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Supreme Court of South Dakota.

Rick FREY, Plaintiff and Appellant,
v.
Kerry KOUF, Defendant and Appellee.

Considered on Briefs Feb. 11, 1992.Decided April 22, 1992.

WUEST, Justice.

Plaintiff Frey (Frey) brought a cause of action against Defendant Kouf (Kouf) on the alternate theories of "intentional assault" (battery) and "negligent assault" (negligence). The matter was tried before a jury. The jury found in favor of Kouf, and the trial court entered a judgment dismissing the plaintiff's complaint. Frey made a timely motion for new trial and, in the alternative, for a judgment notwithstanding the verdict. The trial court denied those motions. Frey appeals to this court raising the following issues:

Whether the trial court erred in instructing the jury on the definition of "intent" within the context of civil proceedings.

Frey and Kouf were friends and business associates. They bought and sold cars together and jointly owned property, including boats and an airplane. On March 12, 1990, Frey and Kouf met at a bar in Rapid City, South Dakota. Both men arrived at the bar sometime between 4:00 P.M. and 5:00 P.M. Both men consumed alcoholic beverages. The bartender testified both men drank steadily throughout the evening. A cocktail waitress testified they were intoxicated. Both men discussed a mutual business arrangement. The conversation became rather heated at times. Both men used profanity. At one point, the owner of the bar admonished both men to quiet down. The situation then seemed to resolve itself. Frey and Kouf had been sitting at the same table next to each other during their discussion. Subsequently, Frey moved to a seat further away from Kouf but still at the same table. Frey testified his move was caused by a feeling of tension which then existed between Frey and Kouf as a result of their animated discussion. The evidence concerning what happened next was highly conflicting.

Dawn Anderson (Anderson), a waitress at the bar, testified as follows. Shortly after she completed her shift, she was seated in the bar having an "after-work drink." While she was having her drink, she heard the discussion at the table where Frey and Kouf were seated get louder. She then observed Kouf stand up very quickly, his chair sliding into the wall, and proceed around the table with a glass in his hand. Kouf then hit Frey in the face with the glass. Anderson denied that Kouf threw the glass. She also denied having seen Kouf throw the glass on the table causing it to ricochet into Frey's face. After Kouf hit Frey in the face with the glass, Anderson saw Frey fall out of the chair. At this point, she testified Kouf was "right on top of him and was kicking the back of him." Anderson saw Kouf kick Frey in the back two or three times. Anderson testified the incident happened very quickly, and that, prior to the occurrence, there was no indication it was about to happen. At no time, did Anderson hear Frey threaten Kouf nor did she see Frey fight back.

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Two other witnesses testified that, although they did not see the actual injury take place, Frey did not physically provoke Kouf. They also stated the incident occurred without warning. Kouf himself testified Frey did not threaten him with physical harm.

Kouf testified the time of the incident was "one of the angriest moments" of his life, that throwing the glass was his way of "venting his frustrations," and that he saw his "life unraveling" moments before the incident occurred. Kouf testified he was losing his business, his marriage was on the rocks, he was probably going bankrupt, and he vented these frustrations by picking up the bar glass and throwing it "in [Frey's] direction." Kouf denied "smashing" the glass into Frey's face. Kouf's attorney asked Kouf, "when the glass left your hand, did you intend to strike him in the face?" Kouf answered, "I didn't intend to *hurt* Rick Frey, that was not my intention." (Emphasis added). Later, Kouf stated he did not intend to *hit* Frey with the glass. He also testified "I picked the glass up and I threw it as quick as I could." Kouf then testified that, when he threw the glass, he was looking down, and "wanted it to catch his attention that I was angry." Kouf admitted he got carried away and was not justified in hurting Frey.

LEGAL DEFINITION OF "INTENT."

We now turn to the merits of Frey's argument. Initially, the court instructed that jury battery is defined as "any willful and unlawful use of force or violence upon the person of another" and assault and battery is "an unlawful touching of the person of another...." The trial court then instructed the jury that wilfully "means intentionally." Then, as noted previously, the trial court, using the criminal pattern jury instruction, defined the word "intentionally" as follows:
The word 'intentionally' or any derivatives thereof as used in these instructions means *a specific design to cause a certain result.* (Emphasis added). In *VerBouwens v. Hamm Wood Products,* 334 N.W.2d 874 (S.D.1983) we held: [I]ntentional tortious conduct is when an ordinary, reasonable, prudent person would believe an injury was *substantially certain* to result from his conduct.... To establish intentional conduct, more than the knowledge and appreciation of risk is necessary; the known danger must cease to become only a foreseeable risk which an ordinary, reasonable, prudent person would avoid (ordinary negligence), and become a *substantial certainty. Id.* at 876 (citing *Spivey v. Battaglia,* 258 So.2d 815 (Fla.1972)) (emphasis changed). *Accord,* Restatement (Second) of Torts § 8A (1965).

In a battery cause of action, it is not necessary to prove the actor had a "specific design" to cause bodily contact. "The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids." W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser and Keeton on the Law of Torts,* 36 (5th Ed.1984) (footnote added). Here that result is an application of force upon the plaintiff's person. Intent "extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does." *Id.* at 35. *Accord* Restatement (Second) of Torts § 8A. By way of example, an actor who fires a bullet into a crowded room may desire that no one be hit, but if he knows it is substantially certain someone will be hit, the actor intends that consequence. *Prosser and Keeton, supra,* at 35.

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Intent is an essential element in an action for assault and battery. 6A C.J.S. *Assault & Battery* § 9 (1975). Thus, the definition of intent was crucial in determining Kouf's liability for battery. The jury was instructed that, to find Kouf liable, it must find Kouf had a specific design to cause the injury to Frey. That was an incorrect statement of the law. Instead, the jury should have been instructed that, to find Kouf liable, it need only find that Kouf acted with substantial certainty that bodily contact with Frey would occur-that Frey would be struck with the glass. *See VerBouwens,* 334 N.W.2d at 876; Restatement (Second) of Torts §§ 8A, 13.

Here, Kouf testified he was only six feet away from Frey. He admitted the moment was one of the "angriest moments" in his life and that he hurled the glass in Frey's direction while looking down. However, Kouf testified he did not desire to harm Frey, but merely wished to "get his attention." Moreover, Frey also testified he did not think Kouf would "intentionally" harm him. Indeed, the defense concentrated on proving Kouf was not a malicious person and did not mean to hurt Frey. The jury found for Kouf on the intentional tort theory. It is apparent the jury's focus was improperly deflected from the true intent requirement set out in *VerBouwens,* that is, whether a reasonably prudent person would have been substantially certain that bodily contact would result from Kouf's conduct.

"For this court to set aside a civil verdict because of an erroneous instruction, prejudice must be established.... The appellant must demonstrate that under the evidence the jury might have, and probably would have, returned a different verdict if a correct instruction had been given. *Glanzer,* 438 N.W.2d at 209. *See also Schelske v. South Dakota Poultry Co-op.,* 465 N.W.2d 187, 190 (S.D.1991); *Schmidt* 261 N.W.2d at 119. "A jury utilizing the *VerBouwens* standard of intent might have, and probably would have, concluded Kouf was liable for battery. Thus, the instruction given by the trial court was not only erroneous but was prejudicial as well.

MILLER, C.J., and, HENDERSON, SABERS and AMUNDSON, JJ., concur.