

IN THE COURT OF APPEALS OF IOWA

No. 9-242 / 98-0307

Filed June 23, 1999

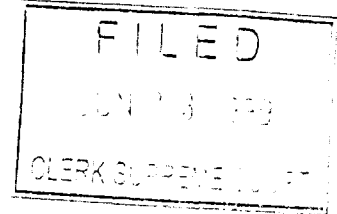
HING CHUN TING,

Plaintiff-Appellant,

vs.

**COLLEGE OF PODIATRIC MEDICINE &
SURGERY, UNIVERSITY OF OSTEOPATHIC
MEDICINE AND HEALTH SCIENCE,**

Defendant-Appellee.



Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg,
Judge.

Plaintiff appeals following a verdict rendered for defendant University of
Osteopathic Medicine which found the University had not breached a contract with
her to provide an adequate clinical education. **AFFIRMED.**

Roger J. Kuhle of the Law Office of Roger J. Kuhle, P.C., West Des Moines,
for appellant.

Steven L. Serck and Edward W. Remsburg of Alhers, Cooney, Dorweiler,
Haynie, Smith & Allbee, P.C., Des Moines, for appellee.

Heard by Sackett, C.J., and Vogel and Zimmer, JJ.

PER CURIAM.

Plaintiff-appellant Hing Chun Ting, a graduate of defendant-appellee College of Podiatric Medicine & Surgery, University of Osteopathic Medicine and Health Science, sued contending defendant breached its contract to provide her a proper education and defendant attempted to cover up her deficiencies by working to deport her to her native China. A jury denied her claim. Plaintiff appeals contending the district court erred (1) in instructing the jury on defendant's claim that plaintiff had waived her right to recover as there was not substantial evidence to support the submission; and (2) in failing to allow her to introduce evidence she contends shows defendant was seeking to deport her. We affirm.

Plaintiff began taking classes at defendant College of Podiatric Medicine & Surgery, a part of defendant University of Osteopathic Medicine and Health Sciences in Des Moines. She graduated from the program with her class in May of 1986.

Prior to defendant's entry into the college, she was given printed information that said:

Except for a few students (i.e., probably less than six), all members of the fourth-year class will be assigned to one of these clinical campuses for a period of nine to twelve months, beginning in July of their last year.

and

The following is a list of specific clinical competencies. It is expected that you will achieve the greater portion of these competencies by the end of . . . the year.

In the first year plaintiff was a student, she failed three classes. In her second year, she failed one class which, through extra work, she eventually passed. She passed all the classes she took in her third year. In her third year, she received a score of 59% on competencies but received no basic operative skills. In her fourth year, she received a score of 64-65% on competencies. While in school, she complained she was not happy with the quality of instruction and the failure of the school to deliver the promised curriculum. Before graduation, she asked that tuition she paid be refunded and she be compensated for her lost time. Her request was denied and she proceeded to graduation.

Plaintiff testified in her fourth year she expected to be trained in podiatric surgery and receive an externship in an out-of-state hospital. She was the only student in her class who did not receive such an externship. Instead, she was assigned to a clinic in Audubon, Iowa.

As a student, plaintiff interviewed for several residencies but could not answer basic clinical questions and did not get the residencies. She applied for a residency at defendant school, but it was given to a classmate. At the time, there were more graduates than residencies.

After graduation, plaintiff was awarded a "post-doctoral fellowship" at defendant school. She contends she was only allowed to walk in and out at a clinic with third-year students. Plaintiff was later hired to practice in Nebraska but was let go because she did not have the necessary clinical skills. In March of 1986, she took

national boards and failed three sections dealing with clinical education. She finally passed them in July of 1987. Eventually, plaintiff was licensed to practice in four states, though she had failures on the clinical portions of other examinations.

Plaintiff first contends the district court should not have given the jury the following instructions on waiver:

INSTRUCTION NO. 12

Defendant claims performance was excused because of waiver. If the defendant has proved waiver, then you shall find for the defendant. If the defendant has failed to prove waiver, then you shall decide whether the plaintiff is entitled to recover damages.

INSTRUCTION NO. 13

The right to insist on performance can be given up. This is known as a "waiver." A waiver may be shown by actions, or you may conclude from plaintiff's conduct and the surrounding circumstances that a waiver was intended. The essential elements of a waiver are the existence of a right, knowledge of that right, and an intention to give it up.

Plaintiff contended at trial and contends now there was not substantial evidence to support the instructions.

We review plaintiff's challenge to the jury instructions to determine if the instructions provide a correct statement of the law and are supported by substantial evidence. *See Bride v. Heckart*, 556 N.W.2d 449, 452 (Iowa 1996). Plaintiff objected to the submission of the instructions and defendant acknowledged error was preserved on this issue.

Contract rights can be waived. *In re Guardianship and Conservatorship of Collins*, 327 N.W.2d 230, 233 (Iowa 1982). Waiver is the intentional relinquishment

of a known right. *Continental Cas. Co. v. G. R. Kinney Co.*, 258 Iowa 658, 660, 140 N.W.2d 129, 130 (1966). The intention to waive must clearly appear. *Id.* at 661, 140 N.W.2d at 130. Whether a right given by a written agreement has been waived is normally a question of fact, and a party pleading the defense has the burden of proving it by a preponderance of evidence. *See id.* Where acts and conduct are relied upon for waiver, the issue is usually one for the jury. *Id.*; *see also Williams v. Stroh Plumbing & Elec., Inc.*, 250 Iowa 599, 602, 94 N.W.2d 750, 753 (1959).

Defendant advances there is substantial evidence to support the giving of the claimed instruction because the evidence created a factual issue on whether plaintiff waived a claim for deficiencies in the third and fourth year of her clinical education. In support of its argument, defendant advances plaintiff testified by April 30, 1986, when she was in a clinic operated by the school, she knew the school was not going to provide the promised academic training. A letter plaintiff wrote to defendant, introduced as an exhibit, said if she did not get an exact schedule to complete her fourth year competency brochure from the school by April 30, 1986, she was going to request a refund of tuition and compensation for lost time. Defendant points to the same exhibit where plaintiff threatened suit if she did not graduate with her class on May 30, 1986. Defendant argues, despite plaintiff having these beliefs, she accepted a diploma at the end of May of 1986, did not request a tuition refund or compensation for lost time, and accepted additional training from the school in the form of the post-doctoral fellowship. Defendant also points to an exhibit, plaintiff's application

for a position with defendant, where she stated the level of clinical education provided her at defendant school should be competitive with or exceed any other post-graduate training program for one year in the country.

Defendant contends the fact plaintiff went on to pass boards in four states further supports its position. Defendant also contends the fact plaintiff waited nearly ten years from her graduation date to file this suit is further evidence to support its claim of a waiver.

An essential element of waiver is that there exists an opportunity for choice between a relinquishment and enforcement of the right in question, so voluntary choice is the very essence of the matter. *Travelers Indem. Co. v. Fields*, 317 N.W.2d 176, 186 (Iowa 1982). There is evidence from which a fact finder could conclude plaintiff waived her claim defendant breached its contract in failing to provide academic training. There was substantial evidence to support the instruction on waiver. We affirm on this issue.

Plaintiff next contends the district court erred when it sustained defendant's objections to Ms. Zimmerman's testimony about helping plaintiff with an application for a visa extension and in refusing to admit into evidence an exhibit that was a set of Immigration and Naturalization Service documents plaintiff claimed demonstrated her efforts to obtain a visa extension for training at defendant university from June to December of 1986 and its denial on July 25, 1986, and another exhibit which was a deportation notice showing the reasons for the deportation. Plaintiff contends both

exhibits demonstrate defendant did not tell the Immigration and Naturalization Service plaintiff was in a "fellowship or post-graduate training" program.

Plaintiff contends the evidence and exhibits would rebut waiver. In particular, she contends the evidence concerning her post-graduation visa difficulties would show the university was not cooperating with her efforts following graduation to remain in the country. The district court denied admission finding it was not relevant to the breach of contract issue.

We review for an abuse of discretion. *Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 569 (Iowa 1997). We find no abuse of discretion.

AFFIRMED.

No. 98-0307. [9-242] TING v. COLLEGE OF PODIATRIC MEDICINE

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge. **AFFIRMED.** Heard by Sackett, C.J., and Vogel and Zimmer, JJ. Per curiam. (7 pages \$2.80)

Plaintiff, a graduate of defendant college, sued contending defendant breached its contract to provide her a proper education and defendant attempted to cover up her deficiencies by working to deport her to her native China. A jury denied her claim. Plaintiff appeals contending the district court erred (1) in instructing the jury on defendant's claim that plaintiff had waived her right to recover as there was not substantial evidence to support the submission; and (2) in failing to allow her to introduce evidence she contends shows defendant was seeking to deport her. We affirm. Plaintiff graduated from the program with her class in May of 1986. While in school, plaintiff complained she was not happy with the quality of instruction and the failure of the school to deliver the promised curriculum. Before graduation, she asked that tuition she paid be refunded and she be compensated for her lost time. Her request was denied and she proceeded to graduation. After graduation, plaintiff was awarded a "post-doctoral fellowship" at defendant school. Plaintiff was later hired to practice in Nebraska. In March of 1986, she took national boards and failed three sections dealing with clinical education. She finally passed them in July of 1987. Eventually, plaintiff was licensed to practice in four states, though she had failures on the clinical portions of other examinations. Plaintiff contends the district court should not have given the jury the instructions on waiver. Defendant advances there is substantial evidence to support the giving of the claimed instruction. An essential element of waiver is that there exists an opportunity for choice between a relinquishment and enforcement of the right in question, so voluntary choice is the very essence of the matter. There is evidence from which a fact finder could conclude plaintiff waived her claim defendant breached its contract in failing to provide academic training. We affirm on this issue.

Plaintiff next contends the district court erred when it sustained defendant's objections to testimony about an application for a visa extension and in refusing to admit into evidence an exhibit that was a set of Immigration and Naturalization Service documents. We review for an abuse of discretion. We find no abuse of discretion.