

IN THE COURT OF APPEALS OF IOWA

No. 6-172 / 05-1350
Filed April 26, 2006

YOSHI OGINO, D.P.M.,
Plaintiff-Appellant/Cross-Appellee,

vs.

FOOT AND ANKLE CLINIC, P.C.,
AND KHAM VAY UNG, D.P.M.,
Defendants-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Woodbury County, James D. Scott,
Judge.

The plaintiff appeals from the order granting the defendants' motion for
judgment notwithstanding the verdict. **AFFIRMED.**

Paul D. Lundberg of Lundberg Law Firm, P.L.C., Sioux City, and
Mohammed Sadden, South Sioux City, Nebraska for appellant.

Patrick W. O'Bryan and Emmanuel S. Bikakis of Bikakis, Areneson,
Karpuk & Hindman, Sioux City, and, Des Moines, for appellees.

Heard by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

VOGEL, P.J.

Yoshi Ogino appeals from the order granting the motion of the defendants, Kham Vay Ung and Foot and Ankle Clinic, P.C., for judgment notwithstanding the verdict. Ung also cross-appeals, conditionally arguing the court erred in rejecting his statute of limitations defense. We conclude the court correctly concluded there was insufficient evidence to support the jury's verdict on the fraudulent misrepresentation claim. We therefore affirm, and need not address the cross-appeal.

Background Facts and Proceedings.

Plaintiff Dr. Yoshi Ogino and defendant Kham Vay Ung are both podiatrists. In November of 1999, Ogino expressed an interest in associating with Ung in his Sioux City clinic because of Ung's work with Native Americans. Because Ogino did not have surgical experience and was not licensed in Iowa, Ung explained that Ogino would have to be treated as any other resident that rotated through his office and that there would be no salary. Ogino agreed, and he initially began working in the billing department of Ung's office. This work continued for several months, and Ung eventually began paying Ogino a salary of \$800 every two weeks for his work. This arrangement was reached orally.

In September or October of 2000, Ung presented Ogino with a written contract to employ him as a podiatrist. Ogino claimed he signed this contract and returned it to Ung; however, Ung claimed it was merely a draft agreement and that Ogino never returned a copy to him. Both parties agree Ung did not sign this contract. Regardless, Ung began paying Ogino a salary of \$35,000 per

year, and by November of that year, Ogino was seeing patients while still doing billing work and retaining that salary as well.

After Ogino received conditional staff privileges at two local hospitals, Ung raised Ogino's salary to \$45,000 in March 2001 pursuant to an oral agreement. In June or July of that year, Ung presented Ogino with a second unsigned draft of an employment contract. Ogino claimed that he signed this contract and returned it to Ung, while Ung claimed that he did not recall Ogino ever returning a signed copy to him as Ogino appeared insulted with the inclusion of non-compete language. This contract provided for bonus compensation based on Ogino's production, which is at the heart of this litigation. Again in August of 2002, October of 2002, and March of 2003 Ogino's salary was raised, each time pursuant to an oral agreement.

On April 21, 2003, Ogino wrote Ung a letter expressing his intent to resign his employment. However, after discussions between the two, Ogino agreed to continue working and other financial incentives were provided to Ogino. It is undisputed that there had been no discussion of any bonus income since the presentation of the draft contract in June 2001. Then, in March of 2004, Ogino's attorney wrote Ung a letter notifying him that Ogino was giving his thirty-day notice to terminate his employment agreement. At that time, Ogino also filed a lawsuit against Ung, alleging breach of a written employment agreement. Ogino later amended his petition to assert an additional claim of fraudulent misrepresentation.

The case was tried to a jury on both claims. At the close of Ogino's evidence, Ung moved for a directed verdict. The court denied the motion as to

the contract claim, but reserved ruling on the fraudulent misrepresentation claim. At the close of all evidence, Ung unsuccessfully renewed his motion for directed verdict. The jury later returned a verdict denying Ogino's contract claim; however, it found in favor of Ogino on his fraudulent misrepresentation claim, and awarded him \$75,000 in damages. Ung later filed a motion for judgment notwithstanding the verdict, arguing the insufficiency of evidence to support the verdict. The court granted this motion, and concluded there was insufficient evidence of "intent to deceive" to support the fraud claim. It therefore entered a judgment of dismissal in favor of Ung. Ogino appeals from this ruling.

Scope and Standards of Review.

We review rulings on motions for directed verdict and for judgment notwithstanding the verdict for correction of errors at law. *Maxim Techs., Inc. v. City of Dubuque*, 690 N.W.2d 896, 900 (Iowa 2005). In reviewing rulings on motions for directed verdict and for judgment notwithstanding the verdict, we view the evidence in the light most favorable to the party opposing the motion. *Midwest Home Distrib. v. Domco Indus., Ltd.*, 585 N.W.2d 735, 738 (Iowa 1998).

We must apply the same standard as the district court by considering the evidence in the light most favorable to the party against whom the motion is directed and conduct our review in favor of upholding the jury verdict. *Watson v. Lewis*, 272 N.W.2d 459, 461 (Iowa 1978). We then decide whether there was sufficient evidence to generate a jury question. *Id.* at 463. Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Johnson v. Dodgen*, 451 N.W.2d 168, 171 (Iowa 1990).

Specificity of Ung's Motion for Directed Verdict.

Ogino first maintains Ung's motion for directed verdict was insufficiently specific in that it "does not specify the particular elements it claims were not supported by specific evidence." Accordingly, Ogino believes the trial court committed reversible error by granting Ung's motion for judgment notwithstanding the verdict on a ground not raised in the directed verdict motion. *See Field v. Palmer*, 592 N.W.2d 347, 351 (Iowa 1999) ("Because the issue the defendant raised in its posttrial motion and on appeal had not been raised in its motions for directed verdict, the defendant could not rely on that issue on appeal.").

We reject this contention, and conclude that the motion for directed verdict adequately raised the issue of the sufficiency of the evidence of Ung's intent to deceive. *See Hylar v. Garner*, 548 N.W.2d 864, 872 (Iowa 1996) (laying out the elements of a fraudulent misrepresentation claim). After Ung moved for a directed verdict, the court and both attorneys engaged in a lengthy dialogue on the record regarding the specifics of the motion. Through that discussion, it was clarified that Ung was arguing the lack of clear and convincing evidence that would support the elements of the fraud claim. During the discussion surrounding the motion for directed verdict, the court specifically addressed the issue of "what the parties' intent was." Accordingly, because we believe "the record indicates the trial court, counsel, and both parties had no doubt what the grounds for the motion were and these grounds were obvious and discussed thoroughly in the court below," *see In re Detention of Hodges*, 689 N.W.2d 467, 470 (Iowa 2004), we reach the merits of this appeal.

Fraudulent Misrepresentation.

As noted previously, as part of his prima facie case of fraudulent misrepresentation, Ogino was required to establish by clear and convincing evidence that Ung intended to deceive him.¹ See *Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 400 (Iowa 2001). Intent to deceive, which is closely related to the concept of scienter, is knowledge of the falsity of a material representation. *Hylar*, 548 N.W.2d at 871. It can be proved by showing that the defendant had actual knowledge of the falsity, possessed reckless disregard for the truth, or falsely stated or implied that the representations were based on personal knowledge or investigation. *Id.*

Here, the district court first accepted Ogino's version of the events as it was required to, and found that "even under this version of the events, the evidence is insufficient to establish by a preponderance of clear and convincing evidence Dr. Ung's intent to deceive Dr. Ogino at the time he presented the contract." We agree with the district court that there is not sufficient evidence Ung intended to deceive, and thus the fraudulent misrepresentation claim must fail.² There is no evidence in the record from which a reasonable fact finder could conclude by a preponderance of clear, satisfactory, and convincing proof that Ung had any existing intent to deceive when the contracts were presented to Ogino.

¹ The full elements of a fraudulent-misrepresentation claim are: (1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent to deceive, (6) reliance, and (7) resulting injury and damage. *City of McGregor v. Janett*, 546 N.W.2d 616, 619 (Iowa 1996).

² Ogino claims a similar situation arose when another doctor, Nicola Pike, was hired. However, the district court ruled, and we agree, the failure of Ung to sign a proposed agreement with Pike is not sufficient to show a custom or habit, such that would support an intent to deceive.

First, the mere breach of a promise is never enough in itself to establish the fraudulent intent. *Magnusson Agency v. Public Entity Nat'l Co.-Midwest*, 560 N.W.2d 20, 29 (Iowa 1997). It is undisputed that Ogino never received a copy of the contracts which were signed by Ung, nor did he ask Ung for one. A variety of Ogino's employment terms over the course of several years were done without benefit of a written agreement. Every one of his raises were done through an oral agreement. In addition, Ogino was provided a vehicle and financing for a home, both of which were offered and accepted orally. Finally, Ogino never questioned why he did not receive the full amount of bonuses that should have been paid if the written contract would have been in effect. The parties did not conduct themselves as though they were governed by the terms of the written contract. As such, it appears that the parties' expectations were that Ogino's employment terms were creatures of oral agreements, which were modified from time to time, and that the written contracts were not in effect.

Accordingly, because we conclude the record simply lacks clear, satisfactory, and convincing evidence that Ung harbored an intent to deceive Ogino at the time he presented him the contracts, we affirm the district court. By virtue of this ruling, we need not address Ung's cross-appeal.

AFFIRMED.