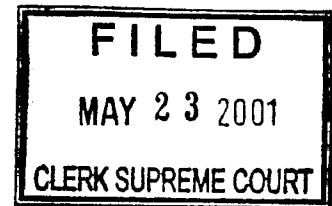


IN THE COURT OF APPEALS OF IOWA

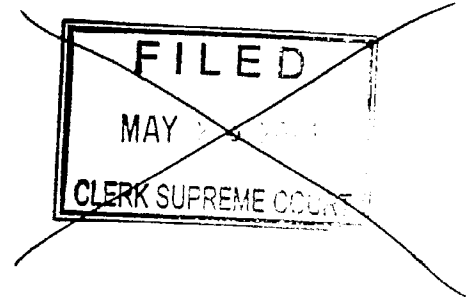
No. 1-216 / 00-1658
Filed May 23, 2001



JERRY LINDER,
Plaintiff-Appellee,

vs.

MIDWEST BENEFITS, INC., and
GROUP BENEFITS CONSULTANTS,
Defendant-Appellants.



Appeal from the Iowa District Court for Winneshiek County, Margaret L.
Lingreen, Judge.

Defendant appeals from a district court decision granting plaintiff's claim
and denying their counter claim. **AFFIRMED.**

Donald H. Gloe of Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.C.,
Decorah, for appellants.

Michael K. Kennedy of Kennedy and Kennedy, New Hampton, for
appellee.

Heard by Vogel, P.J., and Zimmer and Hecht, JJ.

ZIMMER, J.

Defendant Midwest Benefits, Inc. appeals from a district court decision granting plaintiff Jerry Linder's claim for breach of oral contract and denying their counterclaim. Defendant contends the trial court erred in (1) finding that the relationship between plaintiff and defendant was not that of principal-agent, and (2) not finding that plaintiff breached his duty of loyalty to defendant. We affirm.

1. Background Facts and Proceedings. Jerry Linder has been an independent insurance agent for over twenty years. He is involved in selling various kinds of insurance for approximately twelve companies. Linder has had written agency agreements with some, but not all, of these companies. Defendant Midwest Benefits, Inc. (Midwest) is an insurance brokerage firm specializing in employee benefits. Loren Kiel and his wife are the sole stockholders of the company.

Early in his career, Linder became acquainted with Paul Waniorek who is also an insurance agent. In approximately 1991, Waniorek began working for Midwest. He was hired as a marketing manager by Loren Kiel in order to bring new business to the company.

In approximately 1994, Waniorek was attempting to sell an insurance policy to Sumner Community Hospital. Because Linder was acquainted with the business manager of the hospital, Waniorek requested his assistance in setting up a meeting to make a sale. Linder agreed and Waniorek made a sale to the hospital on behalf of Midwest after Linder arranged a meeting.

Linder and Waniorek then entered into an oral agreement. Linder would help get Midwest a meeting with a business regarding the sale of insurance. If a

sale was made, Linder would receive a share of the commission received by Midwest. This share was typically fifty percent unless a contrary agreement was made. Kiel was not present when this agreement was made.

Whenever Linder would attend a meeting he arranged with a potential customer of Midwest, someone from Midwest would accompany him, usually Waniorek. Waniorek would make the presentation to the customer and would draw up any necessary documents. Linder did not participate in Waniorek's presentation, prepare any documents, or make any sales. If a customer had questions regarding an insurance plan, the customer would contact Waniorek or Midwest, not Linder.

Waniorek decided to leave Midwest in late 1998. At that time, he informed Kiel of his intent to take his customers with him. He also informed Linder he was leaving. Waniorek contacted the customers he serviced and informed them of his intention to leave Midwest. Linder accompanied Waniorek to meetings Waniorek arranged with the customers Linder had introduced to Waniorek. At these meetings, Waniorek informed the customers that they could remain with Midwest or change their business to him. Linder was merely present at this meeting and did not encourage the businesses to leave Midwest.

In January of 1999, Midwest stopped sending Linder his commissions. Linder then brought suit to recover these commissions, which totaled \$6,899.85. Midwest counter-sued, alleging Linder violated a duty of loyalty to the company and that he owed the company \$42,778.17 in lost commissions and broker fees.

In September of 2000, a bench trial commenced. The trial court found for Linder and awarded judgment in the amount of \$6,899.85. The trial court denied

Midwest's counterclaim, ruling that no principal-agent relationship existed between Linder and Midwest and therefore there was no duty of loyalty to be breached.

On appeal, Midwest contends that the trial court erred in finding Linder was not an agent of Midwest. Additionally, Midwest argues that Linder violated his duty of loyalty to Midwest.

II. Scope of Review. We review the district court's decision for errors at law. Iowa R. App. P. 4. Where the trial court sits as the fact finder, its findings have the effect of a jury verdict and bind us if they are supported by substantial evidence. *Bazal v. Rhines*, 600 N.W.2d 327, 329 (Iowa Ct. App. 1999). Evidence is substantial when a reasonable mind could accept it as adequate to reach the same findings. *Id.* We view the evidence in a light most favorable to upholding the district court's judgment. *Benson v. Webster*, 593 N.W.2d 126, 129 (Iowa 1999).

III. Principal-Agent Relationship. Midwest first argues Linder was an agent for their company. Midwest has the burden of proving the existence of an agency relationship. *Id.* at 130. An agency relationship exists where there is "(1) a manifestation of consent by one person that another shall act on the former's behalf and subject to the former's control and (2) the consent of the latter to so act." *Id.* (quoting *Mermigis v. Servicemaster Indus., Inc.*, 437 N.W.2d 242, 246 (Iowa 1989)).

Viewing the evidence in the light most favorable to upholding the trial court's judgment, we find there is substantial evidence to support the conclusion that no agency relationship existed between Linder and Midwest. Linder never

signed any written contract with Midwest. Although Midwest entered into written agency agreements with other agents, no such agreement was even presented to Linder. The oral agreement Linder entered into with Waniorek never imposed any duties on Linder. Conditions of termination were never discussed. The credible evidence establishes that Linder merely acted as a conduit to allow Waniorek access to businesses with which Linder had already established a relationship. He never consented to be subject to Midwest's control.

On appeal, Midwest cites to Iowa Code sections 515.123 through 515.125 (1999), which define the terms "agent" and "soliciting agent," to support its proposition that Linder was acting as its agent. It contends the trial court erred in ignoring these statutory provisions. However, we find no indication in the record that Midwest asserted this basis for liability at trial. In addition, Midwest filed no post-trial motions finding fault with the trial court's failure to address these statutory provisions. An issue that was not presented to the trial court will not be considered for the first time on appeal. *Jackson v. Farm Bureau Mut. Ins. Co.*, 528 N.W.2d 516, 517 (Iowa 1995); *Burr v. Apex Concrete Co.*, 242 N.W.2d 272, 274 (Iowa 1976). Because Midwest failed to preserve this issue, we need not address it.

IV. Duty of Loyalty. Midwest next argues Linder breached his duty of loyalty to the company.

A duty of loyalty is a fiduciary duty. See *Cookies Food Products, Inc. v. Lakes Warehouse Distributing, Inc.*, 430 N.W.2d 447, 451 (Iowa 1988). The principal agent relationship necessarily gives rise to such a fiduciary duty. *Kurth v. Van Horn*, 380 N.W.2d 693, 696 (Iowa 1986). We have already upheld the

trial court's conclusion that Linder was not acting as an agent of Midwest. Therefore, Linder did not have a duty of loyalty to Midwest on the basis of an agency relationship.

A fiduciary relationship may also exist where there is a relationship of trust and confidence between two persons. *Kendall/Hunt Publishing Co. v. Rowe*, 424 N.W.2d 235, 243 (Iowa 1988). Because diverse circumstances give rise to a fiduciary duty, the individual facts of a case must determine whether a fiduciary duty exists. *Kurth*, 380 N.W.2d at 696. These factors include:

the acting of one person for another; the having and the exercising of influence over one person by another; the reposing of confidence by one person in another; the dominance of one person by another; the inequality of the parties; and the dependence of one person upon another.

Id. (quoting *First Bank of Wakeeney v. Moden*, 235 Kan. 260, 262, 681 P.2d 11, 13 (1984) (per curiam)).

Given the circumstances of this case, we cannot find that Linder had a fiduciary duty to Midwest. Midwest did not control Linder's conduct or his activities. There is no evidence that one party influenced or dominated the other. Nor is there evidence of inequality or dependence among the parties. Linder simply helped Midwest to make connections with businesses, which allowed its employees to make sales. Therefore, there is substantial evidence to support the trial court's conclusion that Linder did not owe a duty of loyalty to Midwest.

Assuming *arguendo* that Linder did owe a duty of loyalty to Midwest, based on the record before us we cannot find that he breached this duty. Waniorek, not Linder, informed Kiel of his intention to take customers with him when he decided to leave Midwest. Linder was only present at the meetings in

which Waniorek informed the businesses that they had a choice to stay with Midwest or come with him. By all accounts, Linder in no way participated in this discussion. In fact, none of the representatives from the three businesses in question testified that Linder played any role at all in their decision to leave Midwest. One representative did not even recall that Linder attended the meeting Waniorek arranged.

Upon viewing the evidence in the light most favorable to upholding the judgment, we find there is substantial evidence to support the trial court's conclusions that Linder was not an agent of Midwest and did not owe a duty of loyalty to the company. We affirm the decision of the district court.

AFFIRMED.