COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1006

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

LYNN L. BALDWIN,

PLAINTIFF-RESPONDENT,

V.

AURORA HEALTH CARE, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: PATRICK L. SNYDER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Aurora Health Care, Inc. appeals from a judgment awarding damages in promissory estoppel to Dr. Lynn L. Baldwin. We affirm.

¶2 Baldwin sold her medical practice and patient base to Aurora and began employment as an Aurora Medical Group family practice physician in August 1995. In November 1996, Baldwin began informing Aurora administrators that she was interested in shifting her career from direct patient care to working in preventive medicine, wellness and alternative medicine within Aurora's Alternative Delivery and Community Programs (ADCP). She met with Aurora administrators to discuss her ideas for such a transition, and in June 1997, believing that Aurora had committed to an ADCP position for her, Baldwin notified her patients that she would terminate her family medical practice in September. Thereafter, Baldwin and Aurora could not agree on the scope of Baldwin's ADCP position.

¶3 Baldwin sued Aurora for breach of contract and promissory estoppel. The circuit court dismissed the breach of contract claim; the promissory estoppel claim went to a jury. The jury found that Aurora promised Baldwin employment in ADCP, Aurora should have reasonably expected its promise to induce Baldwin to take action of a definite and substantial character, and Baldwin reasonably relied on Aurora's promise and was induced to act on it. The jury awarded Baldwin $128,809 in damages for her reliance on Aurora's promise. On motions after verdict, the court reduced that award to $63,250, which Baldwin accepted in lieu of a new trial. Aurora appeals.

¶4 Aurora argues that there was insufficient evidence for the jury to find the first two elements of promissory estoppel. A jury verdict will be sustained if there is any credible evidence to support the verdict. ***Nieuwendorp v. Am. Family Ins. Co.***, 191 Wis. 2d 462, 472, 529 N.W.2d 594 (1995). In order to reverse there must be "such a complete failure of proof that the verdict must have been based on speculation." ***Id.*** (citation omitted). We consider the evidence in the light most

favorable to the verdict, and when more than one inference may be drawn from the evidence, we are bound to accept the inference drawn by the jury. ***Id.*** The weight to be given to the evidence is a matter for the jury to determine. ***Meurer v. ITT Gen. Controls***, 90 Wis. 2d 438, 450, 280 N.W.2d 156 (1979).

¶5 The elements of promissory estoppel are:

> (1) Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee?
>
> (2) Did the promise induce such action or forbearance?
>
> (3) Can injustice be avoided only by enforcement of the promise?

Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 698, 133 N.W.2d 267 (1965).

¶6 The first two elements are questions for the fact finder. ***U.S. Oil v. Midwest Auto Care Servs., Inc.***, 150 Wis. 2d 80, 89, 440 N.W.2d 825 (Ct. App. 1989). The third element is a policy question to be decided by the circuit court in the exercise of its discretion. ***Id.***

¶7 Our review of the record reveals credible evidence of a promise which Aurora should have reasonably expected to induce action or forbearance of a definite and substantial character by Baldwin. The record also contains credible evidence that Aurora's promise induced Baldwin's action or forbearance.

¶8 Baldwin testified that in November 1996, she met with the then-administrator of her Aurora Medical Group facility to discuss transitioning out of direct patient care and into ADCP work with Aurora. In a letter dated November 17, 1996, Baldwin approached Aurora Medical Group's president, Eliot Huxley, with her ideas for undertaking ADCP work at Aurora. Believing

that she would be able to transition into a new position with Aurora, Baldwin drafted a letter to her clinic's staff in late March informing them that she would be leaving her family practice and exploring other opportunities within Aurora. The letter remained in draft form while Baldwin had further discussions with Aurora administrators about leaving direct patient care for ADCP.

¶9 In June 1997, Baldwin met with William Jenkins, Aurora's president of ADCP, to discuss her interest in changing her position at Aurora. Baldwin submitted a written summary of her ADCP proposals on June 18. On June 24, Jenkins and Baldwin had a telephone conversation during which Baldwin sought to clarify Aurora's intentions vis-à-vis an ADCP position. At that time, Jenkins told Baldwin that he wanted to work with her, that there would be an ADCP position for her, and that Jenkins did not have any problem with the draft letter announcing the closing of her practice which Baldwin read to him over the telephone. As a result of that conversation, Baldwin believed that she had a position in ADCP consistent with her proposal to Jenkins. Baldwin also believed that her compensation would be similar to her treating physician's contract, although she and Jenkins did not discuss compensation for the ADCP position. Baldwin released a letter dated June 30 to her patients stating that she would close her practice as of September 19, 1997, but that she was excited to have the opportunity to work in new health care programs within Aurora. A copy of that letter was attached to a memorandum to clinic staff from the clinic administrator stating that Baldwin "has decided to explore a new position at Aurora involving wellness, prevention and alternative medicine."

¶10 In July 1997, Jenkins hired Linda Dirksmeyer as ADCP director of complementary medicine and wellness. Thereafter, Dirksmeyer and Baldwin toured empty clinic space and discussed alternative medicine, preventive medicine

and wellness programming. Dirksmeyer mentioned that as part of any ADCP work, Baldwin would have to provide direct patient care. On August 28, 1997, Baldwin called Dirksmeyer to discuss the direct patient care requirement. Dirksmeyer told Baldwin that Aurora envisioned Baldwin building a model program for Aurora which would require Baldwin to split her time equally between developing preventive medicine, wellness and alternative medicine programs and providing direct patient care. Baldwin objected and noted that she had told several Aurora representatives that she did not want to provide direct patient care.

¶11 In September 1997, Dirksmeyer informed Baldwin that Aurora did not have a full-time position for her unless she agreed to devote half of her time to direct patient care. Baldwin objected that this was not the agreement she had reached with Jenkins. By this time, Baldwin's family practice patients had been assigned to other physicians and Aurora did not have an ADCP position for her. Aurora offered to reemploy Baldwin as a family practice physician on their terms, but she declined. Baldwin testified that before she formally announced the termination of her practice and facilitated the transition of her patients to new providers at the clinic, she believed she would continue at Aurora in an ADCP capacity.[1]

¶12 We consider the evidence in the light most favorable to the verdict, and we are bound to accept the inferences drawn by the jury. ***Nieuwendorp***, 191 Wis. 2d at 472. The jury was entitled to find Baldwin's testimony credible and to rely upon it in reaching its answers to the first two elements of promissory

[1] In his trial testimony, Jenkins denied that he had offered Baldwin an ADCP position. Other Aurora witnesses also disputed Baldwin's claim of a position in ADCP.

estoppel. Notwithstanding Aurora's attempt to reargue the facts on appeal, the jury's findings that Aurora promised Baldwin employment through ADCP, that Aurora should have reasonably expected its promise of ADCP employment to induce Baldwin to take action of a definite and substantial character (i.e., terminating her practice), and that Baldwin reasonably relied on Aurora's promise and was induced to act on it are supported by credible evidence in the record.

¶13 Aurora argues that the jury verdict was merely advisory because Baldwin's promissory estoppel case was brought in equity. As the ***Hoffman*** court noted, the first two elements of promissory estoppel "present issues of fact which ordinarily will be resolved by a jury …." ***Hoffman***, 26 Wis. 2d at 698. Even if the jury verdict were merely advisory, the court nevertheless had the discretion to follow it. ***Abdella v. Smith***, 34 Wis. 2d 393, 397, 149 N.W.2d 537 (1967).

¶14 Aurora argues that the circuit court did not properly exercise its discretion when it evaluated the third element of promissory estoppel: can injustice be avoided only by enforcing the promise? Specifically, Aurora contends that the court did not evaluate the ***U.S. Oil*** factors governing the injustice analysis. On the question of injustice, a court is to consider:

> (a) the availability and adequacy of other remedies, particularly cancellation and restitution;
>
> (b) the definite and substantial character of the action or forbearance in relation to the remedy sought;
>
> (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;
>
> (d) the reasonableness of the action or forbearance;
>
> (e) the extent to which the action or forbearance was foreseeable by the promisor.

U.S. Oil, 150 Wis. 2d at 92.

¶15 On motions after the verdict, the circuit court found that there was sufficient evidence to support the jury's answers to the first two special verdict questions: the existence of a promise by Aurora (made in the June 24 telephone call with Jenkins) and Baldwin's reliance on the promise (terminating her practice). After upholding the jury's verdict, the circuit court properly applied those findings in exercising its discretion on the injustice element. The court noted that even though Aurora offered to reinstate Baldwin in a direct patient care position, "who would want to, perhaps, work under that circumstance?"

¶16 Although the court did not explicitly discuss the injustice factors set forth in ***U.S. Oil***, consideration of these factors is implicit in the court's ruling on postverdict motions. The injustice element was briefed and argued to the court. The court noted the sufficiency of the evidence for the jury's findings and the fact that it was understandable that Baldwin would not return to work at Aurora, thereby implicitly acknowledging that an injustice would arise if Aurora's promise regarding ADCP employment was not enforced. The court functionally addressed the injustice element, and we will not hold the court to any magic words in its analysis.

¶17 Even if the circuit court's injustice analysis is lacking, we may independently review the record and the ***U.S. Oil*** injustice factors to determine whether they provide a basis for the circuit court's discretionary decision on the injustice element. *See* ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983). On the question of a remedy, Baldwin's only remedy was promissory estoppel because her breach of contract claim was dismissed by the circuit court. The jury found that Baldwin took action in reliance on Aurora's promise by terminating her practice, clearly a substantial action on Baldwin's part. Baldwin's termination of her practice also corroborated the making of a promise by Aurora to

employ her in another capacity within ADCP. Baldwin testified that her inquiries about ADCP work were not an expression of intent to resign as a treating physician, and that she intended to transition out of direct patient care into another capacity with Aurora. Baldwin testified that other than changing the nature of her work, she believed she would continue in a similarly compensated position as a physician within Aurora. Baldwin's termination of her practice was reasonable in light of the jury's finding that a promise was made and Baldwin reasonably relied on it. It was reasonably foreseeable by Aurora that Baldwin would terminate her practice given her clear expression of interest in leaving direct patient care in favor of ADCP work, which the jury found Aurora offered. The injustice factors of ***U.S. Oil*** are satisfied in this case.

¶18 Aurora contends that the damages awarded to Baldwin are unsupported in the evidence. Damages in promissory estoppel cases should be those that "are necessary to prevent injustice" while avoiding "[m]echanical or rule-of-thumb approaches ...." ***Kramer v. Alpine Valley Resort, Inc.***, 108 Wis. 2d 417, 427, 321 N.W.2d 293 (1982) (quoted source omitted). The amount of damages "may be determined by the plaintiff's expenditures or change of position in reliance as well as by the value to him of the promised performance." ***Id.***[2]

¶19 On postverdict motions and a subsequent reconsideration motion, the circuit court reduced Baldwin's $128,809 jury award to $63,250 after concluding that it had instructed the jury on the wrong measure of damages. Nevertheless, the court determined that the damages calculation could be corrected on postverdict motions. The court reasoned that in reliance on Aurora's promise of ADCP

[2] We disagree with Aurora's claim that these statements are dicta.

employment, Baldwin relinquished the right to treat patients under her contract with Aurora. Therefore, her damages were the income she gave up under that contract from September 1997 to September 1998, or $52,825 plus $10,425 of a practice loan which would have been forgiven by Aurora had Baldwin continued under contract, for a total of $63,250.[3] The lost income calculation was based on information in an Aurora exhibit which showed Baldwin's 1996-97 income calculated under a production formula based on the number of patients seen.[4] The court reduced the jury's award to $63,250.

¶20 Aurora argues that under Baldwin's contract, her compensation for 1997-98 would have been determined by a production formula based upon the number of patients she saw. However, because Baldwin terminated her Aurora contract and did not see patients after September 1997, she would not have received any compensation after September 1997. Therefore, Aurora argues, Baldwin did not have any damages.

¶21 Aurora's argument overlooks the jury's finding that Aurora promised Baldwin an ADCP position and that Baldwin relied on that promise in terminating her practice. Baldwin testified that she wanted to transition within

[3] The parties do not allege that the court lacked authority to make this remittitur award.

[4] Aurora's complaint regarding how the circuit court calculated damages is undermined by the fact that the court used an exhibit offered by Aurora which showed Baldwin's income in the 1996-97 contract year under the production formula. The court used that figure to arrive at Baldwin's likely income for 1997-98 under a production formula. Accepting that Baldwin did not intend to render herself unemployed by terminating her practice, this exhibit was properly used by the circuit court in evaluating Baldwin's damages for 1997-98.

The court did not rely on Baldwin's exhibit 20 in reaching this damages award. Therefore, we do not consider any arguments relating to exhibit 20 in reviewing the court's damages award. Furthermore, we are not persuaded by Aurora's argument that the presentation of exhibit 20 to the jury influenced the jury's promissory estoppel verdict.

Aurora, not leave Aurora altogether. The jury apparently rejected the suggestion that Baldwin terminated her Aurora contract independent of an ADCP offer from Aurora. In light of these findings, Aurora's argument is not persuasive.

¶22 Aurora argues that Baldwin did not offer any proof of her expected compensation in an ADCP position. Baldwin testified that because she was under contract to Aurora at the time she sought ADCP employment, she expected her compensation in an ADCP position to be similar to her compensation as a treating physician. The court had before it evidence of Baldwin's compensation under her treating physician's contract. We do not find Baldwin's proof lacking in this regard.[5]

¶23 Because we have rejected Aurora's claims of error, we also reject Aurora's request for a new trial in the interest of justice. A party is not entitled to a new trial in the interest of justice based upon a combination of nonerrors. *See* ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[5] We do not address any of Baldwin's criticisms of the court's postverdict damages calculation because she did not cross-appeal from the judgment in order to seek modification of it by this court. ***State v. Huff***, 123 Wis. 2d 397, 408, 367 N.W.2d 226 (Ct. App. 1985).