

**IN THE COURT OF APPEALS OF IOWA**

No. 8-339 / 07-1581  
Filed May 12, 2010

**RABE HARDWARE, INC.,**  
Plaintiff-Appellee,

**vs.**

**B. ELISABETH JAYAPATHY,**  
Defendant-Appellant.

---

Appeal from the Iowa District Court for Iowa County, Amanda Potterfield,  
Judge.

A defendant homeowner appeals from a jury verdict in favor of a plumbing company, contending (1) the award was not supported by sufficient evidence, (2) she was entitled to damages on her counterclaims, and (3) the district court should have granted her motion for change of venue. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Jeffrey D. Stone of Whitfield & Eddy, P.L.C., West Des Moines, for  
appellant.

John C. Wagner of John C. Wagner Law Offices, P.C., Amana, for  
appellee.

Considered by Vaitheswaran, P.J., Eisenhauer, J., and Miller, S.J.\*  
\*Potterfield, J., takes no part.

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**VAITHESWARAN, P.J.**

A plumbing company sued a homeowner for fraud and breach of a settlement agreement. A jury awarded the company damages. On appeal, the homeowner contends (1) the award was not supported by sufficient evidence, (2) she was entitled to damages on her counterclaims, and (3) the district court should have granted her motion for change of venue.

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

Elisabeth Jayapathy moved to Marengo, Iowa, purchased a lot, and began building a home. Her son, Krishnan Jayapathy (Kris) served as general contractor. He retained Rabe Hardware to install plumbing, heating, ventilation, ductwork, and radiant in-floor heating systems. The work was not performed to Kris's specifications, he declined to pay Rabe, and litigation ensued.

The parties eventually reached a settlement agreement under which Rabe agreed to (1) complete certain identified work at no additional cost to Jayapathy, (2) warrant its workmanship as free from defects and suitable for its intended purposes, and (3) deposit \$35,000 into an escrow account for a period of one year after Rabe completed the work. The agreement further stated that in the event of a breach of warranty during the one-year period, Jayapathy would have access to the funds to perform remedial work. Finally, the agreement provided for the dismissal of all pending claims and the release of all actions except actions for breach of warranty and breach of the settlement agreement.

The settlement agreement did not resolve the parties' differences. Rabe asserted it was denied access to the home to complete the work and Kris asserted that Rabe refused to abide by state plumbing code standards.

Rabe filed suit. The petition contained three counts—two seeking the equitable remedies of specific performance and rescission, and the third seeking damages for fraud. Jayapathy counterclaimed for breach of the agreement, breach of warranty, and violation of the state plumbing code.

The district court was preliminarily faced with Rabe's application for a temporary injunction to prevent Jayapathy from withdrawing any of the escrowed funds. After an evidentiary hearing, the court permitted Jayapathy to withdraw the escrowed funds.

Jayapathy moved for a change of venue based on Rabe's stature in the community. The district court denied the motion and the case proceeded to trial before a jury on claims that the parties breached the settlement agreement, Jayapathy engaged in fraudulent misrepresentation, and Rabe breached an express warranty and an implied warranty of fitness for a particular purpose.

The jury awarded Rabe \$49,176.24. The jury also awarded \$15,000 in punitive damages, and found that Jayapathy was entitled to \$4000 to compensate for "[f]ixtures purchased by Rabe that were paid for by Jayapathy but not provided."

Jayapathy moved for a judgment notwithstanding the verdict and for new trial. The district court struck the punitive damage award but declined to alter the balance of the award. The court also dismissed Rabe's equitable counts for specific performance and rescission of the contract. Jayapathy appealed.<sup>1</sup>

---

<sup>1</sup> A notice of appeal was filed in 2007. Meanwhile, Elisabeth Jayapathy filed a Chapter 7 bankruptcy petition and this appeal was stayed. The parties inform us that the bankruptcy action has been resolved and we may proceed with an appellate decision.

## **II. Rabe's Claims—Sufficiency of the Evidence**

Jayapathy argues there is insufficient evidence (A) to support Rabe's claim that Jayapathy committed fraudulent misrepresentation, (B) to show that she breached the settlement agreement, and (C) to support the damage award. We must determine if there was substantial evidence in the record to support submission of the issues to the jury. *Magnusson Agency v. Pub. Entity Nat'l Co.-Midwest*, 560 N.W.2d 20, 25 (Iowa 1997).

### **A. Fraudulent Misrepresentation.**

The jury was instructed that Rabe would have to prove the following elements of its fraudulent misrepresentation claim by clear, satisfactory, and convincing evidence:

1. The defendant in the Settlement Agreement and negotiations pursuant thereto, Ms. Jayapathy, made representations to Rabe Hardware that she would allow Rabe Hardware to reenter the property and perform work pursuant to the terms of the Settlement Agreement.
2. The representation was false.
3. The representation was material.
4. Ms. Jayapathy knew the representation was false.
5. Ms. Jayapathy intended to deceive Rabe Hardware.
6. Rabe Hardware acted in reliance upon the truth of the representation and was justified in relying on the representation.
7. The representation was a proximate cause of Rabe Hardware's damage.
8. The amount of damage has been shown by Rabe Hardware.

With respect to the fifth, "intent to deceive" element, the jury was further instructed that

Jayapathy intended to deceive Rabe Hardware if any of the following situations existed when she made a representation:

1. Ms. Jayapathy wanted to deceive Rabe Hardware or believed that Rabe Hardware would in all likelihood be deceived.

2. Ms. Jayapathy had information from which a reasonable person would conclude that Rabe Hardware would be deceived.
3. Ms. Jayapathy made the representation without concern for the truth.

Jayapathy argues that “[t]here was no credible evidence presented at trial that she intended to, or did, deceive Plaintiff.” Rabe responds as follows:

The overall plan effectuated by Jayapathy shows that she intended to deceive Rabe. She did only what was necessary to get the Agreement started, then withdrew, collected her benefits from Rabe, and proceeded as though their Agreement never happened. Jayapathy clearly entered into this agreement, and induced Rabe’s agreement to the same, for the sole purpose of ridding herself of the lawsuit against her as well as the lien against her house, obtaining an additional \$35,000.00 from the escrow account, and to further avoid her contractual obligation to pay Rabe the amount remaining on her contract, namely the \$14,176.24.

Rabe’s assertions are not supported by the record. We begin with the assertion that Jayapathy entered into the agreement “for the sole purpose of ridding herself of the lawsuit.” There is no question she did so. That is the nature of settlement agreements. See *Pahl v. Tri-City Ry. Co.*, 190 Iowa 1364, 1367, 181 N.W. 670, 671 (1921) (stating that settlements are not ordinarily to be disturbed because “their very object is to settle disputes without judicial controversy”). This fact does not render the representations in the agreement deceptive.

We turn to Rabe’s assertion that Jayapathy entered into the agreement with the intent to deceive Rabe into providing an escrow account that she could raid. Jake Rabe, owner of Rabe Hardware, testified that it was his idea, not Jayapathy’s, to escrow \$35,000. He stated, “I was that convinced that I could complete the project for her and make them happy.” Jayapathy, in turn, testified

that she entered into the settlement agreement because she wanted to move into the home and, given her lack of knowledge about plumbing details, she trusted Rabe to fix the problems. After the settlement agreement was executed, she and Jake Rabe had an extensive discussion about certain fixtures and whether there was a need for some items recommended by her son. Jake Rabe testified they reached an understanding as to what had to be accomplished. He said he had “nothing against Betty whatsoever” and he “just wanted to get her in the home.” In sum, there is scant, if any, evidence demonstrating that Jayapathy wanted to deceive Rabe when she entered into the settlement agreement, had facts that, if known, would have led people to conclude Rabe was deceived, or lacked concern for the truth.

The only evidence that might arguably point to deception was testimony that Jayapathy or Kris did not allow Rabe onto the premises to perform the repairs. The problem with Rabe’s reliance on this testimony is that the act took place after the settlement agreement was signed. As the jury instructions state, the intent to deceive must exist at the time the representation is made. See *Magnusson*, 560 N.W.2d at 29. Accepting the evidence that Jayapathy prevented Rabe from performing the contract, “[t]he mere breach of a promise is never enough in itself to establish the fraudulent intent.” *Id.* In the absence of a showing of an intent to deceive, we conclude there was insufficient evidence to submit the fraudulent misrepresentation claim to the jury.

### ***B. Breach of Contract***

Jayapathy argues that Rabe’s breach-of-contract claim should not have been submitted to the jury because it was not pled and because “Rabe failed to

submit sufficient proof as to breach of contract . . . as to Defendant.” We will assume without deciding that these issues were preserved for our review and were not waived for failure to cite authority.

We begin with the pleading issue. Jayapathy is correct that Rabe did not plead a count for monetary damages based on breach of contract. However, it was clear by the time of trial that Rabe was pursuing such a count. After lengthy discussions with counsel, the district court submitted a breach-of-contract claim to the jury in addition to Rabe’s fraud claim. There is no indication that Jayapathy objected to the jury instructions on breach of contract. For this reason, the absence of a count for damages based on breach of contract is not fatal. *See Arthur Elevator Co. v. Grove*, 236 N.W.2d 383, 391 (Iowa 1975).

On the question of Rabe’s failure to submit sufficient proof as to breach of contract, the jury was instructed that Rabe’s performance under the settlement agreement would be excused if the jury found that Jayapathy “prevent[ed] it or ma[de] it impossible.” Rabe presented evidence that he was not allowed to enter the home for several months after the settlement agreement was reached. From this evidence, the jury reasonably could have found that Jayapathy prevented him from performing his obligations under the contract. *See Sheer Constr., Inc. v. W. Hodgman & Sons, Inc.*, 326 N.W.2d 328, 332 (Iowa 1982).

### **C. Damages**

Jayapathy contends the jury's damage award was not supported by the law or the evidence.<sup>2</sup> In light of our conclusion that the fraudulent misrepresentation claim should not have been submitted to the jury, the damage award may be upheld only if it flows from breach of contract.

The jury was instructed that it could award contract damages in "an amount that will place Rabe Hardware in as good a position as if the contract had not been breached." If Jayapathy had not prevented Rabe from performing its obligations under the settlement agreement, Rabe would have incurred expenses in repairing its prior work but would have been entitled to a release of the \$35,000, assuming the work was performed as warranted. In actuality, Rabe did not perform any work, the district court authorized the release of the escrowed funds to Jayapathy to have another company perform remedial work, and Rabe received a damage award of \$49,176.24 for the "[a]mount owing for the work done by Rabe Hardware on the three bids."

The parties agree that \$14,176.24 of the damage award was for work performed by Rabe before the settlement agreement was signed. Rabe concedes that this sum could only be justified under a fraud theory and a remedy of "complete rescission of the settlement agreement." As noted, the district court dismissed Rabe's equitable claims, including his claim for rescission. Rabe did not object to the dismissal and, indeed acknowledged in a report to the court that they would not be viable if the jury awarded monetary damages. Because we

---

<sup>2</sup> She also appears to contend that the form on damages received by the jury was incorrect. This issue was not preserved for our review, as Jayapathy did not object to this form at the conference on jury instructions.

have found insufficient evidence to support Rabe's fraud count and the equitable rescission count was dismissed, he is not entitled to the \$14,176.24 in pre-agreement damages.

We turn to the portion of the damage award representing the \$35,000 in escrowed funds. Jayapathy maintains that Rabe should not have been awarded damages equivalent to the entire escrowed amount because, if the agreement had been performed, Rabe would have expended some of its own money. This argument ignores the jury's finding that Rabe was excused from performance because of Jayapathy's interference. And, as will be discussed below, it ignores the jury's rejection of Jayapathy's counterclaims based on poor workmanship.<sup>3</sup> The jury effectively found that Jayapathy had no claim to the escrowed funds that were released to her. For that reason, we conclude Rabe was entitled to damages of \$35,000, representing the entire amount placed in the escrow account.

### ***III. Jayapathy's Counterclaims—Sufficiency of the Evidence***

Jayapathy next asserts that Rabe violated the requirements of the state's plumbing code. In her view, these claimed violations entitled her to damages for breach of warranty and breach of contract and required an additional reduction of the damages awarded to Rabe. We will assume without deciding that state code violations can form the basis for breach of express warranty, breach of implied warranty of fitness for a particular purpose, and breach of contract claims.<sup>4</sup>

---

<sup>3</sup> As noted below, the \$4000 award was not based on poor workmanship.

<sup>4</sup> Jayapathy argues that state plumbing requirements are incorporated into the contract. See *C & F Maint. & Prop. Mgmt., Inc. v. Eliason and Knuth Drywall Co.*, 418 N.W.2d 44, 45 (Iowa 1988) (“[W]e accept plaintiffs’ argument that local ordinances governing

The jury heard extensive testimony from Jake Rabe and others about his failure to comply with the requirements of the plumbing code. Notwithstanding this testimony, the jury declined to award Jayapathy any damages to correct the heating, cooling, and plumbing systems. The only damages the jury awarded had nothing to do with state plumbing code violations but instead related to fixtures that Jayapathy concededly paid for but did not receive. It was the jury's prerogative to weigh the disputed evidence. *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 772 (Iowa 2009). We will not interfere with its judgment. *Id.* We affirm the award of \$4000, which the district court offset against the award to Rabe.

#### ***IV. Change of Venue***

As noted, Jayapathy moved for a change of venue on the ground that Jake Rabe was "a lifetime resident of the area" and she was not. The district court denied the motion, reasoning as follows:

In the case at bar, the Court finds Defendant has not demonstrated that the residents of Iowa County are so prejudiced against her that she could not obtain a fair trial, or that Plaintiff has such undue influence over Iowa County residents that Defendant could not obtain a fair trial. The affidavits submitted by Defendant in support of her Motion contain generalized statements of the affiants' belief that the Rabe family has such undue influence over the residents of Iowa County that Defendant could not obtain a fair trial, but Defendant has not offered any specific evidence indicating

---

buildings may be an implied obligation of a construction contract.""). She does not make an argument concerning how the plumbing code relates to her warranty claims. With respect to the express warranty claim, the jury was instructed that Jayapathy would have to prove that Rabe "expressly warranted all systems to be fit for their intended purpose." No mention was made of an express warranty that the systems would conform with state plumbing codes. With respect to the implied warranty claim, the jury was instructed that "[t]he failure of the *product* to fit the particular purpose was a proximate cause of Ms. Jayapathy's damage." The claimed plumbing code violations related to the quality of the installation rather than the quality of the product.

the Rabe family influence in Iowa County is so great that a fair and impartial jury could not be found in Iowa County.

While the record reflects that Rabe's grandfather and other members of his family generated goodwill in the community, the affidavits supporting the motion did not address the nature and extent of that goodwill. Instead, they simply made conclusory reference to the language of the change of venue rule. See Iowa R. Civ. P. 1.801(3) (requiring showing of "such undue influence over the county's inhabitants that the movant cannot obtain a fair trial"). On this record, the district court did not abuse its discretion in denying the motion. See *Bigelow v. Wilson*, 87 Iowa 628, 634, 54 N.W. 465, 466 (1893) ("It was a matter within the sound discretion of the court, as to whether it should grant the application. It refused to do so. There is nothing in the record which would indicate that in so doing the district court abused the discretion with which it is vested.").

#### ***V. Disposition***

We affirm that portion of the district court's post-trial ruling finding sufficient evidence for submission of Rabe's breach-of-contract claim to the jury. We reverse the submission of Rabe's fraudulent representation claim. We reverse the jury's award of \$14,176.24 and modify the judgment in favor of Rabe to \$31,000, which represents the \$35,000 in escrowed funds minus the \$4000 in favor of Jayapathy.<sup>5</sup> We remand for entry of judgment in that amount.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

---

<sup>5</sup> Generally, claims and counterclaims are not set off against one another, and judgment is entered for each party on its claim. See Iowa R. Civ. P. 1.957. However, because the district court offset the parties' damages, we do the same.