefore affirm the district court's ruling. We have considered the other arguments advanced by Thomas and Weltel and find them to be without merit.

AFFIRMED.

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[1] Thomas and Weltel also argue that Stephanie cannot plead an express contract and at the same time seek recovery on an implied contract theory. *See Guldberg v. Greenfield*, 259 Iowa 873, 878-79, 146 N.W.2d 298, 301-02 (1966). However, the modern view is merely that an "express contract and an implied contract cannot coexist with respect to the same subject matter," *Chariton Feed & Grain, Inc. v. Harder*, 369 N.W.2d 777, 791 (Iowa 1985), since pleading in the alternative is permitted. Recovery under implied contract may be permitted, for example, where an express contract proves unenforceable. *Irons v. Cmty. State Bank*, 461 N.W.2d 849, 855 (Iowa Ct. App. 1990). Here there was substantial evidence in the record to support a jury finding that Stephanie in good faith paid $2000 a month to Thomas under the mistaken impression they had entered into a contract to become co-owners, but in fact no such contract existed. Under the appropriate circumstances, these facts could support a recovery for restitution. *See* Restatement (First) of Restitution § 15, at 61 (1937) (providing that recovery is permitted when money is paid under mistaken belief in existence of contract with payee).