

STATE OF MICHIGAN
COURT OF APPEALS

MARCELLO GALLUPPI, DEBBIE GALLUPPI,
JAN MANSFIELD, NANCY SALLOW, WALID
ABUBAKER, KAREN SATTler, and CELESTE
HAMILTON,

Plaintiffs-Appellees,

v

DIANE SAKS, d/b/a HEALING ARTS CENTER
and ALPINE MEDICAL, R.J. O'CONNOR,
HARRY M. SAMUELS, THE STARFIRE
FOUNDATION, INC., d/b/a NEXT STEP 26
BONES, and STARFIRE COMMUNICATION
NETWORK,

Defendants,

and

GEORGE TALBOT,

Defendant-Appellant.

UNPUBLISHED
March 9, 2001

No. 214307
Wayne Circuit Court
LC No. 98-800448-AV

MARCELLO GALLUPPI, DEBBIE GALLUPPI,
JAN MANSFIELD, NANCY SALLOW, WALID
ABUBAKER, KAREN SATTLER, and CELESTE
HAMILTON,

Plaintiffs-Appellees,

v

GEORGE TALBOT, R.J. O’CONNOR, HARRY
M. SAMUELS, THE STARFIRE FOUNDATION,
INC., d/b/a NEXT STEP 26 BONES and
STARFIRE COMMUNICATION NETWORK,

Defendants,

and

DIANE SAKS, d/b/a HEALING ARTS CENTER
and ALPINE MEDICAL,

Defendant-Appellant.

Before: Markey, P.J., and Murphy and Collins, JJ.

PER CURIAM.

In this consolidated appeal, defendants George Talbot and Diane Saks appeal by leave granted the circuit court’s order affirming the district court’s rulings on their motions for judgment notwithstanding the verdict (JNOV) and for a new trial. We reverse in part, vacate in part, and remand for further proceedings consistent with this opinion.

Talbot first contends that the circuit court erred in affirming the district court’s denial of his motion for JNOV on plaintiffs’ breach of contract and fraudulent misrepresentation claims. We agree. On appeal, “[t]his Court reviews de novo a trial court’s ruling on a motion for JNOV.” *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999). In its review, this Court examines “the testimony and all legitimate inferences therefrom in the light most favorable to the plaintiff.” *Id.* The “trial court should grant a motion for JNOV only when there was insufficient evidence presented to create an issue for the jury.” *Id.*

A valid contract contains the following elements: “parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation.” *Mallory v City of Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). If a party fails to

prove one of the essential elements of a contract, that party cannot sustain a claim for breach. *Alar v Mercy Memorial Hosp*, 208 Mich App 518, 526; 529 NW2d 318 (1995).

The essential elements of claim of fraudulent misrepresentation are “(1) the defendant made a material representation, (2) the representation was false, (3) when making the representation, the defendant knew or should have known it was false, (4) the defendant made the representation with the intention that the plaintiff would act upon it, and (5) the plaintiff acted upon it and suffered damages as a result.” *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999).

A review of the record reveals that plaintiffs presented no evidence of mutual assent or consideration between plaintiffs and Talbot to support a breach of contract verdict. Neither was there sufficient evidence that plaintiffs relied on any representations by Talbot and suffered damages as a result. Indeed, the uncontested evidence revealed that Talbot became involved in the Starfire Foundation classes sometime in December 1994. The only plaintiff who testified that she paid money after that point was Debra Galluppi, who paid her fee in February 1995. The others stated that they paid before December 2, 1994, and, therefore, before Talbot’s first appearance. Further, plaintiffs, including Debra Galluppi, testified that they paid their money and joined the Starfire Foundation based on the representations made by O’Connor and Saks, not because of anything Talbot said or did. Even though Talbot became involved in the business later on, there was no evidence that Talbot contracted with plaintiffs for more money when he did start participating or that he otherwise made any promises to them. Further, there was no evidence that Talbot received any of the money that plaintiffs paid to O’Connor. In addition, O’Connor’s was the only testimony presented on the issue of when Starfire Foundation distributed the brochure that listed Talbot’s name as one of its directors. O’Connor testified that the brochure was not even distributed until February 1995, so plaintiffs could not have attributed the representations and contents of the brochure to Talbot based on his name being listed before they participated in the program.

Plaintiffs testified that Talbot made misrepresentations on behalf of Starfire Foundation by stating that the attorney general’s investigation was minor, by participating in the teaching sessions, and by talking about business opportunities. However, plaintiffs failed to establish that they relied on those representations and suffered damages as a result. All plaintiffs except Debra Galluppi had made their financial investments by the time Talbot arrived. Further, those plaintiffs who passed up employment opportunities or quit their jobs to become participants in Starfire Foundation did so before any representations by Talbot. Although it is possible that Debra Galluppi relied on and may have been influenced by some of Talbot’s misrepresentations before she paid her \$1,500 in February, plaintiffs did not raise that argument below or on appeal.

In addition, we do not believe there was sufficient evidence for the jury to infer that because Talbot’s wife, Saks, made fraudulent representations to plaintiffs before they joined Starfire Foundation, that Talbot also made such representations. The evidence was to the contrary. Talbot did not begin to participate with the program until December, and there was no evidence that Talbot was involved with Starfire Foundation or promoting the business before that time.

Therefore, taking the evidence in a light most favorable to plaintiffs, there was insufficient evidence of a contract between Talbot and plaintiffs and insufficient evidence that anything Talbot said constituted a fraudulent misrepresentation on which plaintiffs relied. Because the district court should have granted Talbot's motion for JNOV, we reverse and remand for entry of JNOV on those claims.

Talbot and Saks both contend that the circuit court erred in affirming the district court's denial of their motions for a new trial. We agree.

Carl Weideman, the attorney representing all defendants at trial, moved to withdraw as counsel for O'Connor and the companies on the first day of trial. Weideman argued that approximately one week earlier, he received new information from plaintiffs' counsel that indicated there was a potential conflict of interest because some defendants were clearly less culpable than others. The district court denied the motion, stating that Weideman should have discovered any potential conflict at or near the time the complaint was filed, not on the day of trial.

Thereafter, Saks and Talbot moved for a new trial, arguing that the district court should have granted Weideman's motion to withdraw. The district court denied the motion, and Talbot and Saks appealed to the Wayne Circuit Court, which affirmed the district court's ruling. Saks and Talbot contend that O'Connor, as the founder and sole officer of Starfire Foundation and Starfire Communication Network, played a much more prominent role in the classes and business; consequently, it was impossible for Weideman to adequately represent their interests while still defending O'Connor. We agree.

An attorney may withdraw from an action or may be substituted "only with the consent of the client or by leave of the court." *In re Withdrawal of Attorney*, 234 Mich App 421, 431; 594 NW2d 514 (1999); MCR 2.117(C)(2). Conflicts of interest between a lawyer and client are addressed by MRPC 1.7, which provides in pertinent part:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

In addition, MRPC 1.16 provides, in pertinent part:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law.

Thus, according to the above rules, an attorney must withdraw if a conflict of interest arises during representation, unless the attorney believes the representation would not be adversely affected, and the client consents after consultation.

O'Connor founded Starfire Foundation in 1994, but he was using the name Starfire as early as 1966 and expounded the Starfire philosophies as early as 1991. Neither Saks nor Talbot signed the articles of incorporation for Starfire Foundation, and O'Connor testified that he was the sole officer of the corporation and that the concept for the companies was his. In fact, O'Connor conceded that he contacted Saks about the Starfire Foundation classes in August 1994, well after he conceived the sessions. O'Connor further stated that he listed Saks and Talbot as directors on a Starfire Foundation brochure, but his intention was to refer to them as coordinators of classes and not as officers. O'Connor testified that he never paid Saks or Talbot for any services.

O'Connor testified that he took the initiative in applying for licenses to run the businesses in various states by sending application packets to attorney general offices throughout the country. In addition, O'Connor testified that he was the founder of Starfire Communication Network in March 1995 or 1996. The record also indicates that O'Connor initiated the promotion of Starfire Foundation and Starfire Communication Network by appearing on radio programs and distributing flyers and brochures. The 1-900 telephone contract with Stargate Communications was also under O'Connor's name and that of Starfire Foundation. O'Connor's testimony also suggests that the format of the classes was his creation and that he wanted to award certificates because he thought he was qualified to do so.

Saks also testified that she played a minor role in the Starfire Foundation classes and business. She stated that she learned about Starfire Foundation from O'Connor, who told her he planned to teach hypnotherapy classes and asked her to recommend the classes to people she knew. Saks testified that she told people she planned to take the classes and that they should call O'Connor if they were interested. Saks further stated that O'Connor taught all the classes, but that she organized some classes for people to practice their skills. Saks also said that she got Talbot involved in the practice sessions because she was not a good leader. Saks acknowledged that O'Connor gave Talbot and her titles in Starfire Foundation, but she said it was merely a friendly gesture and that she was only a student, was never involved in the business aspects of the company, and never received any compensation.

Ward testified that Saks and Talbot were involved in furthering the sales of the business opportunity through Starfire Foundation. Ward also stated that he thought Saks and Talbot, through their role in the enterprise, were leaving people with the wrong impression about O'Connor's qualifications and the potential economic benefits of Starfire Foundation. Similarly, plaintiffs testified that Saks recommended they get involved with O'Connor and told them he held licenses and doctorate degrees. Plaintiffs also stated that Saks referred to Starfire Foundation as a business opportunity to earn money and that she chaired meetings during which the phone line business was discussed. In addition, plaintiffs testified that Saks made statements on behalf of Starfire Foundation about the Attorney General's investigation and about advertising

and funding for the phone service. With regard to Talbot, plaintiffs testified that he, too, was involved in meetings, but not until December 1994. Plaintiffs stated that Talbot also made statements on behalf of the company, and discussed Starfire Foundation as a business opportunity.

This evidence shows the difference in the roles played by O'Connor, Saks, and Talbot in the enterprise. O'Connor was the major, if not sole, participant in conceiving of and founding the companies, deciding and promulgating the content of the classes, creating and setting up the telephone counseling, authoring the pamphlets and registration forms, and taking and spending the money paid by participants. Saks was an enthusiastic advocate for O'Connor and helped advertise the company by word of mouth. Further, Saks and Talbot both took leadership roles in the meetings and helped run the organization. However, there was no evidence that Saks or Talbot benefited financially from their participation or that O'Connor promised them future benefits. Moreover, while they promoted the business opportunity, the evidence does not indicate they did so as officers or agents of O'Connor or the company. In fact there is evidence to suggest that Saks and Talbot themselves may have relied on O'Connor's representations about the classes and business to the same or greater extent than did plaintiffs.

Thus, evidence shows there was a definite conflict of interest in Weideman's simultaneous representation of O'Connor, Saks, and Talbot. O'Connor's role in the business was so much greater than the others' that Weideman could not adequately represent the interests of Saks and Talbot. He could not assert a defense that they also were fooled by O'Connor's representations and that they were mere pawns in his scheme. Further, Weideman could not downplay their role by focusing his defense on O'Connor's wrongdoing. Saks', and especially Talbot's, roles were so minor compared to O'Connor's that they were entitled to be informed of the risk of simultaneous representation by Weideman, particularly the risk that the jury may be inclined to simply lump them together as directors of the business.

This evidence suggests that an actual conflict existed. Further, both Weideman and plaintiffs' counsel stated that a conflict of interest existed and that Weideman's representation of Saks, Talbot, and Samuels would be adversely affected if he continued to represent O'Connor and the companies. This should have prompted further inquiry by the district court into the extent of the conflict and whether it was too serious to waive. Further, the district court should have inquired whether Saks and Talbot knew about the potential conflict of interest and its implications. The district court's failure to do so constituted an abuse of discretion.

Pursuant to MRPC 1.7(b), an attorney owes his undivided loyalty to his client, and where a conflict arises by his representation of clients with potentially adverse interests, he is obligated to move to withdraw. While evidence suggests that Weideman should have discovered the conflict of interest long before the start of trial, it nonetheless was an abuse of discretion for the district court to punish Saks and Talbot for Weideman's apparent negligence. Rather, in the face of an assertion of a conflict, the district court should have made some attempt to discover whether an actual conflict existed and how Saks and Talbot might be prejudiced. The district court could have assessed Weideman costs for the adjournment necessitated by his failure to recognize the conflict sooner. MCR 2.503(D)(2).

Accordingly, we reverse the circuit court's order that affirmed the district court's order denying Talbot's motion for JNOV on the breach of contract and fraudulent misrepresentation claims and remand for entry of JNOV on those issues. Further, we vacate the other judgments against Talbot on the Consumer Protection Act claims and the judgments against Saks and remand for a new trial on those issues. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ William B. Murphy

/s/ Jeffrey G. Collins