FILED
DEC 26 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

404

LEONA C. JOHNSON As Executor of the **MAURICE E. JOHNSON ESTATE,** and **LEONA C. JOHNSON,** Individually,	
Plaintiff-Appellant,	Filed December 26, 1984
vs.	
BEATRICE EDITH SWASAND and **FARMERS SAVINGS BANK,** Vincent, Iowa,	4-449 84-616
Defendants-Appellees.	

Appeal from the Iowa District Court for Webster County - Paul E. Hellwege, Judge.

Plaintiff appeals from the order overruling her motion for new trial in a negligence action. REVERSED AND REMANDED.

Russell S. Wunschel and Gary L. McMinimee of Wunschel, Eich & McMinimee, P.C., Carroll, for plaintiff-appellant.

Claire F. Carlson of Kersten, Opheim, Carlson & Trevino, Fort Dodge, for defendants-appellees.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

DONIELSON, J.

Plaintiff appeals from the order overruling her motion for new trial in a negligence action. She asserts: (1) that the jury's award of no damages was inadequate and unsupported by the evidence; (2) that an instruction permitting her to recover for aggravation of an unrelated injury should have been incorporated within a general instruction on damages; and (3) that costs should not have been taxed to her. We reverse and remand.

Leona Johnson sought damages, both as an individual and as executor of the estate of her husband, for injuries they sustained in an automobile accident. Prior to trial, defendants offered to confess a judgment in the amount of $50,000 in satisfaction of both claims. The offer was not accepted and the case was tried to a jury, which awarded the estate $35,000. Defendant Beatrice Swasand's negligence was found to be the proximate cause of injury to the plaintiff individually, however, she was awarded no damages. Judgment was entered accordingly with costs taxed to the plaintiff. Her motion for a new trial was overruled and plaintiff has appealed.

I.

Leona first argues that the trial court erred in denying her motion for new trial. Her motion was predicated on the ground that the award of the jury was inadequate.

The question of whether damages are so inadequate as to warrant a new trial is usually left for the trial court to decide. Householder v. Town of Clayton, 221 N.W.2d 488, 493 (Iowa 1974). The decision of the court will not be disturbed on appeal unless there is an abuse of discretion.

The adequacy of damages must be determined on the peculiar facts of the case. Precedence is of little value in this respect. Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 526 (Iowa Ct. App. 1977). Generally, however, "damages should be commensurate with the injury, and be sufficient to right the

wrong done to the injured party." Householder, 221 N.W.2d at 493. The determinative question is "whether under the record, giving the jury its right to accept or reject whatever portions of the conflicting evidence it chose, the verdict effects substantial justice between the parties." Kaufman v. Mar-Mac Community School District, 255 N.W.2d 146, 148 (Iowa 1977).

In the case before this court, the jury determined that the defendant driver's negligence was the proximate cause of injury to Leona. It is difficult to imagine a situation where someone is injured due to negligence and no damages are due. Yet this is what the jury determined and the trial court deemed a reasonable decision.

A review of the record admittedly reveals little evidence to demonstrate measureable damages incurred by Leona. Some testimony reflects that Leona suffered from fractured ribs and bruises as a result of the accident. However, the only treatment prescribed by Leona's physician was to apply heat to the injured area and to "take it easy."

Testimony also reflects that shortly after the accident, Leona saw her physician about a lump in her breast that was ultimately diagnosed as cancer. The doctor expressed the opinion that the accident had caused a delay in diagnosis and aggravated the cancer condition. Another treating doctor rejected this theory, suggesting that any such aggravation caused by the accident was conjecture.

We agree with the defendants' claim that much of the evidence concerning damages could have been appropriately rejected by the jury. The seriousness of Leona's injuries is arguably discounted by the fact that she did not seek treatment until June 2, 1981, approximately two weeks after the accident. Furthermore, the jury could have rejected the claim that there was a causal connection between the automobile accident and the aggravation of the cancer.

Even though such evidence could properly have been rejected by the jury, we cannot agree with the trial court's conclusion that Leona failed to prove any damages. Medical expenses, however minimal, were incurred as a result of the

accident. Leona went to her physician two weeks after the accident specifically because of her injuries and was billed accordingly on an outpatient basis. The record also reflects that Leona returned to her doctor for subsequent visits on a periodic basis. During these appointments, her doctor made notes concerning the condition of her ribs as well as the diagnosed cancer.

Essentially, this court recognizes that there was little evidence in the record concerning Leona's physical pain and suffering. Additionally, the extent of her injuries is subject to dispute. Yet the fact that some medical costs were incurred cannot be disputed; testimony and exhibits lend support to this conclusion. Accordingly, we find that the jury verdict is inadequate and remand for a new trial for a determination of damages.

II.

Plaintiff also argues that the trial court erred in instructing the jury on damages. As previously mentioned, the plaintiff contended at trial that her cancer condition was aggravated as a result of the automobile accident. Although the court instructed the jury regarding aggravation, it was not included as part of the damage instruction. Leona claims that "no juror, absent training in law, would recognize that [p]laintiff's suffering and disability due to aggravation of her cancer condition was a proper element for recovery." We are unpersuaded by this argument and do not find reversible error.

In Rumley v. City of Mason City, Iowa, 320 N.W.2d 648, 652 (Iowa Ct. App. 1982), we stated:

> Instructions must be read as a whole. Moose v. Rich, 253 N.W.2d 565, 571 (Iowa 1977). A party is not entitled to any particular form of instruction, but merely to instructions which fairly state the law as applied to the facts. Brigdon v. Brandrup, 267 N.W.2d 396, 401 (Iowa 1978); Heldenbrand v. Executive Council of Iowa, 218 N.W.2d 628, 637 (Iowa 1974).

Read as a whole, we believe the court adequately instructed the jury. The court specifically stated that Leona was entitled to recover upon a showing of

aggravation. This is all that is required. Since the allegation of aggravation was fairly and effectively put before the jury, we affirm on this issue.

III.

Plaintiff also argues that court costs should have been taxed against the defendant.

Costs were assessed against plaintiff in accordance with Chapter 677 of the Iowa Code. Section 677.7 provides that a defendant may "serve upon the plaintiff" an offer of judgment. Section 677.10 provides that "if the plaintiff fails to obtain judgment for more than was offered by the defendant, he cannot recover costs, but shall pay the defendant's costs from the time of the offer."

Defendants offered to confess judgment in the sum of $50,000, an amount greater than that awarded to the plaintiff at trial. Plaintiff argues on appeal that the defendants never offered judgment in accordance with section 677.7. She claims that since the language of the section refers to "plaintiff" in the singular, it is necessary to make separate offers to the separate plaintiffs. We disagree.

Statutes providing procedures for confessing judgments are designed to encourage the settlement of disputes and to prevent the accumulation of costs. They "should receive a liberal construction in furtherance of these objects." Sheer Construction, Inc. v. W. Hodgman and Sons, Inc., 326 N.W.2d 328, 333 (Iowa 1982). A liberal construction of Chapter 677 would indicate that it was appropriately applied in the case before this court.

While we are unpersuaded by plaintiff's argument, we find it unnecessary to base our ruling on this issue since damages have not been finally determined. However, upon remand, if the aggregate damages are determined to be less than $50,000, we believe it would be appropriate to assess court costs incurred after the offer was made against the plaintiff in accordance with section 677.10.

REVERSED AND REMANDED.