IN THE COURT OF APPEALS OF IOWA

No. 5-725 / 95-366

MICHAEL FRY and LISA FRY, Husband and Wife,

Plaintiffs-Appellants,

vs.

FLOYD MOUNT, Individually and as an officer of IOWA ROTO-CAST and REEL-CORE; **GREG WHALEN**, Individually and as an officer of IOWA ROTO-CAST and REEL-CORE; **IOWA ROTO-CAST**, an Iowa corporation; and **REEL-CORE**, an Iowa corporation,

Defendants-Appellees.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Allamakee County, John J. Bauercamper, Judge.

Plaintiffs appeal a district court ruling granting defendants' summary judgment on plaintiffs' action against defendants for their claims of negligent and fraudulent misrepresentation. **AFFIRMED IN PART; REVERSED IN PART AND REMANDED.**

Thomas G. Reidel of the Conway and Reidel Law Offices, Muscatine, for appellants.

Je[redacted] K. Johnson, Des Moines, and James U. Mellick, Waukon, for appellees.

Heard by Sackett, P.J., Huitink, J., and Perkins, S.J.*

* Senior judge from the Fifth Judicial District serving on this court by order of the Iowa Supreme Court.

SACKETT, P.J.

Plaintiffs-appellants Michael Fry and Lisa Fry appeal a district court ruling granting defendants-appellees Floyd Mount, Iowa Roto-Cast, Reel-Core, and Greg Whalen summary judgment on plaintiffs' action against defendants for breach of an employment contract. Plaintiffs contend the district court erred in granting summary judgment on their count of negligent and fraudulent misrepresentation.

In June 1993, plaintiff Michael Fry [1] was hired by defendant Reel-Core to train employees in blow molding operations. Plaintiff had been employed with Central Can Company in Muscatine as a blow molder operator. Plaintiff responded to an ad in the Muscatine Journal for a new position at the Reel-Core plant in Waukon and was interviewed by defendants Mount and Whalen, officers of Reel-Core and Iowa Roto-Cast.

Plaintiff contends during the interview he told defendants Mount and Whalen he could not be hired back at Central Can Company if he decided to take the job. Plaintiff further contends he was offered a position and a salary of $35,000 per year, was offered $1500 for moving expenses, and defendants agreed to pay his health insurance [redacted] COBRA plan for eighteen months because he had a special needs child.

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[1] Lisa Fry was not involved in the hiring or negotiations and is joined only as Michael's wife.

Plaintiff then sold his home in Muscatine and moved with his family to Waukon. Plaintiff trained all new employees at Reel-Core regarding blow molding operations, including the plant manager. However, on September 29, 1993, plaintiff's position was terminated.

Plaintiff subsequently filed this action alleging (1) breach of an implied contract, (2) negligent misrepresentation, (3) fraudulent misrepresentation, and (4) intentional infliction of emotional distress. Plaintiff contends defendants Mount and Whalen gave him false information to entice him to leave his long-term employment with Central Can Company and accept a position with them. Plaintiff further alleges, once he had trained the employees, defendants Mount and Whalen planned to terminate his employment.

All the defendants filed a motion for summary judgment. They maintained plaintiff was hired as an at-will employee and was fired because the new company could not afford to pay his $35,000 salary. They also alleged plaintiff misrepresented his blow molding skills. The district court granted summary judgment as to defendants on plaintiffs' counts of negligent misrepresentation and fraudulent misrepresentation and dismissed their counts based on the breach of an implied contract and the intentional infliction of emotional distress.

The court concluded plaintiff was an at-will employee, as he had been at Central Can Company, who could be discharged at any time. The district court further ruled there was inadequate consideration beyond plaintiff's promise to

perform, promises of health insurance and moving expenses notwithstanding. The court next concluded defendants Mount's and Whalen's actions were not so outrageous as to give rise to a claim of intentional infliction of emotional distress. The court concluded, because the other counts were not proven, the claims of negligent and fraudulent misrepresentation must also fail.

Plaintiffs appealed that part of the ruling granting summary judgment as to their claims of negligent and fraudulent misrepresentation. Plaintiffs contend the affidavit of Michael Fry raises a fact issue on the elements required to prove negligent misrepresentation.

Michael's affidavit stated:

> 1. He had been a long-term employee of Central Can prior to accepting this employment. The employment was secure, but Central Can had a policy that prevented employees who left from returning to work.
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> 2. All qualifications on his resume were true.
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> 3. He was approached by defendants Mount and Whalen and promised long-term employment at Reel-Core at a annual salary of $35,000 plus their paying his health insurance through COBRA for eighteen months.
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> 4. Defendants Mount and Whalen made the following representations to him concerning the employment:
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> A. He had the knowledge and skill to make him an integral part of the new operation;
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> B. His skills would make him indispensable to their operation;
>
> C. He would have long-term employment with their organization.
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> 5. Based on representations made, he believed he would be employed for a minimum of eighteen months.

Plaintiff contended the representations set out in paragraph four of his affidavit were fraudulent and made to entice him to leave his secure job and go to work for defendants. He contends the representations were knowledgeable and were made to disturb his life for defendants' personal gain. He further contended, based on these representations, he sold his home and moved, quit his job, and then thought he was performing satisfactorily until he was terminated on September 29, 1993, without warning.

Plaintiff argues he was provided false information to induce him to quit his job in Muscatine and accept employment with Reel-Core. He asserts defendants Mount and Whalen promised him long-term employment and health care benefits. Plaintiff alleges he was brought to Reel-Core to exploit his knowledge of blow molding until the plant was fully operational. He notes he was never told his work was unsatisfactory. He also notes the plant was fully functional at the time of his termination. Plaintiff likewise argues there was a genuine fact issue on every element required to prove fraudulent misrepresentation.

Summary judgment is appropriate only if there exists no genuine issue of material fact. *Farm Bureau Mut. Ins. Co. v. Milne*, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact. *Id.* The evidence must be viewed in the light most favorable to the nonmoving party. *Thorp Credit, Inc. v. Gott*, 387 N.W.2d 342, 343 (Iowa 1986). This procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably

can be deduced from the evidence should be afforded the nonmoving party. *Id.* A fact issue is generated if reasonable minds can differ on how the issue should be resolved. *Id.* If the conflict in the record consists only of legal consequences flowing from undisputed facts, entry of summary judgment is proper. *Milne*, 424 N.W.2d at 423.

However, the nonmoving party may not simply rest on its pleadings and allegations once a motion for summary judgment is filed.

> When a motion for summary judgment is made and supported as provided in [Iowa R. Civ. P. 237], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Iowa R. Civ. P. 237(e).

The first question we need answer is whether the trial court should have dismissed on summary judgment plaintiff's claim for negligent misrepresentation.

One who, in the course of his business, profession, or other employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. *Freeman v. Ernst & Young*, 516 N.W.2d 835, 837-38 (Iowa 1994). The elements for the tort of negligent misrepresentation are:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
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> (2) . . . [T]he liability stated in Subsection (1) is limited to loss suffered
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> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
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> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Barske v. Rockwell Int'l Corp., 514 N.W.2d 917, 924 (Iowa 1994); *see also Larsen v. United Fed. Sav. & Loan Ass'n*, 300 N.W.2d 281, 287 (Iowa 1981).

This tort does not depend on the existence of a contractual relationship. *Barske*, 514 N.W.2d at 924; *see generally also Larsen*, 300 N.W.2d at 281; *Ryan v. Kanne*, 170 N.W.2d 395, 402-03 (Iowa 1969).

The reliance factor is satisfied in part by showing plaintiff accepted employment with defendants. Plaintiff must prove this reliance was justified under the circumstances. This is a fact question.

A statement of an intent to perform a future act is actionable in fraud if the statement is made with existing real intention not to perform. *Grahek v. Voluntary Hosp. Coop. Ass'n of Iowa, Inc.*, 473 N.W.2d 31, 35 (Iowa 1991).

We distinguish *Freeman*, 516 N.W.2d at 838, and *Haupt v. Miller*, 514 N.W.2d 905, 910 (Iowa 1994), where the court found parties dealt at arm's length.

The trial court erred in granting defendants' summary judgment on plaintiff's negligent misrepresentation count. We reverse and remand for a new trial on this issue.

The next question is whether the trial court should have dismissed plaintiff's count of fraudulent misrepresentation.

One who has a pecuniary interest in a transaction and "supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." *Grahek*, 473 N.W.2d at 35; *Meier v. Alfa-Laval, Inc.*, 454 N.W.2d 576, 581 (Iowa 1990).

The trial court correctly sustained defendants' motions on this ground.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.