

IN THE COURT OF APPEALS OF IOWA

No. 6-629 / 05-1959
Filed October 11, 2006

SANDRA ABBOTT,
Plaintiff-Appellee/Cross-Appellant,

vs.

**RJS ELECTRONICS and
RICHARD JAEGER,**
Defendants-Appellants/Cross-Appellees.

Appeal from the Iowa District Court for Clinton County, J. Hobart
Darbyshire, Judge.

RJS Electronics and Richard Jaeger appeal the jury verdict and award
against them. Sandra Abbott cross-appeals the district court's rulings preventing
her from pursuing economic damages. **AFFIRMED.**

Chad Von Kampen of Simmons, Perrine, Albright & Ellwood, P.L.C.,
Cedar Rapids, for appellants/cross-appellees.

Dorothy O'Brien of O'Brien & Greve, P.L.C., Davenport, for
appellee/cross-appellant.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

RJS Electronics and Richard Jaeger appeal the jury verdict and award against them. They argue the district court erred in failing to grant remittitur or a new trial when (1) the jury based its damage award on lost wages and (2) the awards for past and future pain and suffering were both excessive and not supported by the evidence. Sandra Abbott cross-appeals, arguing the district court erred when it refused to allow her to pursue economic damages. She claims (1) she should have been allowed to amend her pleadings to include interference with a contract; (2) the district court erred by refusing to instruct the jury on both lost wages and punitive damages; and (3) the district erred by ruling as a matter of law that she did not suffer a constructive discharge. We affirm.

I. Background Facts and Proceedings

Sandra Abbott worked for RJS Electronics (RJS) for eight years. During her last two years with the small business, her working relationship with its owner and manager, Richard Jaeger, began to deteriorate. Animosity between the two came to a head in October 2002. During an argument at RJS, Jaeger punched Abbott in the upper arm. Abbott left her job immediately, telling Jaeger she could not work in a place where she would be hit. As a result of the punch, Abbott received a contusion which caused her pain for about a week. She also alleges being hit and losing her job has caused her to become emotional, depressed, and socially withdrawn. She claims she has both lost self-esteem and been anxious about finances.

Abbott filed a petition against RJS and Jaeger alleging constructive discharge, battery, and negligence. Four days prior to trial, the defendants filed a

motion to exclude evidence of Abbott's lost wages. They argued (1) she was an at-will employee; (2) constructive discharge is not a stand-alone tort; and (3) lost wages are not recoverable under battery. Trial began on September 19, 2005. On September 20, 2005, the court ruled to exclude evidence of lost wages. On the same day, Abbott moved to amend her petition to allege Jaeger intentionally interfered with her business relationship with RJS. The court refused to allow the amendment. It also ruled as a matter of law that Abbott was not constructively discharged.

On September 23, 2005, the jury found in favor of Abbott's battery claim. It awarded her \$56,000 for past physical and mental pain and suffering and \$10,000 for future physical and mental pain and suffering. Jaeger appeals the verdict and award. Abbott cross-appeals the district court's rulings regarding economic damages.

II. Standard of Review

We review a motion for new trial according to the grounds on which it is based. *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006). Because the appropriateness of an inquiry into jury deliberations is a legal question, we review the district court's ruling as to the basis of the jury's award for errors at law. See *Weatherwax v. Koontz*, 545 N.W.2d 522, 524 (Iowa 1996). We review the court's ruling on the defendants' claim of excessive damages for an abuse of discretion. *Estate of Pearson ex rel. Latta v. Interstate Power & Light Co.*, 700 N.W.2d 333, 345 (Iowa 2005).

We review a ruling on a motion to amend a petition for abuse of discretion. *Holliday v. Rain & Hail L.L.C.*, 690 N.W.2d 59, 63 (Iowa 2004). Finally, we also

review the court's refusal to give an instruction for abuse of discretion. *Kiesau v. Bantz*, 686 N.W.2d 164, 171 (Iowa 2004).

III. Merits

The defendants argue the district court should have granted either a new trial or remittitur because (1) the jury based its award on lost wages and (2) the award was excessive and not based on substantial evidence. Abbot alleges the district court erred when it (1) refused to allow her to amend her pleading to include a charge of interference with contract; (2) refused her jury instructions on economic and punitive damages; and (3) ruled as a matter of law she did not suffer a constructive discharge. We address each claim below.

A. Defendants' Appeals

1. Juror Misconduct

The defendants allege the district court erred in failing to grant a new trial due to jury misconduct. Specifically, they argue the jury incorrectly based its award on Abbott's lost wages. In support of their motion for new trial, the defendants provided two affidavits. One affidavit, from a juror, stated that the jury contemplated Abbott's lost income while computing her award. The other affidavit was given by an employee of the defense counsel. Her affidavit consisted of summaries of interviews she held with six jurors, including the juror that provided his own affidavit. Each of the summaries indicates that the jurors relied on Abbott's lost wages to determine her award. The district court, however, refused to interfere with the jury's verdict. According to the court's ruling, "the juror affidavits merely show the jurors' thought processes and their thought process inheres in the verdict."

The defendants urge us to apply a subjective/objective test to determine whether the jurors' consideration of lost wages inheres in the verdict. See *Ryan v. Arneson*, 422 N.W.2d 491, 494 (Iowa 1988) (noting that under the objective/subjective test, "objective reports of statements made in the jury room were competent evidence, however, subjective reports concerning the influence or effect of those statements were not competent"). Our supreme court, however, replaced the subjective/object test with the internal/external test in *Ryan v. Arneson*. *Id.* at 495. Under that test,

[t]he internal workings include what parts of the record or instructions were or were not considered, the jurors' discussion, their motivations, mental or emotional reactions, their votes, or other evidence which seeks to show that the actual decision of the jury was, or should have been, something other than what the verdict indicates.

State v. Rouse, 290 N.W.2d 911, 916 (Iowa 1980). Such evidence is inadmissible to show the jury's thinking processes were incorrect. *Weatherwax*, 545 N.W.2d at 524. External matters improperly influencing a verdict may be considered by the court. *Id.* ("[I]t [is] clear that a juror's testimony can be received to show that (1) a verdict was not correctly recorded or (2) external matters were improperly brought into deliberations."); *Rouse*, 290 N.W.2d at 916-17 (listing a juror's experiment or a bailiff's prejudicial comment as examples). These external matters, unlike the internal workings of the jury, do not "inhere" in the verdict. The internal/external test is codified in Iowa Rule of Evidence 5.606(b). Under the rule,

a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or to dissent from the verdict or indictment

or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or brought to bear upon any juror.

Iowa R. Evid. 5.606(b).

In this case, the information the defendants urge us to consider consists of juror statements about how they determined Abbott's award. In asking us to consider the jurors' statements, they urge us to review what parts of the record the jurors considered, which instructions they followed, and how they mentally and emotionally reacted. However, evidence concerning Abbott's financial circumstances was presented at trial; the jurors' statements do not concern an external matter like an experiment. Therefore, we agree with the district court that the jurors' affidavits reflect the jurors' thought processes. Evidence cannot be received to show the jurors' thinking processes were incorrect. *Weatherwax*, 545 N.W.2d at 524. Because those thought processes inhere in the verdict, we will not consider the jurors' statements.

2. Excessive Award

The defendants also argue that the jury's award was both excessive and not supported by substantial evidence. Abbott claims the defendants failed to preserve their arguments. However, because Iowa Rule of Civil Procedure 1.1004 allows motions for new trial based on the grounds defendants allege, we will review defendants' claim.

Traditionally, assessment of damages is a jury function. *Rees v. O'Malley*, 461 N.W.2d 833, 839 (Iowa 1990). Only for the most compelling reasons will we disturb the jury's award. *Id.* We will set aside or reduce an award only if it

(1) is flagrantly excessive or inadequate; or (2) is so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is a result of passion, prejudice or other ulterior motive; or (4) is lacking in evidentiary support.

Id.

Abbott's awards were for past and future physical and mental pain and suffering. Because there is no exact mathematical measurement to calculate pain and suffering, these damages are also to be left to the discretion of the jury. *Estate of Pearson*, 700 N.W.2d at 347. "Physical pain and suffering includes bodily suffering, sensation or discomfort." *Id.* "Mental pain and suffering includes mental anguish anxiety, embarrassment, loss of enjoyment of life, a feeling of uselessness, or other emotional distress." *Id.*

Abbott testified that the bruise Jaeger left was very painful for about a week. There is no lasting physical damage to her arm. However, she also said that the incident was quite emotional for her and that she is feeling emotionally just as bad now as when Jaeger hit her. She has had to deal with unemployment, reduced income, and lack of health insurance. Her financial situation has caused her fear and anxiety. Her daughter testified that she noticed her mother has been hopeless about her future and further employment. She also said she observed Abbott become withdrawn and display social anxiety. She stated Abbott worried constantly about money.

Given the testimony concerning the emotional effect of the battery on Abbott, there was sufficient evidence supporting the jury's determination. The awards of \$56,000 for past physical and mental pain and suffering and \$10,000 for future physical and mental pain and suffering are not flagrantly excessive.

Nor do they shock the conscience or appear to be the result of passion or prejudice. For these reasons we affirm the jury's award.

B. Abbott's Cross-appeal

1. Amendment of Pleadings

District courts have considerable discretion in determining when to allow a party to amend a pleading. *Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 766 (Iowa 2002). According to Iowa Rule of Civil Procedure 1.402(4), leave to amend "shall be freely given when justice so requires." Thus, as long as the proposed amendment does not substantially change the issues at trial, permission to amend a pleading may be given any time before a final ruling is made. *Rife*, 641 N.W.2d at 767. Even if the amendment substantially changes the issues, permission to amend may be given if the opposing party is not unfairly surprised or prejudiced. *Id.*

Abbott sought to amend to add a theory of intentional interference with a contract to her pleadings. In order to show interference with a contract, Abbott would have had to show (1) she had a valid contract; (2) the defendants knew of the contract; (3) the defendants intentionally and improperly interfered with her contract; (4) the interference caused the contracting parties not to perform the contract with her; and (5) her damages. See *Water Dev. Co. v. Board of Waterworks*, 488 N.W.2d 158, 161 (Iowa 1992). The trouble with this theory is two-fold. First, Abbott was an at-will employee and it is unlikely she would have been able to meet the demanding proof required. See *id.* at 162 (noting that in cases involving alleged interference with at-will employment, "the proof is more demanding than when the claimed interference is with an existing contract").

Second, Jaeger, as the owner and president of RJS, was a party to whatever employment contract would have existed between RJS and Abbott. Only a third party, one not party to a contract, can commit tortious intentional interference with a contract. *Harbit v. Voss Petroleum, Inc.*, 553 N.W.2d 329, 331 (Iowa 1996).

Finally, even if Abbott had been able to sufficiently make a case for interference with a contract, the amendment would have substantially and unfairly changed the issues at trial. Her petition alleged battery. She testified she voluntarily quit her job. Her request to amend came nearly halfway through trial. Given the difference between the elements of battery and intentional interference with a contract, amending the pleading would have unfairly surprised and prejudiced the defense. Therefore, the district court's ruling refusing to allow Abbott to amend her pleading is affirmed.

2. Economic Damages

Abbott alleges the district court erred in refusing to allow her to pursue economic damages. A court must give a proposed instruction if the instruction (1) correctly states the law, (2) has application to the case, and (3) is not stated elsewhere in the instructions. *Weyerhaeuser Co. v. Thermogas Co.*, 620 N.W.2d 819, 823 (Iowa 2000). Additionally, the proposed instruction must be supported by both the pleadings and substantial evidence. *Beyer v. Todd*, 601 N.W.2d 35, 38 (Iowa 1999). In reviewing a proposed instruction, we view the evidence in the light most favorable to the party requesting the instruction. *Weyerhaeuser*, 620 N.W.2d at 824. If error occurs, however, we will only reverse if it results in prejudice to the party requesting the instruction. *Id.* "Prejudice results when the

trial court's instruction materially misstates the law, confuses or misleads the jury, or is unduly emphasized." *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 268 (Iowa 2000).

In order to receive punitive damages, Abbott would have to show Jaeger's behavior "constituted willful and wanton disregard for the rights or safety of another." Iowa Code § 668A.1 (2005). "Willful and wanton" means the actor intentionally committed the act without regard for a "known or obvious risk that was so great as to make it highly probable that harm would follow." *Kuta v. Newberg*, 600 N.W.2d 280, 288 (Iowa 1999). Generally, the actor commits the action with "conscious indifference to the consequences." *Id.* In order to be awarded punitive damages, Abbott thus would have had to show Jaeger acted with either actual or legal malice. *Wolf v. Wolf*, 690 N.W.2d 887, 893 (Iowa 2005). Viewing the record in the light most favorable to the plaintiff, the facts simply do not support submitting such an instruction to the jury.

Abbott also alleges the district court should have instructed the jury on lost wages and benefits. We disagree. A showing of actual damages is not an element of battery. See 6 Am. Jur. 2d *Assault and Battery* § 144. An award of lost wages and benefits, however, presumes an injury which somehow diminishes an individual's ability to work. Abbott sustained a contusion that lasted a week, but presented no evidence of physical or mental injury that impaired her earning capacity. Thus, the facts did not support instructing the jury on lost wages and benefits.

3. Constructive Discharge

Abbott claims the district court erred in ruling as a matter of law that she did not suffer a constructive discharge. In Iowa, constructive discharge, standing alone, is not an actionable tort. *Balmer v. Hawkeye Steel*, 604 N.W.2d 639, 643 (Iowa 2000). In fact, “constructive discharge is actionable only when an express discharge would be actionable in the same circumstances.” *Id.* In order to show actionable constructive discharge, the plaintiff must present evidence of illegal conduct “such as the violation of public policy or statutory law or breach of unilateral contract of employment created through an employer’s handbook or policy manual.” *Id.* Abbott was an at-will employee, and has presented no evidence of an illegal discharge. Therefore, the district court correctly ruled as a matter of law that she did not suffer a constructive discharge.

IV. Conclusion

First, we conclude the district court correctly refused to consider juror statements regarding subjects inhering in the verdict. Second, the jury award for past and future physical and mental pain and suffering was supported by substantial evidence and was not excessive. Third, the district court correctly refused to allow Abbott to amend her pleading. Fourth, Abbott failed to present evidence supporting jury instructions on either punitive damages or lost wages. Finally, the district court correctly concluded as a matter of law that Abbott did not suffer a constructive discharge. The district court’s ruling is affirmed.

AFFIRMED.