

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA11-714

AGRACAT, INC., and AGRACAT,
INCORPORATED

APPELLANTS

V.

AFS-NWA, LLC, d/b/a/ MONTANA
TRACTORS; THE ESTATE OF J.B.
HUNT, DECEASED; THE J.B. HUNT
REVOCABLE TRUST; CHARLES
GOFORTH; and DAN DOWNING

APPELLEES

Opinion Delivered May 30, 2012

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT
[NO. CV-07-3040-6]HONORABLE MARK LINDSAY,
JUDGE

AFFIRMED

DAVID M. GLOVER, Judge

Appellants, Agracat, Inc., and Agracat, Incorporated (collectively “Agracat”), appeal from a jury verdict in favor of appellees on claims for fraud, interference with contractual relationships, breach of fiduciary duty, and conspiracy. For reversal, Agracat argues that the circuit court erred in instructing the jury on breach of fiduciary duty, instructing the jury on damages, and excluding the testimony of expert witness Lance Sexton. We affirm.

Agracat operated a tractor-import business.¹ After the company suffered low sales and mounting debts in 2001, its accountant, appellee Dan Downing, along with appellees Charles Goforth and the late J.B. Hunt, formed appellee AFS-NWA, LLC (AFS), to supply Agracat with financing. A January 2003 operating agreement provided that AFS would furnish Agracat with a \$2 million letter of credit to purchase inventory; that sales proceeds would be deposited

¹A detailed recitation of the history of this case can be found in *Agracat, Inc. v. AFS-NWA, LLC*, 2010 Ark. App. 458, ___ S.W.3d ___ (*Agracat I*).

into AFS's account; that AFS would distribute the net sales revenue to Agracat; and that AFS would withhold a nine-percent commission for itself.

In the summer of 2003, AFS discovered that certain inventory was missing and that Agracat had improperly placed \$98,000 into its own bank account. Thereafter, AFS closely monitored Agracat's operations and became intimately involved with Agracat's accounting procedures, personnel matters, and expense records. *See Agracat I, supra*. Whether AFS's increased involvement was due to a desire to assume control of Agracat or to a need for heightened scrutiny given Agracat's money and inventory irregularities is a matter of dispute. In any event, the parties continued their relationship and, in November 2003, executed a Facilitation and Sales Agreement that further expanded AFS's authority over Agracat's business. According to Agracat president Jim Steele, he signed the agreement under threat that appellees would not approve crucial floor-plan financing otherwise.

From late 2003 to early 2004, efforts were made to appease Agracat's creditors, to whom a great deal of money was still owed. Appellees also advanced expense money to Agracat and moved Agracat to another location after timely rental payments were not made on its facility. As Agracat began to consider the possibility of bankruptcy, AFS sent letters to Agracat's dealers that noted Agracat's financial difficulties, apologized for delays in warranty payments, and stated that AFS would purchase all imports and parts and hire Agracat to assemble and deliver them in an attempt to help Agracat avoid bankruptcy. One of Agracat's suppliers was similarly informed of a possible bankruptcy, and AFS eventually took over that supplier's contract.

In the spring of 2004, Agracat filed bankruptcy. AFS quickly evicted Agracat from its premises and began selling tractors and similar vehicles under the name Montana Tractors, using Agracat's suppliers, dealer network, and many of its employees.

These events led to Agracat's suit against appellees for fraud, breach of fiduciary duty, intentional interference with contractual relations, and conspiracy. The gist of Agracat's complaint was that appellees, through self-dealing and other wrongdoing, parlayed a financing and joint-venture agreement into a take-over of Agracat's business. *See Agracat I, supra*. At a trial held in March 2009, the circuit court directed a verdict against Agracat due to insufficient proof of damages. On appeal, we reversed and remanded for a new trial. *Agracat I, supra*. On retrial, the jury found in special-verdict interrogatories that AFS, Downing, Hunt, and Goforth were not liable on any counts. Agracat brought this appeal.

For its first assignment of error, Agracat claims that the circuit court erred in instructing the jury on breach of fiduciary duty. Before trial, Agracat submitted the following proposed instruction to the court:

At the time of the occurrences and transactions in this case, DOWNING was the accountant for Plaintiff.

At the time of the occurrence[s] and transactions in this case, AFS-NWA, HUNT, DOWNING, and GOFORTH were the investment advisers and financiers for Plaintiff.

A fiduciary relationship exists between an accountant and a client. A fiduciary relationship also exists between an investment adviser or financier and a client. The fiduciary relationship imposes a duty on the fiduciary to act with the utmost honesty and good faith toward the client and to never act at the expense of the client without first fully disclosing the self-dealing and obtaining the client's informed consent.

The existence or performance of an agreement between the parties does not

prevent the existence of the fiduciary duty which arises from the relationship itself.

Self-dealing by a fiduciary (without consent) is always a violation of the duty, even if innocent and unintentional.

The court did not give Agracat's instruction but instead stated it would give the following instruction:

At the time of the occurrences and transactions in this case, Dan Downing was the accountant for plaintiffs. At the time of the occurrences and transactions in this case, AFS-NWA, J.B. Hunt, Dan Downing, and Charlie Goforth *were involved in contracts with the plaintiffs.*

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. [This] duty is an implied promise between the parties that they will exercise good faith in performing their obligations under the contract. The existence or performance of an agreement between the parties does not prevent the existence of a fiduciary duty which arises from the relationship itself. Self-dealing by a fiduciary without consent is always a violation of the duty even if it is innocent and unintentional.

(Emphasis supplied to reflect material differences in the two instructions.)²

Agracat objected that the court's instruction "improperly state[d] what a fiduciary duty is or what obligations it imposes on the parties," but the court overruled the objection. Agracat now argues that the instruction failed to set forth the obligations of a fiduciary, which are greater than those owed by a contracting party, and that the instruction was too narrow in that it ignored appellees' wrongdoing outside the realm of the parties' contractual relationships.

We begin by addressing appellees' claim that Agracat failed to make a specific objection

²The format for instructions on breach of fiduciary duty is found at AMI Civ. 1513 (2012).

to the court's instruction, resulting in a procedural bar. We agree that Agracat's objection is too general to preserve the issue on appeal. Rule 51 of the Arkansas Rules of Civil Procedure provides that no party shall assign as error the giving or the failure to give an instruction unless he objects thereto before or at the time the instruction is given, *stating distinctly the matter to which he objects and the grounds for his objection*. Ark. R. Civ. P. 51 (2011) (emphasis added). A mere general objection shall not be sufficient to obtain appellate review. *Id.* In particular, an objection that merely asserts that an instruction is an incorrect statement of the law is general in nature and does not preserve the point for review. See *Precision Steel Warehouse, Inc. v. Anderson-Martin Mach. Co.*, 313 Ark. 258, 854 S.W.2d 321 (1993); *Hess v. Treece*, 286 Ark. 434, 693 S.W.2d 792 (1985). In this case, Agracat objected that the court's instruction "improperly state[d] what a fiduciary duty is or what obligations it imposes on the parties." That broad statement did not tell the trial court exactly why the instruction was wrong. See *Chandler v. Kirkpatrick*, 270 Ark. 74, 603 S.W.2d 406 (1980). Rather, it was essentially an assertion that the court had incorrectly stated the law pertaining to fiduciaries; it therefore was not specific enough to present any question for review.

Agracat argues, however, that a general objection is sufficient if an instruction is inherently erroneous. An inherently erroneous instruction is one that could not be correct under any circumstances. *Advocat, Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003). Agracat contends that the trial court's instruction on fiduciary duty could not be correct under any circumstances because it commingled the standards for breach of contract and breach of fiduciary duty. Even if we were to agree with Agracat, our law requires that an instruction be

binding in nature, in addition to being inherently erroneous, if a general objection is to suffice. *Allstate Ins. Co. v. Dodson*, 2011 Ark. 19, ___ S.W.3d ___; David Newbern, John J. Watkins, D.P. Marshall, *Civil Practice & Procedure* § 28:19 (5th ed. 2010). A binding instruction tells the jury that, if only the conditions stated in that instruction are found to exist, the jury will return a verdict based only on that instruction. See *Woods v. Pearce*, 230 Ark. 859, 327 S.W.2d 377 (1959); *Reynolds v. Ashabramner*, 212 Ark. 718, 207 S.W.2d 304 (1948). See also *Black's Law Dictionary* 935 (9th ed. 2009) (defining a binding or mandatory instruction as one requiring the jury to find for one party and against the other if it determines, based on a preponderance of the evidence, that a given set of facts exist). A binding instruction usually concludes with the phrase “you will find,” although the absence of that phrase does not necessarily keep an instruction from being binding. *Woods, supra*.

The instruction in this case did not direct or require the jury to make any particular finding. It therefore is not a binding instruction. Accordingly, in the absence of a distinct and specific objection to the instruction, we must affirm on this point.

Agracat’s remaining arguments challenge the circuit court’s damages instruction and the exclusion of expert testimony from Lance Sexton, who was slated to offer an opinion on damages. We need not reach these points because we have affirmed the jury’s finding that appellees bore no liability to Agracat on the causes of action tried. Once the lack of liability is affirmed, damages are no longer an issue. See *Gray v. Davis*, 270 Ark. 917, 606 S.W.2d 607 (Ark. App. 1980).

Affirmed.

ABRAMSON and HOOFFMAN, JJ., agree.