**IN THE COURT OF APPEALS OF IOWA**

No. 7-086 / 06-0933
Filed March 28, 2007

**CAVEMAN ADVENTURES, UN, LTD., and RAYMOND NOVICK,**
Plaintiffs-Appellants,

**vs.**

**UNITED STATES CELLULAR CORPORATION, d/b/a U.S. CELLULAR, UNITED STATES CELLULAR OPERATING COMPANY OF CEDAR RAPIDS, UNITED STATES CELLULAR OPERATING COMPANY OF DES MOINES, and UNITED STATES CELLULAR OPERATING COMPANY OF WATERLOO,**
Defendants-Appellees.

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Appeal from the Iowa District Court for Johnson County, David M. Remley, Judge.

Plaintiffs appeal the district court's directed verdict and jury verdict against them. **AFFIRMED.**

Patrick O'Bryan, Des Moines, for appellants.

Rebecca Dublinske of Dickinson, Mackaman, Tyler, & Hagen, P.C., Des Moines, for appellees.

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

**MAHAN, J.**

Caveman Adventures, UN, Ltd. and Raymond L. Novick (Plaintiffs) appeal the district court's directed verdict and jury verdict against them. Specifically, they argue the district court erred in instructing the jury and in dismissing their fraud claim by directed verdict. We affirm.

## I. Background Facts and Proceedings

Plaintiffs entered into an agent agreement with United States Cellular Corporation (USCC) in October 1998. The agreement designated Plaintiffs as an "Agent" and USCC as a "Principal." The contract makes clear the two parties were not in an employer-employee relationship. It contains both nonsolicitation and noncompete provisions. It also provides an agent commission structure in appendix B to the agreement. According to the agreement,

> Principal shall have the right to change and modify the commission structure effective upon thirty (30) days advance written notice to Agent, but in no event shall Principal modify the commission structure more than two (2) times in any twelve (12) month period.

Both parties agree that, under the agreement, the Agent must provide the Principal with any advertising for preapproval:

> Principal shall provide Agent with promotional materials, training materials, and marketing support. The types and amounts of such materials and support shall be determined by Principal in its sole and absolute discretion.

Finally, the Agreement provides certain requisites for termination:

> This Contract may be terminated by either party immediately upon written notice to the other party upon the occurrence of any material breach of this Contract by the other party. Termination by Principal for a material breach by Agent shall expressly include, but is not limited to (1) any illegal or dishonest acts by Agent; (2) any material misrepresentations by Agent to Principal, subscribers or potential subscribers; (3) any unauthorized withholding of Principal funds by

> Agent; (4) any failure by Agent to comply with the provisions of this Contract that remains uncured ten (10) days after written notice to Agent; (5) any assignment by Agent for the benefit of creditors or any filing under bankruptcy or similar laws by or against Agent; (6) any change in the control or management of Agent which is unacceptable to Principal exercising its reasonable business judgment; (7) Agent fails to meet the sales quotas established by Principal pursuant to Paragraph 4(g) hereof; or (8) if Agent ceases to function as a going concern or to conduct its operations in the normal course of business. Principal shall also have the right to terminate this Contract immediately upon written notice to Agent if Principal is no longer a CTS provider in the Market.

Problems regarding advertising and other disputes between Plaintiffs and USCC began as early as June 1999. In September 1999 USCC sent a letter to Plaintiffs stating that all advertising had to be approved by USCC's attorney. Previously, the advertising needed only to be approved by Plaintiffs' agent handler. In April 2000 Plaintiffs learned USCC would be reducing agent commissions. They sent a letter through counsel to the executive vice president of operations at USCC complaining about the changes. On May 1 the commission changes took effect. On May 4 Plaintiffs sent a fax to USCC's attorney threatening to involve the government in the advertising disagreement. Also in May, USCC alleges Plaintiffs ran unapproved advertising. In June 2000 Plaintiffs sent another letter through counsel complaining about the commission changes in June 2000.

USCC terminated Plaintiffs' agent agreement on July 24, 2000. The termination letter stated Plaintiffs materially breached the agreement by using unapproved advertising multiple times. The letter also stated Plaintiffs had been verbally abusive to USCC employees, had refused to deal with certain

employees, and had continually challenged USCC decisions and policies. The letter also indicated USCC would enforce the agreement's noncompete clause.

Plaintiffs brought suit against USCC on July 10, 2002, alleging several different claims.[1] The case proceeded to a jury trial beginning on May 1, 2006. USCC presented an affirmative defense of good cause for its termination of the contract. The district court granted USCC's motion for directed verdict on Plaintiffs' claims for fraudulent misrepresentation and wrongful termination in violation of public policy.[2] The jury returned a verdict on May 5, 2006, in favor of USCC on all remaining claims. Plaintiffs appeal.

**II. Standard of Review**

We review alleged errors in jury instructions for errors at law. Iowa R. App. P. 6.4; *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 748 (Iowa 2006). We also review rulings for directed verdict for errors at law. Iowa R. App. P. 6.4; *Heinz v. Heinz*, 653 N.W.2d 334, 338 (Iowa 2002). We review the district court's ruling to determine whether, viewing the evidence in the light most favorable to the plaintiff, there was insufficient evidence to submit the claim to the jury. *Ette ex rel. Ette v. Linn-Mar Comty. Sch. Dist.*, 656 N.W.2d 62, 66 (Iowa 2002). If there is substantial evidence in the record to support all the elements of the claim, or if reasonable minds could come to different conclusions based on the evidence, the issue must be submitted to the jury. *Heinz*, 653 N.W.2d at 338.

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[1] Those claims included: breach of contract for nonpayment of $4741.25; breach of contract for termination of the contract without proper cause; breach of the implied covenant of good faith and fair dealing; wrongful termination of the Plaintiffs' agent contract in violation of public policy; interference with prospective business advantage; restraint of trade; fraudulent misrepresentation; and breach of fiduciary duty.

[2] Appellants do not appeal the district court's directed verdict on their wrongful termination claim.

## III. Merits

### A. Jury Instruction

The court gave the following instruction concerning USCC's affirmative defense of good cause to terminate the agency agreement:

> Defendant claims it had "good cause" for terminating the Agent Agreement because of Plaintiffs' material beach of the contract for alleged use of unapproved advertising, alleged verbal abuse of Defendant's employees, and other reasons stated in the July 24, 2000 termination letter. If the Defendant has proved good cause for the termination of the Agent Agreement, the Plaintiffs cannot recover damages on this claim. If the Defendant has failed to prove good cause for the termination, then you shall decide if the Plaintiffs are entitled to recover damages under the other instructions.
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> "Good cause" may be based upon the Plaintiffs' failure to perform in accordance with the Agent Agreement or a reason for termination expressly stated in the Agreement. It may also arise from grounds not expressly stated in the Agreement.

This instruction is a modified version of Iowa Uniform Jury Instruction 3110.7 Affirmative Defense—Discharge for Cause. The last paragraph of the district court's instruction, however, comes from the comment to Instruction 3110.7. The record shows the parties and the court spent considerable time discussing the language of this instruction. USCC now argues Plaintiffs' claim is not preserved. In the final objections to the instruction, Plaintiffs' attorney stated "Your Honor, my objection would be to the last paragraph, the need to define good cause as something other than what's already been reflected." We conclude Plaintiffs' objection was sufficient to bring the court's attention to alleged failures in the instruction. *See Reilly v. Anderson*, 722 N.W.2d 102, 105-06 (Iowa 2006); *Weyerhaeuser Co. v. Thermogas Co.*, 620 N.W.2d 819, 828-29 (Iowa 2000). Essentially, Plaintiffs' last objection is the same complaint they

make here: the last sentence of the instruction allowed the jury to determine any ground, not just those stated in the agreement, constituted good cause to terminate.

The language of the agent agreement only allows termination of the contract for material breach. It does not, however, limit material breach to the grounds listed. Instead, the agreement states it may be terminated for material breaches "expressly include[d] *but not limited to* . . . ." (emphasis added). The plain language of the contract indicates the parties were not limited to the breaches expressly stated in the Agreement. *See Federal Land Bank of Omaha v. Bollin*, 408 N.W.2d 56, 60 (Iowa 1987) ("It is the court's duty to give effect to the language of the contract in accordance with its plain and ordinary meaning and not make a new contract for the parties by arbitrary judicial construction."). Though the Uniform Jury Instruction is based on an employer-employee relationship, "[a] trial court is not required to word jury instructions in a particular way and is free to draft instructions in its own way if it fairly covers the issues." *Kiesau v. Bantz*, 686 N.W.2d 164, 175 (Iowa 2004). Further, Plaintiffs concede the instruction is "somewhat analogous" to their case. In fact, their pleadings allege a lack of good faith and fair dealing. These claims are not dissimilar to good cause. Based on the evidence presented, the instruction is a correct statement of the applicable law. *See Le v. Vaknin*, 722 N.W.2d 412, 414 (Iowa 2006). Even if we found the instruction was erroneous, we cannot conclude Plaintiffs were prejudiced in any way. The instruction does not materially misstate the law, confuse or mislead the jury, or unduly emphasize a point of the case. *See Kiesau*, 686 N.W.2d at 176.

**B. Directed Verdict for Fraud**

In order to prove fraud, the Plaintiffs must show the following elements by a preponderance of clear, satisfactory, and convincing evidence: (1) representation; (2) falsity; (4) materiality; (4) scienter; (5) intent; (6) justifiable reliance; and (7) resulting injury. *Hoelscher v. Sandage*, 462 N.W.2d 289, 291 (Iowa Ct. App. 1990). The district court determined Plaintiffs failed to present substantial evidence that (1) USCC knew its representation was false and (2) USCC intended to deceive Plaintiffs.

USCC provided to Plaintiffs a document entitled "Agent Support Package." The document provides pages entitled "Agent Support Package," "Agent Agreement Summary," "The United States Cellular™ Customer Advantage," "The Proven Cellular Advantage," and "Facts About United States Cellular." The pages describe the various attributes of USCC, most employing bullet points. Plaintiffs take issue with the page entitled "Agent Agreement Summary" that states, via bullet point, that the USCC agent agreement includes a "fair and equitable commission payment plan." Plaintiffs also allege the agent agreement indicates they would receive commissions commensurate with those described in appendix B of their agent agreement. They argue these statements constitute fraud in light of USCC changing the commission structure.

We conclude the district court did not err in dismissing Plaintiffs' fraud claim by directed verdict. First, the statement concerning a "fair and equitable commission" is vague. Plaintiffs presented no evidence to indicate what constitutes a "fair and equitable commission." Further there is no indication the statement is or was false. Plaintiffs had no right to rely on such a general,

indefinite statement. *Dierking v. Bellas Hess Superstore, Inc.*, 258 N.W.2d 312, 315-16 (Iowa 1977). Second, the agreement put Plaintiffs on notice that the commission structure could be changed. Other than the thirty-day notification and twice-per-year limit, the agreement contained no boundary on how the structure could be changed. Plaintiffs could not rely on the assumption the commission structure would not change.

The district court's ruling is affirmed.

**AFFIRMED.**