IN THE COURT OF APPEALS OF IOWA

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AMY E. CRONER,	)	FILED
Plaintiff-Appellee/ Cross-Appellant,	)	APR 2 0 1988
vs.	)	CLERK SUPREME COURT
AMERICAN STERILIZER COMPANY,	)	
Defendant-Appellant/ Cross-Appellee.	)	
AMERICAN STERILIZER COMPANY,	)	
Cross-Claimant,	)	
vs.	)	
TERRY L. HOPPER,	)	7-462 86-665
Cross-Claimant Defendant.	)	
TERRY L. HOPPER,	)	
Cross-Claimant,	)	
vs.	)	
AMERICAN STERILIZER COMPANY,	)	
Cross-Claimant Defendant.	)	

Appeal from the Iowa District Court for Clay County (20607), Murray S. Underwood, Judge.

Defendant has appealed the judgment against it, challenging the sufficiency of the evidence to support a punitive damage award and plaintiff has cross-appealed, contending the district court erred by disallowing prejudgment interest on the punitive damage award. **REVERSED.**

David A. Scott of Cornwall, Avery, Bjornstad & Scott, Spencer, for defendant-appellant/cross-appellee.

John G. Martens of Sanderson, Ridout & Martens, Estherville, for plaintiff-appellee/cross-appellant.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ., but considered en banc.

HAYDEN, J.

Defendant, American Sterilizer Company (AMSCO), appeals the punitive damages portion of the judgment entered against it in the district court. AMSCO asserts the district court erred by denying its motion for judgment notwithstanding the verdict. AMSCO contends there was no substantial evidence to warrant submission to the jury of the issue of punitive damages. Plaintiff, Amy Croner, cross-appeals, asserting the district erred by disallowing prejudgment interest on the punitive damages award.

On July 30, 1981, Croner sustained a serious facial burn caused by three to five minutes of constant contact with her dentist's drill during surgery to have her wisdom teeth removed. The burn subsequently left a permanent scar near the corner of her mouth. Croner brought suit against the dentist, Dr. Terry Hopper, and AMSCO, the manufacturer of the drill. Croner and Dr. Hopper reached a settlement agreement.

At trial, the jury found that Croner was entitled to recover $15,000 in damages proximately caused by the negligence of Dr. Hopper and AMSCO. The jury apportioned 50% of the fault to each defendant. The jury also awarded Croner $75,000 in punitive damages from AMSCO. AMSCO then filed its motion for judgment notwithstanding the verdict on the issue of punitive damages. The motion was denied by the district court and this appeal followed. Our scope of review is for the correction of errors at law. Iowa R. App. P. 4.

AMSCO asserts there was not substantial evidence to support the award of punitive damages. Punitive damages may be awarded upon a showing of either actual or legal malice. See Feeney v. Scott County, 290 N.W.2d 885, 892 (Iowa 1980). Legal malice, alleged here by Croner, may be established by showing wrongful or illegal conduct committed or continued with willful

or reckless disregard of plaintiff's rights. Earl v. Clark, 219 N.W.2d 487, 491 (Iowa 1974). Recklessness has been defined as meaning:

> [M]ore than negligence, more than the want of ordinary care. It means, proceeding with no care coupled with disregard for consequences. The acts must manifest a heedless disregard for or indifference to the rights of others in the face of apparent danger or be so obvious the operator should be cognizant of it, especially when the consequences of such actions are such that an injury is a probability rather than a possibility. Recklessness may include willfulness or wantonness, but if the conduct is more than negligence it may be reckless without being willful and wanton. We have required evidence of a persistent course of conduct to show no care with disregard of consequences. If it were not so required, we would be allowing an inference of recklessness from every negligent act.

Vipond v. Jergensen, 260 Iowa 646, 650, 148 N.W.2d 598, 600-01 (1967).

Croner contends she introduced substantial evidence showing AMSCO engaged in a persistent course of negligent conduct with no regard for the damaging consequences. The record reflects AMSCO marketed its drill as requiring no maintenance or lubrication by the user. AMSCO apparently did not, however, inform prospective buyers the drill would periodically need to be sent in for routine servicing. AMSCO merely told buyers that when the drill began to lose speed and torque it should be sent in for servicing. This servicing should have taken place every year to eighteen months, for eighteen months was the designed maintenance-free lifetime of the drill. In this case, the drill had not been serviced for approximately twenty-three months. Croner contends this lack of maintenance, caused by AMSCO's negligent misrepresentations to Dr. Hopper, resulted in the collet bearings in the drill failing. This failure allegedly caused the drill to overheat. AMSCO does not dispute failure of the collet bearings would cause the drill to overheat. AMSCO does dispute whether it knew or was recklessly unaware its drill had a propensity to dangerously overheat due to collet bearing failure before the motor failed or began to fail.

AMSCO believed the life of the collet bearings was 2900-3200 hours of use and the life of the drill's motor was 50-60 hours of use. When the drill's motor began to fail the drill would lose speed and torque. Approximately ninety percent of the drills repaired by AMSCO had been sent in due to motor failure. Thus, AMSCO's instructions to buyers to send the drill in for servicing when it began to lose speed and torque, although negligent for not specifying the appropriate maintenance schedule, did not evince a "heedless disregard for or indifference to the rights of others in the face of apparent danger." Id. Patient injury caused by collet bearing failure was simply not a probability rather than a possibility, particularly under the facts of this case. It was not disputed Dr. Hopper negligently used the drill as a retractor, a purpose for which it was not designed. This negligent use brought the drill into constant contact with Croner's skin for three to five minutes. Ordinary use would have brought the drill into contact with her skin only intermittently.

There is not substantial evidence in this record AMSCO engaged in reckless or malicious conduct in disregard of Croner's rights. Therefore, AMSCO has not acted with actual or legal malice.

Based on the foregoing, we conclude the district court erred by denying AMSCO's motion for judgment notwithstanding the verdict on the issue of punitive damages. Under this disposition of the case, we need not determine whether the district court erred by disallowing prejudgment interest on the punitive damages award.

REVERSED.