**IN THE COURT OF APPEALS OF IOWA**

No. 3-639 / 92-2010

**LESTER R. BEARD and BARBARA BEARD,**

Appellants,

**vs.**

**IASD HEALTH SERVICES CORP., a/k/a BLUE CROSS AND BLUE SHIELD OF IOWA, A Corporation,**

Appellee.

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Appeal from the Iowa District Court for Jasper County, Richard D. Morr, Judge.

The plaintiffs appeal the district court's grant of defendant's motion for directed verdict in this action for breach of contract. **AFFIRMED.**

David L. Kofoed, Englewood, Colorado, and Michael J. Cunningham of Adams & Howe, P.C., Des Moines, for appellants.

David Swinton of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., Des Moines, for appellee.

Heard by Schlegel, P.J., Habhab, J., and McCartney, S.J.*, but decided by Hayden, P.J., and Sackett, Habhab, Cady, and Huitink, JJ. Donielson, C.J., takes no part.

*Senior judge from the 2nd judicial district serving on this court by order of the Iowa Supreme Court.

**PER CURIAM**

In 1980 or 1981 plaintiffs Lester and Barbara Beard obtained a health insurance policy from Blue Cross and Blue Shield of Iowa. The policy was considered to provide basic benefits and provided for a maximum of 365 days of hospital services. The basic benefits could be renewed if the insured stayed out of the hospital for ninety days. The policy also provided that two days in a nursing facility would be considered equal to one day in the hospital.

In April 1985 Barbara became very ill. She was taken to University of Iowa Hospitals, where it was determined she had Pompey's disease, a rare condition which is also known as adult onset acid maltese deficiency. The disease caused paralysis of her diaphragm. Barbara was in the hospital for about forty days, and Blue Cross paid her hospital expenses, which were between $1,000 to $1,600 per day. Barbara then went home, but needed to be hooked to a ventilator at night. Skilled nursing care was needed to hook Barbara to the ventilator and maintain a watch over her during the night.

The Beards contacted Blue Cross to see if their policy would cover the cost of skilled nursing care in their home. Blue Cross stated their policy did not cover home health care. Lester then learned to maintain the ventilator machine. However, a problem arose, and Barbara was placed back in the hospital.

Blue Cross contacted Universal Nursing Services to make a cost analysis of providing skilled nursing care to Barbara in her home. Universal was the only nursing service in Iowa which would provide in-home care to a ventilator-dependent patient at that time. Universal's president, Connie Anderson, determined it would cost between $210 to $265 per day to provide the Beards with ten hours of skilled nursing care each night.

On June 10, 1985, a meeting was held at Blue Cross offices in Des Moines. Present at the meeting were Anderson, Dr. John May and Tony Fosselman of Blue Cross, and Terry Lehman, a representative of Iowa Methodist Home Respiratory Services. Blue Cross agreed to extend to the Beards a major medical policy. Such a policy would not normally be available to the Beards because of Barbara's health. Blue Cross agreed to pay one hundred percent of Barbara's costs for in-home care, which included nursing services provided by Universal and the ventilator machine provided by Iowa Methodist. Blue Cross made these concessions because the cost of in-home services was less than the cost of hospitalization.

Anderson testified that Blue Cross agreed to pay Barbara's expenses indefinitely. Dr. May and Fosselman denied this was their agreement. In a letter, Lehman wrote that he heard no comments as to the length of time that the arrangement would continue. In any event, Blue Cross offered a major medical policy to the Beards. The Beards

signed the policy and paid premiums. The policy provided that Barbara could receive a lifetime maximum of $250,000 in benefits.

In 1988 Blue Cross sent notice to Barbara that she had exhausted her basic benefits under the original policy. The company had counted two days of skilled nursing as one day in the hospital. Also, Barbara was informed she was only about $46,000 from exhausting the lifetime maximum of $250,000 under the major medical policy. The Beards testified they were confused by the notice because Anderson had told them that at the 1985 meeting Blue Cross had agreed to pay Barbara's in-home medical expenses indefinitely.

The Beards expressed their concern to their children, David Beard and Karen Stewart. David is an actuary who had previously worked in the field of health insurance. Karen is a nurse who works as a consultant to seven long-term care facilities in Iowa. Karen's husband is an attorney. The family discussed their options, including the possibility of bringing a suit to enforce the alleged 1985 oral agreement.

In January 1989, after discussion between David, Karen, Connie Anderson, and officials at Blue Cross, Blue Cross extended a proposed agreement to Barbara. The proposal provided that Blue Cross would renew Barbara's basic coverage (365 days of hospital expenses, with two days of skilled nursing care counting as one hospital day). If her

basic coverage ran out, she could receive up to $90,000 in major medical benefits. Also, Barbara was to apply for Medicare coverage once she became sixty-five years old. Blue Cross would then issue her a Medicare Supplement policy, and she would no longer receive any basic or major medical coverage. At the time the proposal was offered Barbara was sixty-two years old.

After further discussions within the family, Barbara signed the proposal. She accepted benefits under the agreement. When she became sixty-five years old, she applied for Medicare and was issued a Medicare Supplement by Blue Cross. Medicare covered fewer hours of skilled nursing care than Barbara had previously received.

The Beards brought the present suit against Blue Cross on February 26, 1992. They claimed the January 1989 agreement was void because it had been obtained by coercion and fraud and was not supported by consideration. They claimed Blue Cross breached the 1985 oral agreement to provide one hundred percent of Barbara's expenses for in-home care indefinitely. The Beards also brought claims of breach of contract causing intentional infliction of emotional distress, outrageous conduct arising from the breach of contract, and bad faith failure to pay insurance benefits. They sought punitive damages.

Before trial, District Court Judge Richard D. Morr informed the parties that he had Blue Cross health

insurance as a state employee.[1] He asked if either party had an objection. Counsel for both parties deferred to the court's judgment on the matter of disqualification. Plaintiffs' counsel stated he was not making an objection. Judge Morr continued as the judge in the case.

The case proceeded to trial before a jury. After plaintiffs presented their evidence, Blue Cross asked for a directed verdict. The court granted the motion. The court determined plaintiffs failed to present sufficient evidence to create a jury question on their initial issue, whether the January 1989 agreement was void. All other issues rested on a finding that the agreement was void. The court dismissed plaintiffs' suit. Plaintiffs now appeal.

I. We first address an issue raised in oral argument before this court. The state's insurance program is administered by Blue Cross. Judges, as state employees, may be insured by the state. In response to our concerns, plaintiffs Lester and Barbara Beard have signed a statement consenting to a determination by this court of the issues presented for our review.

II. We next address the question of whether plaintiffs

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1. The state is self-insured. Blue Cross Blue Shield administers the plan.

are entitled to a new trial due to Judge Morr's failure to recuse himself under Canon 3D of the Code of Judicial Conduct. Canon 3D(1)(c) provides that a judge may be disqualified due to a financial interest in the subject matter in controversy or in a party to the proceeding. However, Canon 3D(3)(c)(III) provides:

> The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest.

The plaintiffs have not shown Judge Morr had a financial interest in Blue Cross Blue Shield which would be affected by this proceeding. State employees are not insured with Blue Cross Blue Shield. The state is self-insured. Blue Cross Blue Shield only administers the state plan. Consequently, a claim against Blue Cross Blue Shield does not affect the rates charged state employees for insurance contract.

We find no reason Judge Morr should have recused himself. Even if Judge Morr had been required to recuse himself by Canon 3D, plaintiffs waived their right to challenge the judge's qualifications. A written statement pursuant to Canon 3E is not the only means by which a party may waive disqualification of a judge. Citizens First Nat'l Bank v. Hoyt, 297 N.W.2d 329, 333 (Iowa 1980). Waiver may be effected not only by express agreement, but also impliedly, by proceeding without objection with the

trial of the case with knowledge of the disqualification. Id. Consent may be inferred where the parties are aware of the relationship and nonetheless proceed without objection. Id. at 334.

The parties were told by the judge he had Blue Cross Blue Shield as a state employee. As we have previously noted, in essence, state employees' coverage is with the state and Blue Cross Blue Shield is merely the plan administrator. Plaintiffs expressly stated to the court they were not objecting. The parties proceeded with the trial. The issue of challenging the judge's qualifications was not preserved for review. The issue of Judge Morr's disqualification was not preserved for appellate review. However, even if it had been preserved, we have determined it to be without merit.

III. Plaintiffs contend the district court should not have directed a verdict for defendants. They claim they set forth sufficient evidence to give rise to a jury question on the issue of whether the January 1989 agreement was void.

When considering a motion for directed verdict, the district court must view the evidence in the light most favorable to the party against whom the motion is directed. Federal Land Bank v. Woods, 480 N.W.2d 61, 65 (Iowa 1992). The movant is considered to have admitted the truth of all evidence offered by nonmovant and every

favorable inference that may be deduced from it. Cockerton v. Mercy Hosp. Medical Ctr., 490 N.W.2d 857, 859 (Iowa App. 1992). A directed verdict is not proper if the plaintiff has presented substantial evidence to support each element of the claim. Larson v. Great West Casualty Co., 482 N.W.2d 170, 173 (Iowa App. 1992).

**A.** Plaintiffs claim they presented sufficient evidence to create a jury question on the issue of whether the January 1989 agreement was void due to coercion and duress. Plaintiffs believe Blue Cross's action of failing to abide by the 1985 oral agreement created economic duress which forced them to accept the 1989 agreement in order to continue to have health insurance coverage. In considering the motion for directed verdict, we view the evidence in the light most favorable to the Beards, and thus, assume the existence of the 1985 oral agreement.

Under Restatement (Second) of Contracts section 175(1), if a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim. Turner v. Low Rent Housing Agency, 387 N.W.2d 596, 598 (Iowa 1986). A threat, even if improper, does not amount to duress if the victim has a reasonable alternative to succumbing and fails to take advantage of it. Id. The assertion of duress must be proven by evidence that the duress resulted from defendant's wrongful and oppressive conduct and not by plaintiff's necessities. Id. at 599.

Furthermore, an alleged victim of duress may not obtain part of the benefits of an agreement and disavow the rest. Id. Ratification of a contract results if the party who executed it under duress accepts the benefits flowing from it or remains silent or acquiesces in the contract for any considerable length of time after opportunity is afforded to annul or void it. In re Marriage of Hitchcock, 265 N.W.2d 599, 606 (Iowa 1978).

In the present case, plaintiffs did not present any evidence to show that they were under duress which resulted from Blue Cross's wrongful and oppressive conduct and not plaintiff's necessities. Even if we assume there was economic duress, any such duress was created by Barbara's ill health and need for health insurance benefits. Also, plaintiffs had the reasonable alternative of bringing suit on the oral agreement, and in fact discussed this option.

In addition, plaintiffs accepted the benefits of the agreement for almost three years. We conclude the evidence shows plaintiffs ratified the contract and may not now claim duress.

B. Plaintiffs claim they presented sufficient evidence of fraud in the inducement to generate a jury question. The misrepresentation plaintiffs rely on is Blue Cross's statement that Barbara's benefits would shortly expire.

Misrepresentations amounting to fraud in the inducement of a contract, whether innocent or not, give rise to a right of avoidance on the part of the defrauded party.

Griswold State Bank v. Milne, 416 N.W.2d 109, 114 (Iowa App. 1987). To make a contract voidable, the misrepresentation must have been either fraudulent or material. Kanzmeier v. McCoppin, 398 N.W.2d 826, 831 (Iowa 1987). A misrepresentation is not material unless it is likely to induce a reasonable person to assent to a contract, or there is some special reason, known to the party making the representation, that it is likely to induce the particular person to manifest his assent. Id. at 830.

We affirm the district court's finding that plaintiffs failed to show Blue Cross made any material misrepresentations. Blue Cross always denied the existence of the 1985 oral agreement. Thus, Barbara signed the 1989 agreement with full knowledge of Blue Cross's position. Plaintiffs failed to produce any evidence to support a finding they were fraudulently induced into signing the 1989 agreement.

C. Plaintiffs claim they presented sufficient evidence to present a jury question on their contention that the 1989 agreement was void due to a lack of consideration.

Contracts must be supported by consideration, and where there is no consideration, no contract is ever formed. Federal Land Bank v. Woods, 480 N.W.2d 61, 66 (Iowa 1992). Under Iowa Code section 537A.2, we presume a written, signed agreement is supported by consideration. Kristerin Dev. Co. v. Granson Inv., 394 N.W.2d 325, 331 (Iowa 1986).

A party seeking to show lack of consideration has the burden of proof. Id. Either a benefit to a promisor or a detriment to a promisee constitutes consideration. Insurance Agents, Inc. v. Abel, 338 N.W.2d 531, 534 (Iowa App. 1983). A promise to do that which one is already obligated to do will not suffice as consideration. Id.

We find plaintiffs failed to present sufficient evidence to overcome the presumption that the 1989 written agreement was supported by consideration. Plaintiffs claimed there was no consideration for the 1989 agreement because Blue Cross only promised to do what it was already obligated to do under the 1985 oral agreement, which was pay one hundred percent of Barbara's costs for in-home health care. However, there was clearly a dispute as to whether the parties had entered into an oral agreement. By entering into the 1989 agreement, each party received the benefit of ending the dispute and the parties suffered the detriment of giving up their position. We affirm the district court's decision on this issue.

D. We affirm the district court's grant of a directed verdict for defendant on plaintiffs' claims the 1989 agreement should be set aside. Plaintiffs failed to present substantial evidence on each element of its claims and therefore failed to prove any of the argued grounds to set aside the agreement.

IV. Plaintiffs contend the district court should not have dismissed their claims of breach of contract causing

intentional infliction of emotional distress, outrageous conduct arising from the breach of contract, and bad faith failure to pay insurance benefits. These claims are all based on plaintiffs' belief defendant breached the alleged 1985 oral agreement.

We agree with the district court that even if we assumed there was a 1985 oral agreement, the 1989 agreement superseded it. As discussed above, plaintiffs failed to present sufficient evidence to permit a finding that the 1989 agreement should be set aside. Thus, the parties are bound by the 1989 agreement. Any agreement made in 1985 no longer constituted the agreement of the parties. Therefore, we conclude plaintiffs may not maintain an action based on defendant's breach of the 1985 oral agreement. We affirm the district court's dismissal on these claims.

In summary, we affirm the decision of the district court granting defendant's motion for directed verdict. Costs of this appeal are assessed to plaintiffs.

**AFFIRMED.**