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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-71 / 90-977

STATE OF IOWA, ex rel. THOMAS J. MILLER, ATTORNEY GENERAL OF IOWA, and IOWA BOARD OF PHARMACY,

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Appellants,

vs.

MEDITREND INTERNATIONAL, INC., d/b/a BOKKIE INTERNATIONAL, et al.,
Defendants,

and

TRUMAN (MAC) McKNIGHT,

Appellee.

Appeal from the Iowa District Court for Polk County, Joel Novak, Judge.

The State appeals from that portion of the district court ruling finding McKnight was not liable for his participation in the marketing of a diet patch developed by Meditrend International. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Bonnie J. Campbell, Attorney General, and Ray Johnson, Assistant Attorney General, for appellants.

Jeffrey Flagg of Flagg & Flagg, Des Moines, for appellee.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.

SACKETT, J.

The issue in this appeal is whether the trial court correctly determined plaintiff-appellant, the State of Iowa, did not introduce sufficient evidence to prove defendant-appellee, Truman McKnight, committed unfair practices in marketing a patch claimed to assist in appetite control and weight reduction. The State contends they did, and McKnight is in violation of Iowa Code section 714.16(2)(a), which prohibits unfair and deceptive trade practices. We affirm in part, reverse in part, and remand to the trial court for further proceedings.

McKnight was charged with a number of others, including Meditrend International, Inc. The other defendants have either settled the claims against them or did not appear, and a default judgment has been rendered against them. McKnight has not filed an appellee's brief.

Actions under section 714.16 are in equity. See Iowa Code § 714.16(7). Our review is therefore de novo. Iowa R. App. P. 4. The State must establish each of the necessary elements by a preponderance of clear, convincing and satisfactory evidence. State ex rel. Miller v. Hydro Mag., Ltd., 436 N.W.2d 617, 619 (Iowa 1989).

Iowa Consumer Fraud Act, Iowa Code section 714.16(2)(a), states:

> The act, use or employment by a person of an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression, or omission of a material fact with intent that others rely upon

> the concealment, suppression, or omission, in connection with the lease, sale, or advertisement of any merchandise whether or not a person has in fact been misled, deceived, or damaged, is an unlawful practice.

The trial court found the act was violated by Meditrend in several particulars. These findings are not challenged on appeal. The only issue is whether the State presented clear, convincing and satisfactory evidence McKnight was personally liable for the violations. See Hydro Mag., Ltd., 436 N.W.2d at 619.

The trial court found: (1) the patch was marketed without any scientific studies of the safety and effectiveness of the product, in violation of Iowa Code section 714.16(2)(a), an unfair practice, in that the patch was not approved as a new drug, and there was not a reasonable basis for the representations made about the patch, (2) Meditrend engaged in deceptive advertising because it lacked a reasonable basis to make a series of material representations to distributors and consumers relating to the patch's ability to suppress the appetite and assist a person lose weight and inches, and (3) Meditrend committed unfair practices under section 714.16(2)(a) in failing to make promised refunds and money back guarantees.

The State contends the trial court should have determined McKnight was responsible for all the charges that were founded against Meditrend. The State introduced

scanty evidence with relation to McKnight's involvement. The trial court found there is little or no evidence McKnight took part in (1) advertising, and (2) in promising, then failing to make promised refunds, and in failing to honor money back guarantees. On our review of this record, we agree. The facts introduced by the State are not sufficient to support a finding by clear, convincing, and satisfactory evidence that McKnight stood in a responsible relationship to these activities. Not every employee or officer of a violating corporation has potential liability. See United States v. Abbott Laboratories, 505 F. 565, 573 (4th Cir. 1974). Only those who share in the responsibility. See Id.

The trial court found Meditrend marketed the patch without FDA approval, but excused McKnight because he was ignorant of the responsibility. We agree with the State that McKnight should be responsible for this violation

The trial court found, and we agree, that McKnight participated in marketing the diet patch. The trial court also found, and we agree, he had some knowledge of the product and knew it was being marketed.

The Consumer Fraud Act provides broader protection than was found under common law fraud. State ex rel. Miller v. Hydro Mag., Ltd., 436 N.W.2d 617, 622 (Iowa 1989). To maintain an action under the act it is necessary to show a misrepresentation of any material fact with the intent that others rely on this misrepresentation. Id.

All that needs to be shown is that the individual was in a position of power or authority to detect, prevent or correct violations of the act. United States v. Datterweich, 320 U.S. 277, 284-85, 65 S. Ct. 134, 138-39, 88 L.Ed. 48, ____ (1943); United States v. Tarigian Laboratories, Inc., 577 F. Supp. 1514, 1529 (1984). This does not mean every employee of a corporation has potential criminal liability, only those who share in the responsibility of distribution. See Unites States v. Abbott Laboratories, 505 F.2d 565 (4th Cir. 1974). Responsibility depends on knowledge and if knowledge is established, it depends on the action or nonaction of the officer or employee after he or she has knowledge. Id. There is clear and convincing evidence McKnight shared the responsibility of distribution and should share the responsibility for marketing the patch without FDA approval.

We affirm in part, reverse in part, and remand to the trial court to enter injunctive and monetary relief against McKnight.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.