IN THE COURT OF APPEALS OF IOWA

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DOUGLAS M. WEST,)

Plaintiff-Appellant/)
Cross-Appellee,

vs.)

LIFE INVESTORS INSURANCE COMPANY OF AMERICA,)
an Iowa Corporation,

Defendant-Third-Party)
Plaintiff/Cross
Appellant,

vs.)

MARK K. WEST,)

Third-Party Defendant.

8-30
86-1189

Appeal from the Iowa District Court for Harrison County (No. 23996), Leo F. Connolly, Judge.

Douglas M. West appeals from a jury verdict in favor of Life Investors Co. which denied him damages for breach of his general agent's contract. **AFFIRMED.**

Charles L. Dorothy of Dorothy Law Firm, P.C., Sioux Falls, South Dakota, and John W. Kellogg of Kellogg & Kellogg, P.C., Missouri Valley, for plaintiff-appellant/ cross-appellee.

Lyle W. Ditmars and Scott J. Rogers of the Peters Law Firm, P.C., Council Bluffs, for defendant-appellee/ cross-appellant.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ. Habhab, J. takes no part.

OXBERGER, C.J.

Douglas M. West appeals from a jury verdict finding in favor of Life Investors Insurance Company. We affirm.

Douglas West signed a general agent's contract with Life Investors Insurance Company. At the time he was recruited, West was advised that he would be given specific counties which would be his exclusively for the recruitment of sales persons who would be licensed to sell Life Investors' products. He was told that no other general agents could recruit in his territory and other general agents could not recruit or hire the people West recruited and trained.

West recruited his brother, Mark, first as a sales person, and eventually made his brother his assistant manager. By 1982, West's agency had outgrown its first office in Missouri Valley, and he built a new office to house the expanding number of agents. West maintains that, unknown to him, Life Investors' regional director contacted Mark West twice in early 1982 about whether Mark would take over Doug's general agency contract if Life Investors terminated Doug's contract. Mark refused because he did not want the full responsibility of a general agent. Later in 1982, general agents Greg Sawyers and Rod Foutch, respectively, also contacted Mark West in an attempt to recruit Mark away from Doug. By September 1982, Mark West left Doug and began working for Greg Sawyers. This was approved by Life Investors' Vice President, Mike Hagen. During this same time frame, other of Doug West's sales people went to other agencies.

By December 6, 1982, Hagen sent Doug West a letter terminating West's general agent's contract in thirty days. West later set up a meeting with Hagen and Sawyers, at which time there was an oral agreement that West would be given a broker's contract so he could remain the servicing agent on the business his agents had put on the books and thereby pay down commission advances to agents he had personally guaranteed. Hagen wrote a letter to Sawyers summarizing this agreement, but West was never copied. Hagen then sent West a second termination letter and enclosed a broker's contract which allowed West to remain the servicing representative on his agents' block of business. West maintains that after Life Investors signed the broker's contract, he was never given the support services, necessary claims reports, correspondence with policyholders, change of beneficiary information, lapse notices, and list of policyholders to roll over for the business his agents had put on the books.

The thrust of West's complaint at trial was that Life Investors allowed, and in some instances urged, his brother and other sales persons that West had recruited to transfer to other general agents without West's knowledge or approval.

It was Life Investors' position that Greg Sawyers and the other general agents who recruited West's sales staff were independent agents and that Life Investors was not responsible for their actions. After a two-week trial, the jury found for Life Investors, and the trial court entered its judgment for Life Investors and dismissed Life Investors' third-party claim against Mark West for contribution.

On appeal, West alleges the trial court abused its discretion in various evidentiary rulings he now challenges and in failing to give the instructions West requested.

West first argues the trial court erred in failing to instruct the jury regarding joint and several liability of joint tortfeasors. West's proposed instruction in this connection stated in pertinent part:

> Where the acts of two or more persons or corporations combine to proximately cause an injury or damage, each of the persons or corporations are individually liable to the plaintiff for all damages sustained by plaintiff. Furthermore, the plaintiff is not required to sue all the persons or corporations whose acts were a concurring proximate cause. It is no defense that the acts of a party not sued were also a concurring proximate cause. That is a matter for resolution between the Defendant found liable, and any other person or corporation whose acts were also a concurring proximate cause.

This instruction is a correct statement of the law on joint tortfeasors. See Rozevink v. Faris, 342 N.W.2d 845, 847-48 (Iowa 1983). We find such an instruction is warranted by the facts of this case. Life Investors' amended answer sets forth an affirmative defense that the fault of other parties was a proximate cause of West's injuries and that Life Investors should be liable for no more than its comparative share of any damages suffered by West, if any. In response, West requested the proffered instruction. We find the trial court erred in refusing to give the proffered instruction. However, we hold the error was harmless and do not require a new trial. The jury answered the interrogatories finding the defendant did not breach the contract nor intentionally interfere with the contract. These two allegations were the sole basis of any liability claimed of the defendant. The essence of joint and several liability is that the defendant must be liable in some fashion. Since the defendant was found by the jury not to be liable in any manner, it cannot be harmful error to not instruct on joint and several liability. Therefore, we affirm the trial court.

West alleges several other points of contention. We briefly address them, should they arise again.

West asserts the trial court erred by failing to adequately instruct the jury regarding damages; specifically, he alleges the instructions on damages for breach of contract and for intentional interference with an existing contract did not address the issue of lost profits. In determining whether the concept conveyed by the requested instruction is otherwise embodied in the court's instructions, we look to all the relevant instructions and not to any one standing alone. Palleson v. Jewell Cooperative

Elevator, 219 N.W.2d 8, 17 (Iowa 1974). We have reviewed the instructions as given by the district court and find that the instructions covering damages adequately cover the issue of lost profits.

West contends the trial court erred by refusing to sequester Life Investors' witnesses. The granting of such a request rests within the discretion of the trial court. *State v. Sharkey,* 311 N.W.2d 68, 70 (Iowa 1981). West does not state how he was prejudiced, but only that there was conformity of testimony of Life Investors' witnesses. We are not persuaded that the trial court abused its discretion or that Life Investors' witnesses were influenced by the testimony of other witnesses.

West next contends the trial court erred by commenting negatively on his evidence in the presence of the jury. Life Investors correctly points out that West took no exception to any of the court's remarks during the trial. Thus, he has failed to preserve for review this issue. *Kengorco, Inc. v. Jorgenson,* 176 N.W.2d 186, 191 (Iowa 1970). Even assuming error was preserved, we find the court's remarks were not prejudicial.

West argues that the trial court erred by refusing to allow an ex-executive of Life Investors to testify in rebuttal of facts presented by Life Investors. Trial courts have considerable discretion in determining proper rebuttal evidence. *Karr v. Samuelson, Inc.,* 176 N.W.2d

204, 211 (Iowa 1970). We find after a review of the record that the trial court did not abuse its discretion. The witness last worked for Life Investors in 1979; the incidents in question happened in 1981 and 1982. There was no showing he was familiar with the procedures at Life Investors during the relevant time frame. Additionally, we find any evidence along the lines of the proffered testimony should have been presented, if at all, during West's case in chief.

The next assertion by West is that the trial court erred by refusing to allow evidence of the premiums generated by West's assistant manager after he left his contractual arrangements with West. We cannot say that the trial court abused its discretion since West, in compliance with the pretrial order, provided his list of damages, which did not include the evidence sought to be later admitted by West, nor did West seasonably update the answers to interrogatories. The case was on file for two years; the evidence sought to be introduced could have been made available by West prior to the week before trial. Life Investors did not have an adequate opportunity to determine the correctness of West's new damage figures. However, on remand, we find that the evidence of West's assistant manager's actual premiums generated, as opposed to only speculated premiums in the first trial, should be allowed in light of Life Investors' ability to conduct additional discovery prior to the new trial. "[I]f factual data are presented which furnish a basis for compilation of probable loss of profits, evidence of future profits should be admitted and its weight, if any, should be left to the jury." Harsha v. State Sav. Bank, 346 N.W.2d 791, 798 (Iowa 1984).

West alleges the trial court erred by refusing to allow West's manager to testify about the various general agents of Life Investors who attempted to recruit him in the spring and summer of 1982 before Life Investors terminated West's general agent's contract. In his main brief, West urges only that the proffered evidence was relevant. We note that the trial court overruled Life Investors' relevance objections, but sustained the hearsay objections. We agree with the trial court ruling. In his reply brief, West does not assert any exception to the hearsay rule.

West next contends the trial court erred by allowing oral testimony of an alleged oral contract to settle the dispute between the parties. He contends the testimony violates Iowa Code section 622.32, which provides no evidence of a contract to pay for the debt of another or of a contract not to be performed within one year of making is competent unless it is in writing. Even assuming the contract entered into was for the debt of another or could not be performed within one year, we find West cannot now assert the statute of frauds objection. West testified regarding the oral agreement that was reached. As such, the contract is valid, see Meylor v. Brown, 281 N.W.2d 632, 634 (Iowa 1979), and West cannot now complain of error.

West contends the trial court erred by giving an instruction which advised the jury that there is a presumption that a compromise based upon a disputed claim is intended to serve as a substituted contract replacing all prior agreements. He asserts the instruction should have stated the presumption was rebuttable and that Life Investors was liable if it breached the compromise contract. We have reviewed the instructions in this case relative to this particular assertion and find that the applicable law was set forth in the instructions and find no error therein.

West's last argument on appeal is that the trial court erred in allowing into evidence a letter sent from an exeutive at Life Investors to an agent of Life Investors regarding oral negotiations the executive had with West. Once again, he urges that the statute of frauds applies. Based on our previous discussion, we find West's argument without merit.

For its cross-appeal, Life Investors argues that if the judgment below is not affirmed, then the trial court should be directed to instruct the jury on the issue of contribution as to defendant's claim against Mark West. We affirm the trial court and accordingly need not reach this issue.

AFFIRMED. 465

Sackett, J. concurs; Donielson, J. dissents.

DONIELSON, J. (dissenting)

I respectfully dissent from the majority opinion. The trial court erred in refusing to give the proffered instruction regarding joint and several liability of joint tortfeasors. Prejudice is presumed where error is found unless the contrary is affirmatively established. Vine Street Corp. v. City of Council Bluffs, 220 N.W.2d 860, 863 (Iowa 1974). I do not agree that an adequate showing of lack of prejudice has been made. This is not a case of harmless error. Therefore, I would reverse and remand this case for a new trial.