**IN THE COURT OF APPEALS OF IOWA**

No. 7-596 / 06-1554
Filed December 12, 2007

**DANA WAYNE KONO, d/b/a DANA KONO SALON and also d/b/a DANA KONO,**
Plaintiff-Appellee,

**vs.**

**LAWRENCE R. MEEKER and CAROLE J. MEEKER, d/b/a ANTIQUES OF A MECHANICAL NATURE and also d/b/a PATENTED ANTIQUES.COM,**
Defendants-Appellants.

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Appeal from the Iowa District Court for Polk County, Richard G. Blane II, Judge.

The defendants appeal from the judgment entered against them on the plaintiff's action for defamation, invasion of privacy, and intentional infliction of emotional distress. **AFFIRMED.**

Margaret Callahan of Belin Lamson McCormick Zumbach Flynn, Des Moines, for appellant.

David Phipps of Whitfield & Eddy, Des Moines, for appellee.

Heard by Vogel, P.J., and Mahan and Zimmer, JJ.

**VOGEL, J.**

The defendants appeal from the judgment entered against them on the plaintiff's action for defamation, invasion of privacy, and intentional infliction of emotional distress. We affirm.

**Background Facts.**

Larry and Carole Meeker are California residents who are in the business of buying and selling antiques. They do so under the name of "Antiques of a Mechanical Nature." Dana Kono is an Iowa resident and hair stylist, whose hobbies include the collection of antique woodworking tools and scientific instruments. Through telephone conversations in March 2003, Kono and Larry reached an oral agreement whereby Kono would send the Meekers a surveying transit in exchange for seven crank handle chisels from the Meekers.

The Meekers and Kono shipped the chisels and transit, respectively, in early March of 2003. A short time after the Meekers received the transit, Kono phoned to inquire whether it was satisfactory. Kono claimed Meeker told him "the deal would work out fine." For his part, Meeker claimed that he asked Kono why he hadn't mentioned that the transit was Japanese and, in particular, why he hadn't informed Meeker that the name "Sokkisha" appeared on the transit. He claims to not have immediately accepted the trade but, wanting more time to investigate the value of the transit, made a comment to the effect that "something could be worked out."

With no further communication, Meeker returned the transit to Kono on March 10, in the same packaging in which Kono had sent it. Kono received the package on March 14, but declined delivery, claiming concern about the status of

the box's contents based on its poor shipping condition. On March 17, Kono sent the Meekers an email advising them of his refusal to accept return of the transit. Telling the Meekers he considered their actions of returning the transit without any further discussion "arrogant and inconsiderate," Kono also warned the Meekers against trying to bill his credit card account.[1] Later that evening, Meeker responded by email. He stated that "it was not a done deal until I saw [the transit]." Meeker claimed that because he was not informed the transit was "an obsolete Japanese transit," that it was not the type of transit for which he had contracted. He thus requested that Kono return his chisels. Over the course of the next several days, Meeker sent Kono a series of profane and threatening emails, and made several hostile telephone calls.

In one email, Meeker warned Kono that he was going to put up a "special page" on his website "fully describing the incident, and your problems." In an email sent March 24, Meeker advised that the "watch page" had been posted on the web. He also wrote "I would imagine your name will begin appearing with regularity in searches on Google." An April 11 email from Meeker indicated the page had "made the top of the Google search list" and stated that he was "so PROUD!!!" That watch page remained posted on the Internet for approximately eight months, until November 2003.

In particular, that web page, entitled the "Dana Kono Watch Page," explained that it was intended "as a service" to all "who may have occasion to do business with" Dana Kono. Among other things, it called Kono an "admitted liar" and a "thief who stole $700.00 worth of merchandise from me using deception

[1] The Meekers had Kono's credit card number from an earlier transaction.

and lies." It then recounted, from the Meekers' point of view, the facts of the transaction involving the transit and the chisels. A number of selections from the parties' email conversations were then excerpted and posted on the watch page. A separate paragraph points out a word in Kono's email address, "belial," asserting the dictionary definition was "the personification of evil or the fallen one" and a "telling choice of names." Meeker also recommended that people not use Kono as a hair stylist. He claimed Kono "has a problem with the truth, with facts, and it seems with alcohol. Simply stated, he is a flat-out liar, thief and cheat." The watch page also labeled Kono as a "drunk" who is "in the denial stages of his problem, so beware if you are about to do business with this individual . . . ." Finally, the watch page stated

> [t]his sort of slimy little weasel usually only ventures out under the cover of darkness or through the anonymity or over great distances like over the internet to do business. One can see/sense and oftentimes smell the deceit and air of dishonesty that these types give off when you meet them in person. Beware!!

**Proceedings.**

On May 15, 2003, Kono filed the present lawsuit alleging defamation, false light invasion of privacy, and intentional infliction of emotional distress. The defamation and false light claims were based exclusively on the content of the Meekers' watch page, while the emotional distress claim was based on a combination of the emails, telephone calls, and the web page. The Meekers counterclaimed for fraudulent misrepresentation.[2] Following a trial, the jury

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[2] On April 12, 2005, on the Meekers' motion for summary judgment, the district court ruled the verbal contract between the parties was a nullity and ordered Kono to return the chisels and accept return of the transit from the Meekers. In all other respects, the motion was denied.

returned a verdict in favor of Kono, awarding compensatory damages of $150,000 for defamation, $50,000 for invasion of privacy, and $50,000 for intentional infliction of emotional distress. It also awarded Kono $125,000 in punitive damages against each of the Meekers. The jury rejected the Meekers' fraudulent misrepresentation counterclaim.

The Meekers appeal from this verdict, seeking a new trial. They first claim the "verdicts are contrary to the weight of the evidence and reflect impermissible considerations." They also assail the damage awards, contending they are "flagrantly excessive and reflect prejudice, rather than the relevant evidence." They next assert the "trial process was fatally flawed as a result of improper jury argument and erroneous admission of prejudicial evidence." Finally, in the alternative, they argue that the punitive damages are excessive and should be reduced.

**Motion for New Trial.**

*Issues Not Preserved for Appellate Review.* The Meekers advance a number of very specific reasons as to why the court erred in refusing to grant a new trial. However, we conclude a number of them have not been preserved for our review. Fairness and considerations of judicial economy dictate that we do not consider a claim for the first time on appeal. *State v. Sanborn*, 564 N.W.2d 813, 815 (Iowa 1997). Issues must be presented to and passed upon by the district court before they can be raised and decided on appeal. *State v. Eames*, 565 N.W.2d 323, 326 (Iowa 1997). A motion for new trial is generally not sufficient to preserve error when no objections were made at trial. *Hobbiebrunken v. G & S Enterprises, Inc.*, 470 N.W.2d 19, 23 (Iowa 1991).

The following specific claims, which are now asserted on appeal, were not raised in the Meekers' motion for new trial or addressed by the trial court in its ruling on the motion: (1) that certain references on the watch page constituted "protected speech" in that they were mere "rhetorical hyperbole"; (2) that Kono's counsel's urging to the jury to "disregard the facts related to the trade of antiques" was improper; (3) that Kono's counsel's characterization of the Meekers' actions as a "jihad" was inflammatory; (4) that Kono's invocation of the "Golden Rule" regarding his reputation damages was improper; (5) that Kono's counsel's "personal guarantee" and invocation of his own credibility was improper. Furthermore, the Meekers did not contemporaneously object to grounds (1), (2), (4), and (5). Accordingly, we do not address them on appeal.

*Scope of Review.* On the issues preserved, the parties agree that our review is for an abuse of discretion. In ruling on motions for new trial, the trial court has broad, but not unlimited, discretion in determining whether the verdict effectuates substantial justice between the parties. *Gorden v. Carey*, 603 N.W.2d 588, 590 (Iowa 1999).

*Weight of the Evidence.* The Meekers assert generally the verdicts are "contrary to the weight of the evidence" and that a new trial is "required to prevent a miscarriage of law and promote justice." We view the evidence in a light most favorable to the verdict, and consider only the evidence favorable to the plaintiff, whether it is contradicted or not. *Estate of Pearson v. Interstate Power & Light Co.*, 700 N.W.2d 333, 345 (Iowa 2005). Upon our review of the record, we conclude the court did not abuse its discretion in denying the

Meekers' motion for new trial on this ground as there is sufficient evidence to sustain the verdict.

The Meekers' lengthy watch page quite explicitly accused Kono of being a disreputable person who makes business dealings while under the influence of alcohol. The watch page lead off with this warning:

> I am posting this page on my site as a service to all fellow tool collectors, tool dealers or other unsuspecting people who may have occasion to do business with this individual Dana Kono, an admitted liar and now thief who literally stole $700.00 worth of merchandise from me using deception and lies. In addition it seems he has no honor and I believe is the type of person that should be avoided in all manner of business dealings.

This watch page clearly was, in large part, intended to dissuade third parties from doing business with Kono both with regard to antiques and with regard to his hair styling business. While Meeker claims the assertions were "tongue in cheek," the jury was well within its fact-finding role to conclude otherwise. The accusations made on the web page constitute more than mere "name calling" or venting personal frustrations, and reflect the Meekers' determined attempt to tarnish Kono's reputation and his business.

These accusations go to the heart of a defamation claim, which is described as the "malicious publication . . . in writing . . . tending to injure the reputation of another person or to . . . injure [the person] in the maintenance of [the person's] business." *Vinson v. Linn-Marr Cmty. Sch. Dist.*, 360 N.W.2d 108, 115 (Iowa 1984). The Meekers' claims can accurately be described as "attacking a person's moral character or integrity . . . ." *Id.* (defining libel per se). We affirm the district court's denial of a new trial as there is sufficient evidence to support the jury's verdict.

*Damages.* The Meekers next aver that a new trial was warranted because the damage awards were excessive and reflect prejudice. They ask this court to review both the punitive and compensatory damage awards. As a preliminary matter, the amount of damages awarded is peculiarly a jury, not a court, function. *See Yoch v. City of Cedar Rapids*, 353 N.W.2d 95, 98 (Iowa Ct. App. 1984). A jury's assessment of damages should be disturbed "only for the most compelling reasons." *Rees v. O'Malley*, 461 N.W.2d 833, 839 (Iowa 1990). The jury's verdict should not be set aside or altered unless the plaintiff proves the verdict: (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 the result of passion, prejudice or other ulterior motive; or (4) is lacking in evidential support. *Schmitt v. Jenkins Truck Lines, Inc.*, 170 N.W.2d 632, 659 (Iowa 1969).

*Compensatory Damages*. We conclude the district court did not abuse its discretion in failing to grant a new trial, as it properly found the compensatory damage awards were not excessive. Kono produced evidence that the Meekers' watch page, as partially set forth above, had the apparent and intended effect of hurting his hair styling business. Because this watch page was posted on the World Wide Web, it was open to anyone, including by people merely searching for information about his hair styling business. Susan Raibikis, a long-time client, entered a "Google" search of "Dana Kono" simply to retrieve Kono's salon's telephone number. She testified the Meekers' watch page came up on the search, and "it was very unsettling." After reading the watch page, she was so concerned about the Meekers' claims of Kono's lying, cheating, drinking and potential "devil worship," that she decided to stop using Kono as her family's hair

stylist. In addition to this anecdotal incident, Kono produced other evidence of his lowered reputation in the community and decrease in income from his salon business. Kono also perceived that tool collectors were “cooler” toward him in subsequent transactions following the publication of the watch page. Emails were introduced which Kono had received from various individuals who had read Meekers’ warnings, and suggested Kono change his ways. The record also included testimony regarding Kono’s personality change, increased stress and fear for the safety of his family. We affirm the district court’s conclusion that the evidence supports the jury verdicts on compensatory awards.

*Punitive Damage Awards.* We further affirm the district court conclusion the punitive damage awards against both Larry and Carole Meeker were not excessive, and thus not grounds for a new trial. When analyzing a claim of excessive punitive damages, we look to the relationship between the punitive damages award and the wrongful conduct of the offending party. *Economy Roofing & Insulating v. Zumaris*, 538 N.W.2d 641, 652 (Iowa 1995). We allow punitive damages to punish the defendant and to deter the defendant and like-minded persons from committing similar acts. *Id.* at 654. The watch page created by the Meekers was posted on the Internet for over eight months and the record supports that it achieved its intended effect of discouraging others from doing business with Kono. The award reflects the offensive conduct and level of damage caused by the Meekers. Under these circumstances, a punitive damage award of $125,000 against each defendant is not flagrantly excessive.

Carole asserts there is insufficient evidence for the punitive damage verdict against her; however, she testified that she was a partner with Larry in

their antique business. In addition, she was aware of the dispute, and that the content of the phone calls her husband placed to Kono had her “full authority,” as representing her thoughts on the situation. Carole reviewed the profane and threatening emails prior to Larry sending them to Kono and participated in constructing the web page. In her testimony she accepted the content of the Dana Kono Watch Page as part of her own making. The district court did not abuse its discretion in failing to set aside the jury’s verdict as to Carole Meeker.

*Improper Argument and Prejudicial Evidence.* Finally, the Meekers claim a new trial should have been granted due to improper arguments made by Kono’s trial counsel and because of the erroneous admission of prejudicial evidence. We have already determined they have failed to preserve for appellate review some claims under this heading. Upon our review, we affirm the district court’s assessment that there was no prejudicial error such that a new trial would have been warranted.

**Request to Modify Damage Awards.**

The Meekers next request that, in the event we reject their claim the court erred in denying them a new trial, this court should modify the damages awards in order to “eliminate excessiveness and duplication.” They assert that the punitive damage award is “unconstitutionally excessive and bears no relation to their conduct and to the need to punish.” In addition, they claim a portion of the compensatory damage award is duplicative.

*Punitive Damages.* Appellate review for unconstitutional excessiveness is de novo. *Wolf v. Wolf*, 690 N.W.2d 887, 894 (Iowa 2005). An appellate court reviewing a punitive damage award for excessiveness should consider three

"guideposts." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75, 116 S. Ct. 1589, 1598, 134 L. Ed. 2d 809, 826 (1996). These guideposts are:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

*State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S. Ct. 1513, 1520, 155 L. Ed. 2d 585, 601 (2003).

The district court characterized the Meekers' conduct as "offensive," and the record supports that it was willful and wanton, and not accidental or inadvertent. The jury awarded Kono $250,000 in compensatory damages. This is the same amount of punitive damages awarded by the jury. This ratio of 1/2:1 as to each defendant is not so excessive that it should require remittitur of the punitive damage award.

*Compensatory Damages.* We conclude the compensatory damage award is supported by substantial evidence, and is neither excessive nor duplicative. The jury was instructed that a "party cannot recover duplicate damages" and that it should not "allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage." We presume the jury followed the court's instructions. *State v. Piper*, 663 N.W.2d 894, 915 (Iowa 2003).

While Kono's defamation and false light claims were based exclusively on the content of and statements made on the watch page, the invasion of privacy claim was broader, encompassing the watch page, the emails, and the phone conversations. The jury permissibly could have found separate damages on that

ground. Moreover, the jury could have found certain false-light damages flowed from the non-defamatory portions of the watch page. Accordingly, we refuse to interfere with the compensatory damage awards. As the district court found, “the jury verdict of May 26, 2006, does effectuate substantial justice between the parties.”

**AFFIRMED.**