DA 18-0347

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 109N

JEANETTE JERGENS,

Plaintiff, Appellant, and Cross-Appellee,

v.

MARIAS MEDICAL CENTER, BOARD OF COUNTY COMMISSIONERS OF TOOLE COUNTY, and MARY FRYDENLUND,

Respondents, Appellee, and Cross Appellants.

APPEAL FROM: District Court of the Ninth Judicial District,
In and For the County of Toole, Cause No. DV-2016-046
Honorable Robert G. Olson, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Joanne DeLong, Attorney at Law, Somers, Montana

For Appellee:

Mark F. Higgins, MACo Defense Services, Helena, Montana

Submitted on Briefs: March 20, 2019

Decided: May 7, 2019

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Plaintiff/Appellant/Cross-Appellee Jeanette Jergens (Jergens) appeals the orders of the Ninth Judicial District Court, Toole County, dismissing her claims of invasion of privacy and defamation against Defendant Mary Frydenlund (Frydenlund). Defendants/Cross-Appellants Board of County Commissioners of Toole County and Marias Medical Center (MMC) cross-appeal the jury's verdict finding that Jergens was wrongfully terminated from MMC and the District Court's admission into evidence records of Jergens's earnings produced on the morning of trial. We affirm.

¶3 Jergens was a certified surgical technologist at MMC for over twenty years. In 2015, Jergens was accused of bullying and abusive behavior at work. MMC placed Jergens on paid administrative leave and hired an outside investigator, Michele Puiggari (Puiggari), to investigate the allegations against Jergens. As part of her investigation, Puiggari contacted Jergens's former supervisor at MMC, Frydenlund, for information regarding Jergens. Frydenlund sent Puiggari a four-page letter which detailed her numerous complaints about Jergens, both at work and regarding her personal life. Frydenlund then sent an unsolicited copy of her letter to Fred Paoli (Paoli), an attorney representing Dr.

Robert Clary (Dr. Clary) in a wrongful discharge suit against MMC. After Puiggari completed her investigation and issued a report, MMC fired Jergens.

¶4 In 2016, Jergens filed suit alleging, in relevant part, defamation and invasion of privacy against Frydenlund, and wrongful discharge by MMC. The District Court dismissed the invasion of privacy claim on summary judgment, while the defamation and wrongful discharge claims went to trial. The District Court ultimately dismissed the defamation claim after the close of Jergens's evidence on an M. R. Civ. P. 50(a) motion for judgment as a matter of law, and only the wrongful discharge claim against MMC went to the jury. The jury found that Jergens was wrongfully discharged by MMC and awarded her $71,074.50 in lost wages and $9,687.50 in lost benefits.

¶5 We review summary judgment orders de novo, performing the same M. R. Civ. P. 56 analysis as the district court. *Ray v. Connell*, 2016 MT 95, ¶ 9, 383 Mont. 221, 371 P.3d 391. Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Hughes v. Lynch*, 2007 MT 177, ¶ 8, 338 Mont. 214, 164 P.3d 913. "We will affirm the district court when it reaches the right result, even if it reaches the right result for the wrong reason." *Talbot v. WMK-Davis, LLC*, 2016 MT 247, ¶ 6, 385 Mont. 109, 380 P.3d 823 (citations omitted).

¶6 The District Court granted Frydenlund's summary judgment motion regarding Jergens's invasion of privacy claim stemming from Frydenlund's letter. The District Court found that the invasion of privacy claim was both barred by a provision of Montana's

Wrongful Discharge From Employment Act (WDEA), specifically § 39-2-905, MCA, and that the "publication requirement for an invasion of privacy claim cannot be met."

¶7 Frydenlund's letter accused Jergens of frequently padding her hours on timesheets. Because Frydenlund was Jergens's former supervisor, she had non-public knowledge of Jergens's employment history. Jergens asserts that it was therefore an invasion of her privacy for Frydenlund to publish her letter to Paoli. The Restatement (Second) of Torts addresses public disclosure of private facts as follows:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.

Restatement (Second) of Torts, § 652D (Am. Law Inst. 1979). An invasion of privacy claim necessarily requires more than just publication, it requires *publicity*. While publication occurs simply through communication to a third party, publicity "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." Restatement (Second) of Torts, § 652D cmt. a.

¶8 The undisputed facts of this case show that the publicity requirement to maintain an invasion of privacy claim cannot be met. The only two people who were confirmed to have seen the letter in question are Puiggari and Paoli. Puiggari, as MMC's hired investigator, clearly had a right to see Frydenlund's claims regarding Jergens's time sheets. Paoli was

unconnected to the matter, however, it is not an invasion of privacy "to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons." Restatement (Second) of Torts, § 652D cmt. a. Because there was no publicity, there is no invasion of privacy. Because we uphold the District Court for reaching the right result for the wrong reason, it is unnecessary to address any WDEA preemption arguments. *Talbot*, ¶ 6.

¶9 We review a district court's M. R. Civ. P. 50 decision granting judgment as a matter of law de novo. *Wagner v. MSE Tech. Applications, Inc.*, 2016 MT 215, ¶ 15, 384 Mont. 436, 383 P.3d 727. "A district court should grant judgment as a matter of law only where there is a complete lack of any evidence which would justify submitting an issue to the jury, considering all evidence and any legitimate inferences that might be drawn from it in a light most favorable to the opposing party." *Wagner*, ¶ 15 (citing *Deonier & Assocs. v. Paul Revere Life Ins. Co.*, 2004 MT 297, ¶ 18, 323 Mont. 387, 101 P.3d 742).

¶10 After the close of Jergens's case-in-chief, the District Court granted Frydenlund's M. R. Civ. P. 50 motion for judgment as a matter of law regarding Jergens's defamation claim. The District Court found that Jergens did not prove causation, because no evidence was put forth showing that Frydenlund's letter caused any damage to Jergens. We agree. Jergens points to several examples of negative treatment she received in her briefing, but each example provided either occurred prior to Frydenlund sending the letter to Paoli or Jergens herself testified to the treatment being unrelated to the claims in Frydenlund's

letter. The District Court correctly granted Frydenlund's motion for judgment as a matter of law as Jergens could provide no examples of damage to her reputation due to the letter.

¶11 "In reviewing a jury verdict, we do not decide whether the verdict was correct or whether the jury made the right decision. We only review whether there is substantial credible evidence in the record to support the jury's verdict." *Campbell v. Canty*, 1998 MT 278, ¶ 17, 291 Mont. 398, 969 P.2d 268 (internal citation omitted). "[A] jury verdict may be overturned only in the complete absence of any credible evidence to support it." *Papich v. Quality Life Concepts, Inc.*, 2004 MT 116, ¶ 34, 321 Mont. 156, 91 P.3d 553. "All evidence and all inferences drawn from the evidence must be considered in a light most favorable to the adverse party and, if conflicting evidence exists, the credibility and weight given to the evidence is within the province of the jury and will not be disturbed unless the jury's findings are inherently impossible to believe." *Papich*, ¶ 29 (citing *Campbell*, ¶ 19).

¶12 The only issue before the jury in this case was whether MMC had good cause to fire Jergens. Trial in this matter lasted for five days. Sixteen witnesses testified. The jury determined that MMC did not have good cause to fire Jergens. MMC now asks this Court to come in after the fact and declare that the jury's verdict is impossible to believe and should be overturned.

¶13 Under the WDEA, a discharge is wrongful if it was not for good cause. Section 39-2-904(1)(b), MCA. The WDEA defines "good cause" as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason." Section 39-2-903(5), MCA.

"A legitimate business reason is a reason that is neither false, whimsical, arbitrary or capricious, and it must have some logical relationship to the needs of the business." *Buck v. Billings Mont. Chevrolet*, 248 Mont. 276, 281-82, 811 P.2d 537, 540 (1991).

¶14 At trial, Jergens made the case that the reasons behind her firing were "false, whimsical, arbitrary, or capricious" because some of the behavior ascribed to her by others and cited as reasons for her firing was false, some behavior was common among employees, and some behavior had already been punished years before her termination. MMC made the case that its reasons for firing Jergens were entirely legitimate. Sixteen witnesses testified with conflicting evidence. In the end, the jury believed Jergens. There is not a "complete absence of any credible evidence" to support the jury's verdict, and therefore we will not disturb it. *Papich*, ¶ 34.

¶15 Relatedly, MMC also asserts that a new trial is warranted due to Dr. Clary's name resurfacing during jury deliberations. The jury sent a note to the District Court asking, in relevant part, "why is Dr. Clary on the Bailiffs jury room activity[?]" After discussing both what the jury's question meant and what response should be given with counsel for both Jergens and MMC, the District Court wrote back that "Dr. Clary was originally sued for defamation. He was later dismissed from the law suit." When the District Court drafted this response, he asked both counsel what they thought. Counsel for MMC stated "I think that's fair." When asked if he objected to sending this response, counsel for MMC stated "[n]o objection." Dr. Clary was originally sued by Jergens for defamation in relation to the Frydenlund letter, but he was dismissed by the District Court early in the proceedings.

Dr. Clary's name remained on the case caption throughout because no one ever moved to amend the caption. MMC asserts that the mere sight of Dr. Clary's name by the jury was prejudicial due to Jergens's theory of the case, but there is no evidence to support this. The District Court answered the jury's question about Dr. Clary's name appearing on paperwork without objection from MMC, and a new trial is not warranted.

¶16 Finally, MMC asks us to reverse and remand for a new trial due to Jergens's late production of wage evidence. In discovery, Jergens provided MMC with evidence of her wages from the time of her termination until September 2017. MMC asked for supplementation, which Jergens did not provide until the first day of trial on May 14, 2018. Counsel for MMC objected to the admission of this evidence but did not ask for a continuance.

¶17 "For the District Court to be reversed for improperly admitting evidence, substantial prejudice to the complaining party must be shown." *Green v. Green*, 181 Mont. 285, 293, 593 P.2d 446, 451 (1979); *see* M. R. Evid. 103. Jergens started a new job in January 2018 and had a duty to supplement her discovery responses regarding her wages with this information. She did not provide it to MMC until the morning of the first day of trial. While this is undoubtedly bad practice, MMC has not shown that it was substantially prejudiced by the late production of this evidence. MMC did not ask for a continuance of trial after receiving the evidence and its cross-examination of Jergens regarding the evidence did not occur until the second day of trial. MMC was not substantially prejudiced by the admission of this wage evidence and a new trial is not warranted.

¶18 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶19 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ DIRK M. SANDEFUR
/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE