IN THE COURT OF APPEALS OF IOWA

No. 1-375 / 90-605

FILED
NOV 26 1991
CLERK SUPREME COURT

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BRIAN B. DUBES,

Appellee,

vs.

KENNETH W. WINJUM,

Appellant.

Appeal from the Iowa District Court for Warren County, Peter A. Keller, Judge.

The defendant, Kenneth W. Winjum, appeals a judgment of the district court, following a jury trial, finding him liable for breach of contract to purchase stock, bad faith, breach of employment contract, breach of fiduciary duty, and fraud concerning contractual relations with a co-owner of his professional corporation. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Emil Trott, Jr., Des Moines, and Max Burkey, Des Moines, for appellant.

Phil Watson of Watson & Peterson, P.C., Des Moines, for appellee.

Heard by Donielson, P.J., and Sackett and Habhab, JJ. Hayden, J., takes no part.

DONIELSON, P.J.

This is a dispute between two optometrists who successfully practiced together for almost thirteen years, most of the time as the two shareholders of a professional corporation. The defendant, Kenneth W. Winjum, began practicing optometry in Indianola in 1965. He incorporated his practice and issued 250 shares of stock to himself. On June 14, 1975, Winjum entered into an employment contract with the plaintiff, Brian Dubes, for Dubes to enter the practice as an associate for a one-year trial period. His salary was set at $12,000 per year, plus a specified percentage of the corporation's profits. Dubes started employment with Winjum on January 1, 1976.

On December 10, 1976, Dubes, as buyer, and Winjum, as seller, signed a stock sale and repurchase agreement. Dubes wrote a check to Winjum for $5,000 based on the purchase of 10 shares of stock at a contract price of $500 per share. On January 2, 1977, Dubes and Winjum entered into a revised stock sale and repurchase agreement, superseding the prior agreement. Pursuant to the revised agreement, Dubes could purchase from Winjum 75 shares, thirty percent, of the stock at a rate of 10 shares per year for seven years and 5 shares on the eighth year. The option could be exercised by Dubes paying the $500 per share price to Winjum within thirty days after the end of each calendar year. If Dubes left his employment with the corporation, Winjum was obligated to repurchase Dubes'

shares at a value calculated using a specified formula. Were Winjum to retire, Dubes was obligated to buy all of the shares Winjum then owned.

Dubes never again paid $500 per share for the stock. Nevertheless, Dubes typed up 65 additional certificates, and Winjum signed them. Dubes admits that he received 6 shares in 1980 without consideration. He claims he acquired the 65 shares "by participation" or as gifts. There was evidence that Winjum rejected the idea, rejected proposed agreements providing for Dubes' acquisition of shares without payment of substantial cash, and never gave the shares to Dubes as gifts. Winjum had placed the certificates in a filing cabinet with what he claimed to be an understanding that Dubes could have them when he paid the agreed-upon $500 per share price.

Dubes, however, claims that from 1977 to 1983, Winjum issued, and Dubes purchased, varying numbers of shares of stock. Dubes claims Winjum issued him stock in the amount of the gift tax exclusion, with Dubes forbearing to exercise his option. Dubes claims to have ultimately received 75 shares of stock, representing a thirty percent interest in the corporation. Dubes also alleges that, during this period of time, Winjum represented to him on numerous occasions that he would become majority shareholder of the corporation upon Winjum's retirement.

In 1987, Winjum's son, Craig, began optometry school. Also that same year, another optometrist was hired by the

corporation. The new optometrist, Kurt Meints, wished to become a shareholder, and in the spring of 1988, the three held a discussion concerning his prospects of becoming a shareholder. At that meeting, Dubes claims that Winjum told him that his son, Craig, would be coming into the business and that the largest percentage that Dubes would be able to obtain was a 33-1/3 share of the stock.

There was evidence that in May or June of 1990, Dubes had decided to quit his job. He was looking into a practice in Oelwein as early as May 20, 1988. Dubes removed his equipment from his exam room on July 20, and the employees thought that he had left permanently. There was also evidence that Dubes had come back to the office, on July 28 and before, and sat in the front area reading his Bible, falsely telling patients that Winjum would not let him work. This apparently made both the staff and Winjum uncomfortable.

On July 28, 1988, Winjum gave Dubes written notice that his employment with the corporation was terminated effective July 25, 1988, despite a provision in the employment contract providing that either party could terminate the employment relationship upon 120 days' notice.

Dubes filed a petition against Winjum on September 13, 1988, demanding specific performance of the stock sale and repurchase agreement, or damages for breach of the agreement. Dubes subsequently filed a separate action

against both Winjum and the corporation, alleging breach of employment contract. More claims were added by Dubes as he amended his petition several times. The trial court subsequently consolidated the equity and law cases, except that of specific performance.

Trial commenced on February 12, 1990, and, following a three week trial, the issues were submitted to a jury. The jury returned its verdicts on March 9, 1990, finding for Dubes on the issues of breach of contract, bad faith, breach of fiduciary duty, and fraud, and finding for Winjum on the issues of interference of contractual relationship, wrongful termination, intentional infliction of emotional distress, and defamation. The jury awarded damages to Dubes of approximately $285,000, including $100,000 in punitive damages.

The trial court entered judgment on April 2, 1990. Winjum then filed motions for new trial and judgment notwithstanding the verdict. On April 11, 1990, the trial court overruled all posttrial motions. Winjum now appeals.

Winjum argues that Dubes entered into the contracts at arms length, and that someone of his intelligence and expertise in contracts involving optometry businesses should have been on guard as to any discrepancies there may have been between the written and oral representations. Winjum maintains that any talk of Dubes eventually acquiring a fifty-one percent majority stake in the stock of the company was merely talk, because it was impossible

to determine what would happen in the future. Winjum contends that Dubes could not rightfully rely on any alleged oral agreement to the effect that he could acquire ownership by participation or gift, because the stock sale and repurchase agreement specifically requires Dubes to pay for the stock.

Winjum also argues there is no evidence of the value of the stock sale and repurchase agreement had it included a provision affording him a right to acquire a fifty-one percent stake in the business upon Winjum's retirement, and therefore, it is impossible to determine the difference in value between the contracts if the representations were true and if they were false. Winjum also maintains there is no evidence of any other compensable damages sustained by Dubes.

Winjum next contends the trial court erred in refusing to allow cross-examination of Dubes to show that the purchaser of Dubes' home was actually Dubes' attorney. Winjum argues there is a question of whether the sale of the house was done at arms length. Winjum additionally maintains that the trial court erred in admitting evidence of settlement negotiations on the grounds that offers of compromise to avert litigation are not admissible.

Winjum next contends the trial court erred in admitting projections sheets prepared by Dubes to show the level at which his income and profits would have been had the alleged oral agreement been put into practice. He argues

that such statements are grounded in speculation and are self-serving.

Winjum also argues the trial court erred in failing to correct misstatements by Dubes' counsel during closing arguments. Finally, Winjum argues the trial court erred in refusing to instruct the jury regarding his qualified privilege to discharge Dubes if he was acting in good faith to protect the interests of the corporation.

On appeal from this law action, our scope of review is for correction of errors of law. Iowa R. App. P. 4. We are bound by the trial court's factual findings if they are supported by substantial evidence. Iowa R. App. P. 14(f)(1).

I. **Fraudulent Misrepresentation--Stock Purchase.**

Winjum's first argument asserts the trial court erred in overruling Winjum's motions for directed verdict, judgment notwithstanding the verdict and new trial on Dubes' fraud claim. We agree.

A. **Preservation of the Issues.** Winjum asserts that Dubes failed to produce sufficient evidence of justifiable reliance or damages to send the fraud claim to the jury. Dubes argues these issues were not properly preserved for appeal.

Winjum moved for directed verdict on the fraud claim, at the close of plaintiff's evidence, on the following grounds:

> The plaintiff has not shown within the meaning of the word reliance that he was justified

> in relying on any representations made by the defendants herein.
>
> He has failed to show any injury or damages that resulted from his justifiable reliance. In fact, he has received everything under the contracts that he has coming.

The motion was renewed at the close of evidence. This is all that is required to preserve error. See Konicek v. Loomis Brothers, Inc., 457 N.W.2d 614, 617 (Iowa 1990).

B. Motion for Directed Verdict. A directed verdict is appropriate in cases where each element of the claim is not supported by substantial evidence. Oberreuter v. Orion Industries, Inc., 398 N.W.2d 206, 209 (Iowa App. 1986). A court ruling on a motion for directed verdict must view the evidence in the light most favorable to the nonmoving party. Beitz v. Horak, 271 N.W.2d 755, 757 (Iowa 1978); Iowa R. App. P. 14(f)(2). Movant is considered to have admitted the truth of all evidence offered by nonmovant and every favorable inference that may be deduced from it. B & B Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 279, 284 (Iowa 1976). To overrule the motion, the court must find substantial evidence in support of each element of nonmovant's claim. Beitz, 271 N.W.2d at 757. If reasonable minds could differ, an issue is for the jury. Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443, 444 (Iowa App. 1984). The trial court is vested with considerable discretion in determining whether evidence is sufficient. Hoover's Hatchery, Inc. v. Utgaard, 447 N.W.2d 684, 687 (Iowa App. 1989). On the record before us, we do

not find sufficient evidence supporting each element of Dubes' fraud claim to justify the trial court's denial of Winjum's motion for directed verdict.

The elements of a claim for fraudulent misrepresentation are: (1) a material misrepresentation (2) made knowingly (3) with the intent to induce the plaintiff to act or refrain from acting (4) upon which the plaintiff justifiably relies, and (5) the plaintiff suffered damages. See Beeck v. Kapalis, 302 N.W.2d 90, 94 (Iowa 1981).

1. Damages. Winjum argues that Dubes failed to present evidence sufficient to engender a jury question on the element of damages. We agree.

Iowa recognizes two alternative measures of damages for fraud: (1) benefit-of-the-bargain, and (2) out-of-pocket losses. See Cornell v. Wunschel, 408 N.W.2d 369, 380 (Iowa 1987). "The purpose of the benefit-of-the-bargain rule is to put the defrauded party 'in the same financial position as if the fraudulent representations had been in fact true.'" Id. (citing D. Dobbs, Handbook on the Law of Remedies § 9.2, at 595 (1973)). "The out-of-pocket recovery is then used to give the defrauded party 'the difference between the value of what he has parted with and the value of what he has received.'" Id. (citing W. Prosser & W. Keeton, Handbook on the Law of Torts § 110, at 767 (5th ed. 1984); Fong v. Town & Country Estates, Inc.,

600 F.2d 179, 182 (8th Cir.), cert. denied, 444 U.S. 942 (1979)).

Dubes argues that "[i]n the case at bar, out-of-pocket losses would be inappropriate." Dubes further states "The jury instruction did not contain a definition of these two measures of damages, but it is clear that the damages were assessed under the 'benefit-of-the-bargain rule'. The jury assessed damages for unpaid compensation." Dubes also states "the evidence is clear that, but for the fraudulent misrepresentations concerning stock ownership, [Dubes] would never have found it necessary to leave his job and lose his ownership benefits and expectations."

We find Dubes presented no evidence to show what the value of the stock sale and repurchase agreement would have been had it included a provision that Dubes had a right to acquire a fifty-one percent ownership interest in the corporation upon Winjum's retirement. Clearly, such a valuation is necessary to apply the benefit-of-the-bargain measure of damages.

Rather, we find, as Winjum argues, the only evidence introduced by Dubes to prove he suffered damages as a result of Winjum's representations pertained to the losses he had incurred by being fired. We do not believe such losses fall within the gambit of the benefit-of-the-bargain rule. Dubes argues that had Winjum's representation been true, Dubes would not have been fired. In asserting this argument, Dubes apparently ignores the fact that under his

employment contract, Winjum could have terminated his employment either for cause, or by 120-days' written notice. Dubes presented no evidence tending to show that Winjum would not have exercised that right in the future.

Therefore, we find Dubes failed to present sufficient evidence to submit the issue of damages to the jury using the benefit-of-the-bargain measure. Any assessment of benefit-of-the-bargain damages must necessarily have been based upon mere speculation. We reverse the trial court's decision overruling Winjum's motion for directed verdict on Dubes fraudulent misrepresentation claim regarding the stock sale and repurchase agreement. We remand with the instruction that judgment be entered in Winjum's favor.

II. Cross-Examination--Purchaser of Home.

Winjum contends the trial court erred in refusing to allow Winjum to cross-examine Dubes in an attempt to show that the purchaser of Dubes' home was actually Dubes' attorney. We are not persuaded.

The right to cross-examine is an absolute right. It is essential to a fair trial. Avery v. Harms Implement Co., 270 N.W.2d 646, 650 (Iowa 1978). However, the scope of cross-examination is within the trial court's discretion. Id. at 649. We will reverse only when that discretion has been abused and prejudice has resulted. Id.

On February 12, 1990, the day trial commenced, Dubes filed a motion in limine which stated that his attorney had purchased his home in Indianola prior to undertaking his

representation in this matter. Dubes requested that Winjum be ordered not to mention the fact that Dubes' attorney was the purchaser of Dubes' home, nor to enter the warranty deed or any other documents regarding the transaction into evidence. The trial court sustained the motion. Nevertheless, Dubes, himself, testified that he lost $54,000 on the sale of the house, as he was "ripped out" of the community by Winjum.

Winjum agrees that no issue of damages, founded upon the sale of the house, was submitted to the jury. Accordingly, we believe the entire line of inquiry was irrelevant. Winjum's remedy in this situation was to object to questions or move to strike testimony relating to this issue on the basis of relevancy. We do not believe Winjum was prejudiced by his inability to proffer irrelevant evidence in an attempt to refute other irrelevant evidence.

III. Evidence of Settlement Negotiations & Offers.

Winjum next contends the trial court erred in admitting evidence of settlement negotiations and offers of compromise over Winjum's objection. We agree.

The trial court has discretion when ruling on the admissibility of evidence. Gail v. Clark, 410 N.W.2d 662, 671 (Iowa 1987). We will reverse the trial court only when we find a clear abuse of discretion. Id. at 672. On our review of the record, we find it necessary to reverse and

remand for a new trial on both the bad faith and the breach of stock sale contract claims.

Dubes testified on direct examination that after June 29, 1988, he had a figure in his mind as to what his shares of stock were worth and communicated that figure to Winjum. He testified Winjum absolutely did not agree with that figure. In fact, Dubes testified Winjum said, "'You're going to give me a heart attack. There is no way I'm am going to give you that.'"

Dubes' counsel then asked, "Did he make you an offer of some kind at all or not?" Winjum's counsel promptly objected on the basis that offers of settlement are not admissible. The trial court overruled the objection, and Dubes proceeded to testify that Winjum had made a low offer. Dubes also testified he and Winjum "basically shook hands. And halfway between his low and my estimate--."

Winjum's counsel objected. Outside the presence of the jury, Winjum argued that rule 408, Iowa Rules of Evidence, was directly on point and prohibited the admission of such evidence. Dubes argued the negotiations were not offered to prove any amount or liability, but to prove a course of action on the part of Winjum to force Dubes to give up his stock too cheaply. The trial court overruled the objection and allowed the testimony.

Dubes was also asked by his attorney whether, in July 1988 when the two were negotiating, Winjum attempted to substitute a corporate obligation for a personal obligation

to purchase Dubes' stock. Outside the presence of the jury, Winjum objected stating that Dubes was going into the substance and form of offers to settle this matter which violated the trial court's standing order on Winjum's motion in limine. Dubes responded the evidence would show elements of his different claims. The court overruled the objection, and Dubes testified that Winjum had, indeed, attempted to substitute a corporate obligation for a personal one.

Finally, the trial court overruled Winjum's objection to testimony by Kenneth W. Rittgers concerning settlement negotiations. Rittgers testified that he represented Dubes from the middle of May to July 27, 1988, and was never told that Winjum was taking the position Dubes did not own all 75 shares. As to this item of testimony, we note that the question of whether Dubes owned 75 shares, as he claims, or only 10 shares, as Winjum claims, was at the very heart of several of Dubes' claims.

Rule 408 provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue

delay, or proving an effort to obstruct a criminal investigation or prosecution.

This evidence cannot reasonably be characterized as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. Rather, it is clear, and Dubes indeed argues, that this evidence went to establishing the merits of Dubes' claims. Case law provides us with no auxiliary list of exceptions to this rule, and we do not feel it necessary to begin. The evidence should have been excluded. We reverse and remand for a new trial on Dubes' claims of bad faith and breach of contract to purchase Dubes' stock.

In Stewart v. Madison, 278 N.W.2d 284 (Iowa 1979), the supreme court stated that there are "strong policy considerations favoring settlements and discouraging their use in a manner which might place a chill on settlements or settlement attempts." Id. at 293. Were we to affirm the trial court's rulings on this evidence, we would be thwarting the strong public policy underlying rule 408.

IV. Improper Argument.

We next address Winjum's argument that the trial court erred in taking no action to correct Dubes' counsel's improper closing argument to the jury. Because we have reversed the trial court's denial of Winjum's motion for directed verdict on Dubes' fraud claim, we need not address

Winjum's first cited instance of improper argument. Winjum asserts that Dubes' counsel made misstatements regarding the law governing professional corporations in the course of his summation. Assuming any prejudice resulted, we believe it could only have affected the jury's verdict on the claim of fraud relating to the stock purchase agreement.

On Winjum's second cited instance of improper argument, we find the issue was not properly preserved for our review. No timely objection was made. The trial court was not given an opportunity to act.

Error with regard to improper argument by counsel is ordinarily preserved by making an appropriate objection or motion at the time of the improper argument. See State v. Phillips, 226 N.W.2d 16, 18-19 (Iowa 1975). This allows the trial court an opportunity to admonish counsel or instruct the jury as it sees fit. See Andrews v. Struble, 178 N.W.2d 391, 401 (Iowa 1970). A party may not remain silent allowing the trial court to commit inadvertent error only to raise it later on appeal. Miller v. Bonar, 337 N.W.2d 523, 530 (Iowa 1983).

Dubes' counsel, in the course of his summation, made the following statement of personal experience:

> In twenty-three years of practice, I've never had a more evasive witness than Doctor Winjum. I may have had some that are as evasive, but believe me, I've never spent as much time with them.

On appeal, Winjum asserts, and we agree, that this form of

argument is improper. However, no timely objection or motion was made in response to the statement.

Winjum cites Shover v. Iowa Lutheran Hospital, 252 Iowa 706, 717, 107 N.W.2d 85, 91 (1961), for the proposition that misconduct during argument may be so flagrantly improper and obviously prejudicial that it may constitute grounds for a new trial, even though no exception was taken at the time. We believe the language of this case must be strictly construed considering the fact that Iowa has no plain error doctrine. See Allbee & Kincaid, Error Preservation in Civil Litigation: A Primer for the Iowa Practitioner, 35 Drake L. Rev. 1, 14 (1985-86); compare Iowa Rule of Evidence 103 with Federal Rule of Evidence 103.

While the statement made by counsel was improper, we do not believe it can be fairly characterized as "flagrantly improper and obviously prejudicial." Therefore, we believe an objection or motion to strike was necessary to preserve the error. The issue has been waived.

V. Qualified Privilege.

Winjum's final argument asserts the trial court erred in refusing to instruct the jury regarding Winjum's qualified privilege to discharge Dubes if Winjum was acting in good faith to protect the interests of the corporation. We agree. The trial court erred in overruling Winjum's objection to the jury instructions. We, therefore, remand for a new trial on Dubes' breach of fiduciary duty claim.

Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978). Submission of issues that have no support in the evidence to the jury is error. W. T. Rawleigh Medical Co. v. Bane, 181 Iowa 734, 739, 165 N.W. 42, 43-44 (1917); accord Borough v. Minneapolis & St. L. R. Co., 191 Iowa 1216, 1223, 184 N.W. 320, 323 (1921); see Miller v. International Harvester Co., 246 N.W.2d 298, 301 (Iowa 1976). Conversely, failure to submit issues that are supported by substantial evidence also is error. See Borough, 191 Iowa at 1223, 184 N.W. at 323; see also Miller, 246 N.W.2d at 301. A corollary to these rules is that the trial court has a duty to ensure that the jury understands the issues it must decide. Clinton Land Co. v. M/S Assocs., Inc., 340 N.W.2d 232, 234 (Iowa 1983); McDivitt v. Des Moines City R. Co., 141 Iowa 689, 697-98, 118 N.W. 459, 463 (1909). In fulfilling these duties, the trial court must "instruct with reasonable fullness on pleaded issues supported by substantial evidence." Clinton Land Co., 340 N.W.2d at 234. "The sufficiency of the evidence to warrant submission of a pleaded issue to the jury is decided by giving the evidence the most favorable construction it will reasonably bear in favor of the party urging submission." Collegiate Mfg. Co. v. McDowell's Agency, Inc., 200 N.W.2d 854, 858 (Iowa 1972); Campbell v. Martin, 257 Iowa 1247, 1251, 136 N.W.2d 508, 511 (1965).

A second corollary is that the trial court has a duty to ensure that the jury understands the law it must apply. Sanders v. Ghrist, 421 N.W.2d 520, 522 (Iowa 1988). In evaluating this, we must read all of the instructions together, not piecemeal or in artificial isolation. Id.; Clinton Land Co., 340 N.W.2d at 234. We must reverse and order a new trial if the instructions as a whole are insufficient to convey the applicable law. Sanders, 421 N.W.2d at 522 (citing Adam v. T.I.P. Rural Elec. Co-op, 271 N.W.2d 896, 900-01 (Iowa 1978)).

In Bump v Stewart, Wimer & Bump, P.C., 336 N.W.2d 731, 738 (Iowa 1983), the Iowa Supreme Court quoted with approval a decision by the North Carolina Supreme Court, Wilson v. McClenny, 262 N.C. 121, 132-33, 136 S.E.2d 569, 578 (1964), in which wrongful contractual interference by directors was alleged. The Wilson case states:

> As stockholders they had a financial interest in the corporation; as directors they owed it fidelity and the duty to use due care in the management of its business . . . . As either directors or stockholders, they were privileged purposely to cause the corporation not to renew plaintiff's contract as president if, in securing this action, they did not employ any improper means and if they acted in good faith to protect the interests of the corporation. In other words, because of their financial interest and fiduciary relationship they had a qualified privilege to interfere with contractual relations . . . . To hold otherwise, "would tend to hinder directors of a corporation from acting on their judgment for the interest of their corporation . . . ."

Id. (emphasis added)(quoting 3 W. Fletcher, Private Corporations § 1001, at 541 (1975)).

Again, in Wolfe v. Graether, 389 N.W.2d 643 (Iowa 1986), the defendant requested that the trial court instruct the jury that his actions were privileged if, in seeking termination of the plaintiff's contract, he was acting in good faith as an officer or director of the professional corporation. Id. at 656. However, the trial court refused the instruction. Id.

The supreme court stated "if, on retrial of this action, [the defendant] again requests an instruction on the qualified privilege of corporate officers and directors to act with respect to corporate matters, such instruction should be given." Id. In the present case, we believe such an instruction should have been given. It was not.

In Stover v. Lakeland Square Owners Assn., 434 N.W.2d 867 (Iowa 1989), the supreme court stated "error in giving or refusing to give an instruction does not require reversal unless the error is prejudicial." Id. at 868. "Generally, Iowa law requires that a court give a requested instruction when it states a correct rule of law having application to the facts of the case and the concept is not otherwise embodied in the other instructions." Id.

In the present case, it is clear that the erroneous refusal to give the requested instruction was prejudicial. There was evidence in the record that Dubes' actions were disruptive to the business. Furthermore, the concept of the requested instruction was not embodied in those

instructions which were given. The third paragraph of Instruction 55 stated:

> If you find that Winjum has conducted the affairs of the corporation in a manner that was unlawful, inequitable, or to the detriment of Dubes, then Winjum has breached his fiduciary duty.

(Emphasis added). Use of the disjunctive term "or" told the jury there were alternative ways in which Winjum could have breached his fiduciary duty: (1) he could have conducted the affairs of the corporation in a manner that was unlawful, or (2) he could have conducted the affairs of the corporation in a manner that was inequitable, or (3) he could have conducted the affairs of the corporation to the detriment of Dubes.

The second paragraph does not cure the problems of the third. The second paragraph stated:

> A majority shareholder has the right to control the affairs of the corporation, if done so lawfully and equitably, and not to the detriment of minority shareholders.

(Emphasis added). The first paragraph of the Instruction 55 stated:

> A person in a fiduciary relationship to another is under a duty to act for the benefit of the other, as to matters within the scope of the relationship.

Clearly, the instruction told the jury, categorically, that Winjum must have conducted the affairs of the corporation so as not to harm Dubes in order to avoid liability for breach of fiduciary duty.

Winjum's objection to the trial court's failure to instruct on the qualified privilege should have been sustained. We reverse on this issue and remand for a new trial on the claim for breach of fiduciary duty.

VI. Punitive Damages.

Because we cannot discern upon which claims the assessment of punitive damages was made, we remand for a new trial on punitive damages on all remaining claims. See Steckelberg v. Randolph, 448 N.W.2d 458, 464, 464 (Iowa 1989).

VII. Conclusion.

We find Dubes failed to present sufficient evidence on each element of his fraudulent misrepresentation claim regarding the stock sale and repurchase agreement. Specifically, we find insufficient evidence of damages. Therefore, we reverse the trial court's decision to overrule Winjum's motion for directed verdict.

We find the trial court properly exercised its discretion in governing the scope of cross-examination. The court properly refused to allow Winjum the opportunity to cross-examine Dubes concerning the identity of the purchaser and other specific issues surrounding the sale of Dubes' house.

We need not address Winjum's assignment of error regarding Dubes' counsel's misstatements of law in the course of his summation, because any resultant prejudice would only have effected the claim for fraudulent

misrepresentation concerning the stock sale and repurchase agreement. We find error on other statements of personal experience made by Dubes' counsel during closing argument has not been properly preserved for our review. No timely objection was made at trial, and therefore, the issue is waived.

We hold the trial court erred in admitting evidence of settlement negotiations and offers in violation of Iowa Rule of Evidence 408 and reverse the trial court. Finally, we reverse the trial court's refusal to instruct the jury on Winjum's right to act in good faith as a director of the corporation, albeit to the detriment of Dubes, so long as he acts for the benefit of the corporation.

Accordingly, we remand for a new trial on the claims for (1) bad faith, (2) breach of stock purchase contract, (3) breach of fiduciary duty, and (4) punitive damages. On the claim of fraudulent misrepresentation concerning the stock sale and repurchase agreement, we remand with the instruction that judgment be entered in Winjum's favor.

The costs of this appeal are taxed equally between the parties.

For all the reasons stated, the judgment of the district court is affirmed in part, reversed in part, and remanded.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.