

**IN THE COURT OF APPEALS OF IOWA**

No. 6-295 / 04-2070

Filed July 12, 2006

**DONALD ROSDAIL, DOUGLAS  
FULLER, STAN McCLURG,  
JOEL KESSLER and JOHN HUSTON,**  
Plaintiffs-Appellants/Cross-Appellees,

**vs.**

**WILLIAM BYRNE, RICHARD  
STEPHENS and BRUCE KERN,**  
Defendants-Appellees/Cross-Appellants.

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Appeal from the Iowa District Court for Linn County, Marsha M. Beckelman, Judge.

Plaintiffs appeal the district court's denial of their motion for a new trial in their claim of fraudulent misrepresentation and intentional interference with business relations. Defendants cross-appeal the district court's denial of their motion for directed verdict. **REVERSED ON CROSS-APPEAL.**

Sara Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellant.

William J. Wright and Eugene Kopecky, Cedar Rapids, for appellee.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

**HUITINK, J.**

***I. Background Facts and Proceedings.***

Donald Rosdail, Douglas Fuller, Stan McClurg, Joel Kessler, and John Huston (“Detectives”) are detectives with the Cedar Rapids Police Department. They filed claims of fraudulent misrepresentation and intentional interference with business relations on July 17, 2000. The suit was filed against William Byrne, who served as chief of police from 1990 through 1999, and Richard Stephens and Bruce Kern, who both served as assistant chiefs through the date of trial.

The Detectives’ claims of fraudulent misrepresentation and intentional interference with business relations stem from the existing pay disparity between sergeants and detectives of equal seniority at the Cedar Rapids Police Department. Byrne, Stephens, and Kern allegedly promised the Detectives that if they left the collective bargaining unit which encompassed both sergeants and detectives, the Detectives’ pay would be brought within five and ten cents of the hourly wage earned by the sergeants of equal seniority. In reliance on this promise, the Detectives petitioned and ultimately withdrew from the collective bargaining unit on July 18, 1995.

On August 7, 2000, Byrne, Stephens, and Kern filed an answer to the petition. Byrne and the assistant chiefs filed a motion for summary judgment, which was denied. Trial began on August 16, 2004. On the second day of trial, the Detectives withdrew their intentional interference with business relations claim. Each Detective testified on his own behalf, and retired Detective Stark testified as to the events leading up to the Detectives’ withdrawal from the collective bargaining unit. Timothy Terry also testified for the Detectives as an

expert on damages. The Detectives also called Chief Byrne, Assistant Chief Stephens, and Gloria McMahan, who worked for the city and adjusted the Detectives' salaries after they left the collective bargaining unit. At the close of the Detectives' evidence, Byrne and the assistant chiefs made a motion for directed verdict, which was overruled.

The assistant chiefs called Kern, McMahan, and Judy Perkins, the city's collective bargaining representative, to testify on the assistant chiefs' behalf. Byrne also called J. D. Smith, Safety Commissioner. At the close of evidence, Byrne and the assistant chiefs again moved for a directed verdict. The district court granted the motion for directed verdict as to Byrne. The district court also granted Assistant Chief Kern's motion for directed verdict as to McClurg, Huston, and Fuller. Stephens's motion for directed verdict was denied as to all Detectives, and Kern's motion was denied as to Rosdail and Kessler.

Two jury verdict forms were submitted to the jury. The verdict forms were identical except Form of Verdict 1 applied to Stephens and Form of Verdict 2 applied to Kern. Each form consisted of nine questions.

On August 27, 2004, the jury returned the verdict. On Form of Verdict 1, the jury answered "yes" to questions one through eight. Question nine asked the amount of damages sustained by the plaintiffs. The jury responded "0". On Form of Verdict 2, the jury answered question one "no". They did not find by a preponderance of clear, satisfactory, and convincing evidence that Kern made representations to Rosdail or Kessler individually that if Rosdail and Kessler got out of the collective bargaining unit they would be paid close to or equal to

sergeants' pay. Pursuant to the instructions, the jury did not answer any of the other questions on Form of Verdict 2.

The Detectives filed a motion for a new trial on damages against Stephens or, in the alternative, a new trial against Byrne, Stephens, and Kern on all the issues. The district court denied the motion. On appeal, the Detectives raise the following issues:

- I. Did the trial court err in denying plaintiffs' motion for new trial against defendant Stephens on the issue of damages?
- II. The trial court erred in refusing to grant the detectives a new trial on all issues against defendants Stephens and Kern?

On cross-appeal, Byrne, Stephens, and Kern argue the following:

- I. It was error for the district court to deny the defendants' motion for directed verdict because the plaintiffs' reliance upon the representation was not justified as a matter of law.
- II. It was error for the district court to deny the defendants' motion for a directed verdict because the plaintiffs did not prove the amount of their damages.

## ***II. Motion for Directed Verdict.***

We first consider the cross-appellant's argument that the trial court should have granted the motion for directed verdict. We review a trial court's denial of a directed verdict for correction of errors of law, and we limit our review to the grounds raised in the motion. *Pierce v. Staley*, 587 N.W.2d 484, 485 (Iowa 1998). We "review the evidence in the light most favorable to the nonmoving party" and we determine "whether a fact question was generated." *Id.* "A directed verdict is appropriate in cases where any element of the claim is not supported by substantial evidence." *Id.* (quoting *Hill v. Winnebago Indus., Inc.*, 522 N.W.2d 326, 328 (Iowa Ct. App. 1994)). Substantial evidence means evidence that a "reasonable mind would accept as adequate to reach a

conclusion.” *Bellville v. Farm Bureau Mut. Ins. Co.*, 702 N.W.2d 468, 473 (Iowa 2005) (quoting *Thomas v. U.S. Fid. & Guar. Co.*, 559 N.W.2d 288, 290-91 (Iowa 1997)).

Stephens and Kern moved for a directed verdict as a matter of law claiming that the Detectives failed to prove they justifiably relied upon the alleged representations. Reliance is an element of fraudulent misrepresentation.<sup>1</sup> *Cornell v. Wunschel*, 408 N.W.2d 369, 374 (Iowa 1987). However, “some misrepresentations may not justifiably be relied on.” *Lockard v. Carson*, 287 N.W.2d 871, 878 (Iowa 1990). Statements of intent to perform a future act may not justifiably be relied upon unless the statement is “spoken with the existing intention not to perform.” *City of McGregor v. Janett*, 546 N.W.2d 616, 619 (Iowa 1996). “[W]here a plaintiff has equal information of certain knowledge as the defendant, he has no right to rely upon defendant’s statements.” *Lockard*, 287 N.W.2d at 878 (quoting *Andrew v. Baird*, 221 Iowa 83, 93, 265 N.W. 170, 175 (1936)). As the recipient of a fraudulent representation, the plaintiff is “required to use his senses, and cannot recover if he blindly relies on a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation.” *Id.* (quoting Restatement (Second) of Torts § 541, cmt a (1971)). We have held as follows:

[T]he test for determining whether a party to a transaction has a right to rely on representations of the other is not whether a

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<sup>1</sup> In an action for fraud, the plaintiff must “show by a preponderance of the evidence, satisfactory and convincing evidence 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.” *Cornell v. Wunschel*, 408 N.W.2d 369, 374 (Iowa 1987); *Arthur v. Brick*, 565 N.W.2d 623, 625 (Iowa Ct. App. 1997). “[A]ll seven elements of fraudulent misrepresentation must be met.” *Arthur*, 565 N.W.2d at 625.

reasonably prudent person would be justified in relying on such representations but rather, whether the complaining party, in view of his own information and intelligence, had a right to rely on the representations.

*Lockard*, 287 N.W.2d at 878. In other words, the test is not an objective standard but a subjective standard. *McGough*, 526 N.W.2d at 332.

In *Jerry's Homes, Inc. v. Tamko Roofing Products, Inc.*, 40 Fed. Appx. 326, 327 (8th Cir. 2002), Jerry's Homes's claim for fraud was based on representations made by Tamko that hand-sealing loose shingles would effectively repair a problem experienced by homeowners covered under a homeowner warranty. Jerry's Homes was assured Tamko would "take care of Jerry's and its customers." *Jerry's Homes* at 328. The court stated that "the fact that an agreement was not performed does not alone prove that the promisor did not intend to keep the promise when it was made." *Id.* "A false statement innocently made but mistakenly made will not establish intent to defraud unless the statement was recklessly asserted." *Id.* The court held that no jury could find that Jerry's Homes justifiably or reasonably relied on Tamko's representations because Jerry's Homes "did not have the authority to dictate Tamko's response to warranty claims." *Id.* at 329. "[T]he claimed reliance rests only on non-binding predictions of future actions" and non-binding predictions of future actions "are not actionable under a theory of fraud." *Id.*

Following the rationale of *Jerry's Homes* and the standard needed to show reliance, we find that the Detectives were not justified in their reliance on the representation made by Assistant Chiefs Stephens and Kern. The Detectives are long-time employees of the Cedar Rapids Police Department with significant

experience.<sup>2</sup> The Detectives admit that they knew that neither Assistant Chief Stephens nor Assistant Chief Kern had the authority to increase their hourly wage. The Detectives recognized that a pay increase had to be approved by Chief Byrne, the safety commissioner and ultimately the city council.<sup>3</sup> The Detectives also admit that they never talked to Chief Byrne regarding an increase in their hourly rate if they left the collective bargaining unit.

Despite the contrary evidence that the Detectives relied on the statements made by Stephens and Kern because of the close personal relationship they had with the Detectives and retired Detective Stark, the Detectives' raises were still dependent upon the future actions of the city council, the safety commissioner and Chief Byrne. Viewing the evidence in the light most favorable to the nonmoving party, we find that the element of reliance was not supported by substantial evidence. Accordingly, the trial court erred in denying the motion for directed verdict. Additionally, in light of our finding, we need not address the arguments raised by the Detectives on appeal.

**REVERSED ON CROSS-APPEAL.**

Miller, J., concurs; Sackett, C.J., concurs specially.

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<sup>2</sup> McClug began with the Cedar Rapids Police Department in 1969, was promoted in 1973 or 1974 to detective, and retired in 2001. Fuller joined the department in 1969, was promoted in October 1973 to detective and worked for twenty-seven or twenty-eight years as a detective. Huston joined the department in 1971, was promoted in 1978 to detective, and retired in August 2002. Rosdail joined the department in 1965, was promoted to detective in 1971, and was still a detective at the time of trial. Kessler joined the department in September 1974, was promoted to detective in September 1977, and was still a detective at the time of trial.

<sup>3</sup> Section 7.28 of the Cedar Rapids Municipal Code states “[t]he members of the Police Department shall receive such salary as the council may by resolution or ordinance fix as compensation in full for all services rendered in lieu of all fees.” This policy is also present in section 3.01 of the City of Cedar Rapids Personnel Policy Manual.

**SACKETT, C.J.** (concurring specially)

I concur with the majority opinion.

Clearly the plaintiffs could not rely on the alleged promises by defendants to pay them more money for performing their duties. Acts by individuals employed by a public body cannot bind the municipality unless officially sanctioned in accordance with the statute. See *City of McGregor v. Janett*, 546 N.W.2d 616, 620 (Iowa 1996); *Lemke v. Mueller*, 166 N.W.2d 860, 864 (Iowa 1969); *Greusel v. O'Brien County*, 223 Iowa 747, 750, 273 N.W. 853, 854 (1937); *Emmet County v. Dally*, 216 Iowa 166, 168, 248 N.W. 366, 367 (1933); *Modern Steel Structural Co. v. Van Buren County*, 126 Iowa 606, 617, 102 N.W. 536, 539 (1905). There is no evidence that these defendants had the authority to fix or increase plaintiffs' salaries. Persons dealing with city officers must, at their peril, understand the limits upon a city's power. *McGregory*, 546 N.W.2d at 620; *Marco Dev. Corp. v. City of Cedar Falls*, 473 N.W.2d 41, 43 (Iowa 1991); *Johnson County Sav. Bank v. City of Creston*, 212 Iowa 929, 934, 237 N.W. 507, 508 (1931). The validity of dealings with a municipality can be measured by reference to public documents and proceedings, the doctrine of ultra vires has enjoyed stricter application in the public, as opposed to the private, corporate realm. See generally 56 Am. Jur. 2d *Municipal Corporations* §§ 503-04 (1988). In order to prevail on their tort claim, plaintiffs were obliged to prove justifiable reliance. They cannot claim under this record that they relied to their detriment on a fraudulent misrepresentation of a salary increase. Their claimed reliance rests on no more than informal, nonbinding predictions of a promise to seek a salary increase by persons unable legally to provide for the increase.