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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0587**

Eric Berg, et al.,
Respondents,

vs.

Wendy Brown, et al.,
Appellants.

**Filed April 26, 2021
Affirmed in part and reversed in part
Johnson, Judge**

Hennepin County District Court
File No. 27-CV-18-19715

Scott Moriarity, Baillon Thome Jozwiak & Wanta L.L.P., Minneapolis, Minnesota (for respondents)

Joel O'Malley, Nilan Johnson Lewis P.A., Minneapolis, Minnesota; and

Alexander N. Loftus (*pro hac vice*), Loftus & Eisenberg, Ltd., Chicago, Illinois (for appellants)

Considered and decided by Johnson, Presiding Judge; Hooten, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

A Hennepin County jury awarded the two plaintiffs in this case a total of \$117,431 on their fraud and breach-of-contract claims. We conclude that the evidence is sufficient to support the jury's verdict on the breach-of-contract claim but that the evidence is

insufficient to allow a reasonable jury to find fraud. We also conclude that the district court did not err in its ruling on a pre-trial motion *in limine* or in its jury instructions. Therefore, we affirm in part and reverse in part.

FACTS

This appeal concerns the professional relationships between Eric Berg and Allan Brown and Wendy Brown, who are married to each other. Between 2015 and 2017, Allan and Berg worked together at AllStaff Recruiting, Inc. (ARI), a staffing company that provided call-center services. Allan was ARI's president and owned a minority stake in the company. Berg was the vice president of ARI's call-center operations. Berg's employment agreement provided him a base salary of \$180,000; commissions; ten percent of the profits of the call-center operations; and a "phantom stock bonus payment," which would be payable at the termination of his employment in an amount equal to ten percent of the value of ARI.

In the summer of 2017, the owners of ARI decided to sell the company to Management Registry, Inc. (MRI), which was engaged in staffing and call-center businesses in multiple states. Allan and Wendy discussed with MRI the possibility that, after acquiring ARI, MRI might spin off part of its Minnesota operations and sell it to Wendy. Wendy and Allan apparently understood that such a transaction would occur soon after MRI closed on its acquisition of ARI in September 2017.

During a transitional period, the Browns expressed to Berg their hope that he would continue his employment with the business after Wendy acquired it. Wendy encouraged Berg to join the future company by offering terms that were equal to or better than what he

had been receiving from ARI. Specifically, she offered to pay him a base salary of \$240,000 and 25 percent of the company's profits after she acquired MRI's Minnesota operations. She also offered to pay him an additional \$6,000 per month (or \$72,000 per year) as a consultant to another division of the company. With respect to phantom stock, Wendy told Berg that he could choose to receive the phantom-stock-bonus payment to which he was entitled from ARI, which would be equal to ten percent of the value of ARI and then accrue a two-and-one-half-percent phantom-stock interest in the new company each year thereafter for nine years. Or, she wrote, Berg could forgo a phantom-stock-bonus payment from ARI and, in essence, roll over his 12.5-percent phantom-stock interest to the new company and thereafter accrue an additional two-and-one-half-percent phantom-stock interest each year for five years. Berg asked Wendy the value of his phantom-stock-bonus interest in ARI. Allan answered the question by writing that Berg's phantom stock was worth \$75,431. Berg responded that he would forgo a phantom-stock-bonus payment from ARI and roll over his phantom-stock-bonus interest to the new company. Wendy provided Berg with a written ARI employment agreement that reflected these terms, and Berg signed the agreement.

After MRI acquired ARI in September 2017, Wendy began running its call-center operations alongside Allan. But on October 27, 2017, MRI informed the Browns that it would not sell the Minnesota call-center operations to Wendy. Shortly thereafter, MRI terminated Allan's and Wendy's employment.

Wendy immediately took steps to form a new company called A.W. Companies, Inc. On October 30, 2017, Wendy, Allan, and Berg exchanged group text messages about

the new company and Wendy's hope that Berg would leave MRI and join A.W. On November 1, 2017, Berg resigned from MRI and joined A.W. as president of the company. In addition to Berg, A.W. hired approximately 30 other persons who had been employed by ARI and MRI. Berg persuaded his largest client to move its business from MRI to A.W. Berg was compensated by A.W. according to the terms that he and Wendy previously had negotiated. Wendy prepared a written A.W. employment agreement that was almost identical to the ARI employment agreement that Berg had signed earlier. But Berg did not sign and return it to Wendy.

Shortly after A.W. began operations, it was sued by MRI in federal district court. For a period of time, A.W. was enjoined from doing business. A.W. experienced financial difficulties. The professional relationships between Berg and the Browns began to deteriorate. In March 2018, Wendy sent Berg another copy of the A.W. employment agreement and asked him again to sign it, but he did not do so. Wendy and Berg also exchanged e-mail messages about Berg's \$6,000 monthly consulting fee. Wendy stated that A.W. would continue to pay Berg's consulting firm, Eric Berg Consulting, LLC (EBC), \$6,000 per month through June 1 but would do so after that date only if A.W. were profitable. In May 2018, Wendy informed Berg that A.W. would pay EBC's monthly invoices after June 1 only if Berg signed the A.W. employment agreement that she previously had sent to him, which included non-competition and non-solicitation clauses. Berg did not ever sign an A.W. employment agreement.

The parties' professional relationships continued to deteriorate. In June 2018, Wendy learned that Berg had approached some A.W. employees about joining him if he

started a new call-center company. The next day, A.W. terminated Berg's employment. Berg later wrote to A.W. requesting repayment of a \$12,000 loan and \$30,000 in unpaid consulting fees. As far as the record reveals, A.W. did not respond.

In December 2018, Berg and EBC commenced this action against the Browns and A.W. The two plaintiffs asserted nine causes of action: one count of fraud, one count of promissory estoppel, three counts of breach of contract, and four counts of unjust enrichment. The Browns and A.W. answered and asserted three counter-claims of breach of fiduciary duty, civil theft, and tortious interference with contract or prospective business advantage.

In May 2019, the district court granted the defendants' motion to dismiss with respect to two of the plaintiffs' claims. In January 2020, the district court granted Berg's motion for summary judgment on parts of the defendants' first and third counter-claims. The remaining claims were tried to a jury on five days in February 2020. After the plaintiffs rested, the defendants moved for judgment as a matter of law (JMOL) on the fraud and breach-of-contract claims. The district court denied the motion with respect to the breach-of-contract claims. With respect to the fraud claim, the district court commented that the plaintiffs had either "an incredibly weak case or . . . no case at all" and reserved ruling.

The jury found that the Browns and A.W. had engaged in fraud and awarded Berg damages of \$75,431 on his fraud claim. The jury also found that A.W. breached its contract for consulting services with EBC and awarded EBC \$30,000. The jury next found that A.W. breached a loan agreement with Berg and awarded him \$12,000. With respect to A.W.'s counter-claims, the jury found that Berg breached his fiduciary duty to A.W. but

that his breach did not cause A.W. any damages. The jury found in Berg's favor on A.W.'s counter-claims of civil theft and tortious interference.

Immediately after the jury returned its verdicts, the defendants asked for a ruling on their motion for JMOL with respect to the fraud claim. In March 2020, the district court denied the motion in a written order. The district court entered judgment in favor of Berg for \$87,431 and in favor of EBC for \$30,000. The Browns and A.W. appeal.

DECISION

I. Breach-of-Contract Claim

A.W. argues that the district court erred by denying its mid-trial motion for judgment as a matter of law on EBC's breach-of-contract claim concerning the consulting contract, for which the jury awarded \$30,000.

A district court may grant a JMOL motion if “during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.” Minn. R. Civ. P. 50.01(a). A district court may grant such a motion “with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.” *Id.* “When considering a motion for . . . judgment as a matter of law, the judge *must* ignore all the evidence that points in favor of the moving party and focus solely on the evidence supporting the nonmoving party's position.” *Peterson v. Western Nat'l Mutual Ins. Co.*, 946 N.W.2d 903, 910 (Minn. 2020). We apply a *de novo* standard of review to a district court's ruling on a motion for JMOL. *Kaiser-Bauer v. Mullan*, 609 N.W.2d 905, 909-10 (Minn. App. 2000), *review denied* (Minn. July 25, 2000).

To establish a breach-of-contract claim, a plaintiff must prove three elements: “(1) formation of a contract, (2) performance by plaintiff of any conditions precedent to his right to demand performance by the defendant, and (3) breach of the contract by defendant.” *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 833 (Minn. 2011). The district court’s jury instructions in this case conform to the caselaw concerning these essential elements.

EBC sought to prove that A.W. committed a breach of contract by not paying five monthly consulting invoices, in the amount of \$6,000 each, for the months of January through May 2018. The district court orally denied A.W.’s mid-trial motion for JMOL. The jury later found in favor of EBC and awarded it \$30,000. On appeal, A.W. argues that the district court erred in its ruling on the mid-trial motion for JMOL for three reasons.

First, A.W. argues that EBC did not prove the second element of its claim on the ground that Berg did not actually provide consulting services. We note that it is unclear whether actual performance is required; the oral agreement is reflected in the unsigned proposed employment agreement, which provides that Berg “shall be entitled to invoice A.W. Companies, Inc. Clerical and Accounting Division a consulting fee of \$6,000 per month from [EBC] for consulting support of these divisions,” without specifying the nature or quantity of consulting services that must be performed. In any event, there was conflicting evidence about Berg’s performance of consulting services, some of which supports the verdict. Berg testified that he provided consulting services to A.W.’s clerical-and-accounting division by bringing in new clients. He also testified that A.W. paid him \$12,000 for consulting duties performed in November and December 2017. Viewed in the

light most favorable to EBC, the evidence is sufficient to prove that EBC performed its contractual obligations.

Second, A.W. argues that EBC did not prove the third element of its claim on the ground that EBC was not entitled to payment for consulting services unless and until A.W. became profitable, which never occurred. In response, Berg points to his own testimony that there was no such condition for the period of January through May of 2018. Indeed, the evidence on which A.W. relies is part of an exchange of e-mail messages in which Wendy proposed to discontinue the \$6,000 monthly payments on June 1, 2018, if A.W. was not yet profitable. Viewed in the light most favorable to EBC, the evidence is sufficient to prove that, between January and May of 2018, EBC's right to \$6,000 per month was not dependent on A.W.'s profitability.

Third, A.W. argues that the oral agreement violates the statute of frauds on the ground that it could not have been performed within one year. EBC responds initially by arguing that A.W. did not preserve this argument. Indeed, A.W. did not ask the district court to instruct the jury on the statute of frauds, and the district court did not do so. The instructions that were given "are the law of the case," *Wolner v. Mahaska Indus., Inc.*, 325 N.W.2d 39, 42 (Minn. 1982), and the sufficiency of the evidence is "determined by application of the rules of law laid down in the charge," *Coenen v. Buckman Bldg. Corp.*, 153 N.W.2d 329, 334 (Minn. 1967). Furthermore, A.W. did not mention the issue in closing argument. In light of the instructions that were given, A.W. cannot establish that it is entitled to JMOL because of the statute of frauds.

Thus, the district court did not err by denying A.W.'s mid-trial motion for JMOL on EBC's breach-of-contract claim.

II. Fraud Claim

Appellants argue that the district court erred by denying their motion for JMOL with respect to Berg's fraud claim.

If a district court does not grant a motion for JMOL "made during trial, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion." Minn. R. Civ. P. 50.02. "[W]e construe the evidence in the light most favorable to the prevailing party." *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220, 229 (Minn. 2010). We apply a *de novo* standard of review to a district court's ruling on a motion for JMOL. *Kaiser-Bauer*, 609 N.W.2d at 909-10.

The district court instructed the jury that Berg was required to prove the following five elements of a fraud claim:

One, defendants falsely represented a past or present material fact to Plaintiff Eric Berg. A fact is material if it would have influenced the other person's judgment or decision had he known about it.

Two, at the time the false representation was made, defendants either knew the representation was false or they made representations without knowing whether they were true or false.

Three, defendants made the false representations intending that Plaintiff Eric Berg would rely on them.

Four, Eric Berg relied and acted on the false representations.

Five, Plaintiff Eric Berg was harmed as a direct result of relying on the false representations.

The district court's jury instructions conform to the caselaw concerning the essential elements of a claim for fraudulent misrepresentation. *See Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.*, 736 N.W.2d 313, 318 (Minn. 2007).

We begin by identifying the specific misrepresentation on which Berg's fraud claim is based. At trial, Berg's attorney argued to the jury that the Browns engaged in fraud by representing to Berg that "he would receive profit sharing and phantom stock benefits from A.W." but not actually conveying such benefits to him. In his appellate brief, Berg similarly argued that the Browns defrauded him by representing that he would receive a phantom-stock interest in A.W. but not actually delivering such an interest. At oral argument, Berg's attorney explained that the Browns denied Berg a phantom-stock interest in A.W. because they did not memorialize it in writing and never made a payment to him representing a phantom-stock interest in A.W.

Appellants argue that Berg was not denied a phantom-stock payment from A.W. because he was not entitled to such a payment. Appellants contend that Berg was entitled to a profit-sharing payment and a phantom-stock-bonus payment only if A.W. was profitable but that A.W. was not profitable. We construe this argument to be a challenge to Berg's evidence on the first and fifth elements of his fraud claim.

Appellants' representations to Berg concerning his right to receive profit-sharing and a phantom-stock interest from A.W. are reflected in the two proposed employment agreements that Wendy sent to him in November of 2017 and March 2018, which he never

signed. The proposed employment agreement that Wendy sent to Berg states that Berg would be entitled to “25% of the net profits” of A.W. But A.W.’s financial records show that, in 2017, A.W. had a net loss of approximately \$290,000 and, in the first five months of 2018, had a year-to-date net loss of approximately \$40,000. The proposed employment agreement also states that, if Berg resigns his employment with A.W. or is terminated, he would be entitled to a phantom-stock-bonus payment equal to a certain percentage of “the company value.” The agreement provides that the value of the company must be determined by the company’s prior earnings before interest, taxes, and amortization. But there is no evidence in the record that A.W. had positive earnings at the time of Berg’s termination.

Berg does not argue that A.W. was profitable or that it had positive earnings. Rather, he argues that A.W. promised to pay him something and that his damages for the alleged fraud may be determined by the value of his phantom-stock interest in ARI, which he relinquished. But there is no evidence that the Browns represented to Berg that A.W. would pay him that amount or any other fixed amount. The evidence shows that the Browns represented to Berg that he would receive a phantom-stock interest in A.W. But at the time of Berg’s termination from A.W., his phantom-stock interest in A.W. was worthless. Berg’s phantom-stock interest in A.W. could have been worth more than his phantom-stock interest in ARI if A.W. had become a successful company. But A.W. was not successful in its first seven months of operations.

Given the evidence introduced at trial, Berg’s evidence is insufficient to prove that the Browns made a false representation to him concerning a then-past or then-present fact,

as required to prove the first element of a claim of fraudulent misrepresentation. *See Hoyt Properties*, 736 N.W.2d at 318. The Browns' representation concerned a future event, specifically, the payments of profit-sharing and a phantom-stock-bonus based on the profitability of the company at a later date. *See Vandeputte v. Soderholm*, 216 N.W.2d 144, 147 (Minn. 1974) (stating that "representation or expectation as to future acts is not a sufficient basis to support an action for fraud merely because the represented act or event did not take place"). The Browns' representation, which was made in the context of negotiating an employment agreement, accurately described the terms of the written proposed employment agreement that the Browns in fact gave to Berg on two occasions. The Browns' representation was based on the assumption that Berg would sign the proposed employment agreement. The Browns honored the terms of the proposed employment agreement in other ways by paying Berg the stated salary and by making two monthly payments to his consulting firm. But it turned out that Berg was not entitled to any profit-sharing payment or any phantom-stock-bonus payment because the calculation of those payments depended on the company's profitability and the company was not profitable during Berg's employment.

Thus, the district court erred by denying the Browns' motion for JMOL on Berg's fraud claim.

III. Motion *in Limine*

Appellants also argue that the district court erred by excluding evidence of a settlement agreement between Berg and the former majority owners of ARI. The issue arose before trial, when Berg moved *in limine* for a ruling that the Browns could not present

evidence that Berg sought and obtained a payment in settlement of a claim against ARI for the phantom-stock-bonus payment described in his written employment agreement with ARI. The Browns opposed the motion on the ground that it was relevant to his request for damages for the alleged fraud. The district court ruled that the evidence could not be introduced at trial but that, if Berg prevailed on his fraud claim, the matter could be addressed in a post-trial motion to ensure that there was no double payment. Nonetheless, in light of our resolution of appellants' challenge to the sufficiency of the evidence of fraud, the issue now is moot.

IV. Jury Instruction

Appellants also argue that the district court erred by denying their request for a jury instruction concerning the measure of damages on A.W.'s counter-claim for breach of fiduciary duty.

In its first counter-claim, A.W. alleged that Berg breached his fiduciary duty to the company by hiring his mother to work for A.W. without giving her meaningful responsibilities and by soliciting A.W. customers and employees in an attempt to start a competing business while still employed by A.W. Appellants sought an instruction that, if the jury found such a breach, the jury should award A.W. the compensation that it had paid Berg during the period in which the breach occurred. Specifically, A.W. requested the following language: "Faithful and honest service is a condition of an employee's right to compensation. If the employee breaches his duty of loyalty, the employer owes him nothing, and the employee's compensation is forfeited for the period during which his breach of duty occurred." The district court declined to give the requested instruction on

the ground that A.W.’s theory does not apply. Instead, the district court instructed the jury that, if it found that Berg breached his fiduciary duty to A.W., the jury should determine the “amount of money, if any, that will fairly and adequately compensate A.W. Companies for the losses directly caused by the breach of fiduciary duty.”

A party is entitled to a specific instruction on its theory of the case “if there is evidence to support the instruction and it is in accordance with applicable law.” *Sandhofer v. Abbott-Northwestern Hosp.*, 283 N.W.2d 362, 367 (Minn. 1979). A district court has “considerable latitude in selecting language used in the jury charge and determining the propriety of a specific instruction.” *Morlock v. St. Paul Guardian Ins. Co.*, 650 N.W.2d 154, 159 (Minn. 2002). This court applies an abuse-of-discretion standard of review to a district court’s decision about how to instruct the jury. *See Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002).

A.W. cites several opinions in support of its argument, but none of them is a close fit with this case. For example, in *Peterson v. Mayer*, 49 N.W. 245 (Minn. 1891), the plaintiff sought to recover seven months of salary from his former employer, and the defendant argued in response that the plaintiff had embezzled funds from the employer. *Id.* at 468-69. The supreme court recognized the validity of the defendant’s defense but noted that it would not “be extended so far as to forfeit wages already earned on a contract already fully performed and at an end.” *Id.* at 470; *see also Hlubeck v. Beeler*, 9 N.W.2d 252, 254 (Minn. 1943) (rejecting defense to counter-claim because former employee did not breach fiduciary duty). Similarly, in *Stiff v. Associated Sewing Supply Co.*, 436 N.W.2d 777 (Minn. 1989), the plaintiffs commenced an action against their former employer to

collect unpaid commissions, and the defendant alleged that the plaintiffs had breached their duties of honesty and loyalty to their employer. *Id.* at 778, 780. The supreme court reasoned that an employee's breach of duties toward his employer "results in the employer owing the employee nothing." *Id.* at 780. This case is distinguishable because A.W. has alleged breach of fiduciary duty as a free-standing cause of action. Only one of the opinions cited by A.W. concerned a former employer's free-standing claim of breach of fiduciary duty against a former employee. *See Marsh v. Minneapolis Herald, Inc.*, 134 N.W.2d 18 (Minn. 1965). But the supreme court in *Marsh* reversed the trial court's finding that the former employee had breached his duties to his employer, so it was unnecessary for the supreme court to discuss an appropriate remedy. *Id.* at 21-23. In short, none of the cases cited by A.W. clearly establish that a breach of fiduciary duty by Berg would require him to disgorge all compensation he earned at A.W. while he was in breach, even if the amount of that compensation far exceeded the direct losses incurred by A.W.

Thus, the district court did not abuse its discretion by not instructing the jury that A.W.'s damages on its breach-of-fiduciary-duty claim must be equal to the amount of the compensation that Berg earned while he was in breach.

V. Judgment Amount

Appellants last argue that the district court erred by ordering judgment in favor of Berg in the amount of \$87,431. Appellants contend, "No reasoning was provided for this increase and the odd number it was not supported by any of evidence presented at trial." In response, Berg contends that \$87,431 is the sum of his fraud damages of \$75,431 and his breach-of-contract damages of \$12,000. We agree; it is a matter of simple math.

Nonetheless, in light of our resolution of appellants' challenge to the sufficiency of the evidence of fraud, Berg is entitled to a judgment of only \$12,000.

Affirmed in part and reversed in part.

A handwritten signature in cursive script, appearing to read "Matthew Johnson". The signature is written in dark ink and is centered horizontally.