

IN THE COURT OF APPEALS OF IOWA

No. 1-03 / 89-1767

FILED

APR - 2 1991

CLERK SUPREME COURT

IOWA LAKES ORTHOPAEDICS, P.C., J. MICHAEL DONOHUE,
and BRIAN W. NELSON,

Plaintiffs-Appellants,

172

vs.

CHARLES J. MAXWELL & COMPANY, CHARLES J. MAXWELL,
Individually, ROBERT M. EBERLY, and CONNECTICUT GENERAL LIFE
INSURANCE COMPANY, A CIGNA COMPANY,

Defendants-Appellees.

Appeal from the Iowa District Court for Dickinson
County, James L. McDonald, Judge.

Plaintiffs appeal the district court ruling which
refused plaintiffs' request to rescind the purchase of two
insurance policies and for actual and punitive damages.
AFFIRMED IN PART, AND MODIFIED IN PART.

David J. Stein, Milford, for appellants.

Stephen F. Avery of Cornwall, Avery, Bjornstad & Scott,
Spencer, and John C. Gray of Eidsmoe, Heidman, Redmond,
Fredregill, Patterson & Schatz, Sioux City, for appellees.

Heard by Donielson, P.J., and Hayden and Sackett, JJ.

PER CURIAM

Plaintiffs-appellants purchased life insurance policies from defendants. The focal question in this appeal is whether the trial court should have ordered rescission of the life insurance policies and awarded actual and punitive damages to plaintiffs. We modify the trial court's decision and order rescission of the policies. We award no further damages.

Plaintiffs J. Michael Donohue and Brian W. Nelson are medical doctors and orthopaedic surgeons. They practice medicine as Iowa Lakes Orthopaedics, P.C. Defendant-appellee Charles J. Maxwell & Company employs defendants-appellees Charles J. Maxwell and Robert M. Eberly. It is a general agent for defendant-appellee Connecticut General Life Insurance Company.

Iowa Lakes Orthopaedic purchased from defendant Eberly two modified whole life insurance policies with defendant Connecticut General Life. The policies were on the lives of Donohue and Nelson. Donohue was the first employee of the corporation and the first policy was purchased on his life. The policy was purchased on October 3, 1985. Donohue was thirty-two years old. The policy called for an annual premium of \$20,000, and at the end of the first year provided a death benefit of \$44,131 and had a cash or loan value of \$5,825. Donohue paid the first year's premium in two installments of \$10,421.09 each, one in December 1985

and the second in April 1986. Donohue borrowed against the policy to pay partial premiums in 1987, and paid an additional premium of \$4,217.78. On September 21, 1987, when Donohue decided to cancel the policy, the cash value of the policy was \$431.35. The Donohue policy showed after five years of \$20,000 payments (\$100,000), it would have a cash value of \$54,524 and a death benefit of \$324,550.

The policy on Nelson's life was purchased on June 18, 1986, Nelson was thirty-nine years of age. The policy on his life was for an initial amount of life insurance with a death benefit of \$45,952. It called for annual premiums of \$20,000 which Nelson paid by making four payments totaling \$22,104.92. On August 14, 1987, when he decided to cancel the policy, Nelson received an \$8,273 surrender check marked "in full settlement of all claims." The check has not been cashed. After five years of \$20,000 payments, or \$100,000, Nelson's policy would have a \$59,792 cash value and he would have paid up insurance of \$280,714.

Defendants collected commissions on the policies of over \$25,000, or more than fifty-five percent of the money plaintiffs paid.

Plaintiffs brought suit contending the policies were not what they wanted to purchase, and defendants breached their duty to them and committed fraud when they sold them the policies. Plaintiffs sought rescission, punitive damages, and costs.

The case was tried to the court. The trial court denied plaintiffs relief and plaintiffs appeal. This was tried as an equity case. Therefore, we review de novo. Iowa R. App. P. 4. Plaintiffs contend we should find (1) defendants assumed a confidential relationship and breached the relationship, and (2) defendants made false and fraudulent representations.

I.

Plaintiffs and defendants disagree on the nature of their relationship. Plaintiffs contend the evidence proved defendants stood in a confidential relationship and defendants owed plaintiffs all the duties such a relationship entails. Defendants contend in selling the modified whole life insurance policies to plaintiffs they did not assume a greater duty than that of an insurance agent.

Defendants are in the business of selling insurance. But, defendants do not represent themselves as insurance salespersons or agents. All of defendants' advertisement and letterheads are carefully crafted to omit any reference or inference to words insurance or premium. Defendants obviously do not want to be perceived as insurance salespersons or agents. Defendants represent themselves as financial planners and as being, among other things "in the business of designing a plan around your unique needs, concerns, and problems of your financial life" and "of

using income tax strategies to maximize your investment return while minimizing your tax burden."

Robert Eberly's first contact was with Donohue. Donohue had come to Dickinson County in 1985 to practice medicine. Donohue hired a local attorney to form plaintiffs' professional corporation. Donohue also hired a local CPA. In 1985, prior to Nelson's arrival, the corporation started to establish a qualified deferred compensation program and Donohue was referred to Eberly. Eberly was presented to Donohue as a financial planner. In June 1985, Donohue bought a disability policy and an office overhead policy from Eberly. Shortly thereafter, Eberly claimed he offered to do financial planning for Donohue on a fee-for-service basis. He said the normal cost for such a fee-for-service financial plan is \$2,500.

Eberly said Donohue did not want the fee-for-service financial advice. Donohue testified he did not remember it ever being offered. What ultimately did happen was Donohue bought the Connecticut General Life Insurance Company modified whole life policy.

In mid-1986, Nelson joined Donohue in the practice. Donohue requested Eberly to make a presentation to Nelson. Eberly's presentation was made on August 20, 1986, and that same evening Eberly prepared and Nelson signed an application for the same type of policy Donohue had purchased. Eberly contends Nelson also refused to purchase

fee-for-service financial planning. Nelson too denies it was offered.

Plaintiffs contend, relying on the advice of Eberly as a financial advisor, they borrowed money to make an investment by way of a payment to their nonqualified plan. They contend Eberly represented the payment could be made with pretax dollars and the income from the investment could accrue tax deferred. Both Donohue and Nelson testified they made it clear to Eberly they did not want life insurance and they understood from Eberly there was just enough life insurance to make it legal. They contend Eberly represented nothing else on the market would perform like what they were getting.

Even if acting only as insurance agents, defendants were agents obliged to perform their duty toward plaintiffs with reasonable care and diligence. Collegiate Mfg. Co. v. McDowell's Agency, Inc., 200 N.W.2d 854, 857 (Iowa 1972). The question is did defendants assume a greater duty. An expanded agency agreement, arrangement or relationship, sufficient to require a greater duty from the agent than the general duty, generally exists when the agent holds himself or herself out as an insurance specialist, consultant or counselor and is receiving compensation for consultation and advice apart from premiums paid by the insured. See Hardt v. Brink, 192 F. Supp. 879, 880-81 (W.D. Wash. 1961); Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457, 465 (Iowa 1984).

We find defendants by their own representations took on a greater duty than just insurance agents. Defendants held themselves out as more than insurance agents and defendants admit they offered to perform more services than insurance agents.

Defendants contend, however, when plaintiffs turned down the financial planning for \$2,500, defendants became no more than insurance agents. Plaintiffs deny the \$2,500 package was offered. We recognize an agent held to a greater duty is generally one who receives fees for advice. Hardt, 192 F. Supp. 880-81; Sandbulte, 343 N.W.2d at 457; Collegiate Mfg. Co. v. McDowell's Agency, Inc., 200 N.W.2d 854, 859 (Iowa 1972). The absence of a fee should not preclude these defendants from being held to a higher standard where they have continually represented they are advisors, planners and tax strategists. Eberly commenced his relationship with plaintiffs under this guise and continued to offer tax advice after the plan was in place. There is no evidence Eberly ever made it clear to plaintiffs he was altering their relationship.

In Smith v. New York Life Insurance Company, 208 F. Supp. 240, 243 (S.D. Iowa 1962), the court said "the superior knowledge of insurance possessed by the agent, as well as the elements of the confidential relationship between the parties, brings this close to a fiduciary relationship, at least close enough that it can be said

here that the plaintiff was reasonable in relying on the statements of the agents." Id. Applying the rationale of Smith, we agree with plaintiffs that defendants by their own representations and actions assumed a greater duty to plaintiffs than just an agent.

The second question becomes one of whether defendants breached their duty to plaintiffs in selling them the modified whole life contract.

Plaintiffs testified they did not want life insurance, understood they were purchasing just enough insurance to make the deferred compensation plan legal, that the payments to the plan could be paid with pretax dollars, and the income from the plan could accrue tax deferred. Both Donohue and Nelson had substantial other life insurance. Plaintiffs also contend defendants advised the plan was a good investment. Plaintiffs argue they would not have borrowed money to put into their nonqualified plan and waited to fund their qualified plan which was tax deductible, if they had realized payments to the nonqualified plan were not tax deductible. Plaintiffs also contend defendants represented the plan had other tax advantages which are not available. The trial court commented, and we agree, that Eberly did not understand the tax implication of what he was selling. We do not find it necessary to analyze the additional tax implications of the plan.

Defendants argue plaintiffs knew, or should have known, what they were purchasing, and plaintiffs had an attorney and a CPA. Plaintiffs did not consult their attorney with relation to this purchase. The CPA relied on Eberly's advice and consulted Eberly on deductions under the plan.

The trial court found it was plaintiffs' own misfortune to cancel the policies. We disagree. We find the policies were not a good vehicle for plaintiffs' intended purpose. Clearly, plaintiffs did not intend for their money to purchase modified life insurance policies. Plaintiffs have introduced evidence showing, as an investment, the policies were poor. We find after considering the evidence, a term life insurance policy and an annuity would have been a more advantageous vehicle. Accruals on principal would have been substantially greater in an investment vehicle that would not have reduced plaintiffs' initial investments by a fifty-five percent agent's commission. The payments to the plan were not deductible from current income and had to be paid with after-tax dollars. There is no evidence that continued premium payments would be a good investment in accordance with plaintiffs' needs and wants.

A party may obtain rescission of a contract where the other party's breach is so substantial as to defeat the object of the contracting parties. See Beckman v. Carson, 372 N.W.2d 203-08 (Iowa 1985); Nora Springs Cooperative Co. v. Brandau, 247 N.W.2d 744, 749 (Iowa 1976); Maytag Co. v.

Alward, 253 Iowa 455, 464-66, 112 N.W.2d 654, 659-60 (1962).

Parties seeking rescission are entitled to restitution for expenses incurred under the contract, but as a result of the election to rescind ordinarily cannot also recover contract damage. Robinson v. Perpetual Services Corp., 412 N.W.2d 562, 568 (Iowa 1987); Maytag Co. v. Alward, 253 Iowa 455, 464-66, 112 N.W.2d 654, 659-60 (1962).

The plaintiffs have shown their policies should be rescinded. We order the policies be rescinded and premiums paid by defendants be returned to them with interest at the legal rate from the date of the filing of this petition.

We do not find the evidence supports an award of punitive damages. See Seraji v. Perket, 452 N.W.2d 399, 402 (Iowa 1990).

AFFIRMED IN PART, AND MODIFIED IN PART.