IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

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1-392
2-66833

GERTRUDE GINTHER,

Plaintiff-Appellee,

vs.

CITY OF DES MOINES, A Municipality,

Defendant-Appellant;

WEBSTER MILLS LEHMAN, An Individual; **EIGHTH STREET CORPORATION,** A Corporation; and **LEE OPTICAL COMPANY OF MISSOURI, INC., d/b/a CAPITOL OPTICAL COMPANY OF IOWA,** A corporation,

Defendants.

Appeal from Polk District Court, James P. Denato, Judge.

Defendant city appeals from the judgment entered on a jury verdict for plaintiff that resulted from the trial court's order requiring further deliberations because the jury had rendered a verdict below the stipulated special damages. AFFIRMED.

Thomas J. McSweeney, Assistant City Attorney, for defendant City.

Richard J. Sapp of Nyemaster, Goode, McLaughlin, Emery & O'Brien, P.C., Des Moines, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

Defendant-city appeals from the judgment entered on a jury verdict for plaintiff that resulted from the trial court's order requiring further deliberations because the jury had rendered a verdict below the stipulated special damages. We affirm.

Plaintiff, Gertrude Ginther, sustained personal injuries in a fall on May 13, 1978. In her petition she alleged her fall was caused by the City of Des Moines' negligence in maintaining the public sidewalks. She filed suit against the city to recover her medical expenses, lost wages and damages for pain and suffering.

The case was submitted to the jury on March 18, 1981. On the morning of March 19, 1981, the jury informed the court they were deadlocked at a vote of four to three. The trial court, without contacting counsel for either side, instructed the jury to continue deliberations. The jury continued to deliberate, and returned a verdict of $3000 for plaintiff. The trial court rejected the jury verdict of $3000 for the stated reason it was less than the stipulated special damages of $4650.71. After counsel for both parties were given an opportunity to make a record on the matter, the court reinstructed and resubmitted the case to the jury. The jury then returned a verdict of $5000. The defendant filed a motion for a new trial, which the court overruled on April 30, 1981.

The issue on appeal is whether the trial court erred in denying defendant's motion for a new trial after the trial court resubmitted the case for further deliberation because the jury returned a verdict below the stipulated special damages.

As a general proposition, trial courts are given wide latitude in ruling on requests for new trials. Iowa R. App. P. 14(f)(3); Wirtanen v. Provin, 293 N.W.2d 252, 257 (Iowa 1980).

In Reilly v. Straub, 282 N.W.2d 688 (Iowa 1979), the jury returned a verdict for plaintiff while indicating by the foreman's note that the defendant was not guilty of negligence or any wrongdoing. The trial court observed that the note was not compatible with the verdict and requested the jury to resume its deliberations after having read Instruction No. 12, which was the instruction on res ipsa loquitur. After further deliberations, the jury returned a verdict for plaintiff based on res ipsa loquitur. On appeal defendant claimed error in permitting further deliberations and in specifically directing attention to the res ipsa instruction. The supreme court held the trial court's procedure was not an abuse of discretion but was within its inherent power to manage the trial and jury and assure completion of its work. Reilly, 282 N.W.2d at 696.

The initial verdict being in an amount less than the stipulated special damages constituted an error of law similar to that reviewed in Reilly. We have reviewed the subsequent instruction given by the trial judge in the case at bar and find that it clearly allowed the jury to find for the defendant or for the plaintiff in an amount equal to or in excess of the stipulated special damages. As such, it is within the ambit of the procedure sanctioned in Reilly,

AFFIRMED.

All judges concur except Donielson, J., who dissents.

I dissent.

I believe this case should be decided in a manner consistent with Rueber v. Negles, 147 Iowa 734, 741-42, 126 N.W. 966, 970 (1910). In Rueber, the trial court sustained a motion by plaintiff and entered a judgment for $749 instead of $133.50 awarded plaintiff by the jury upon the theory that if the jury found for plaintiff at all it could not be less than the larger sum. The supreme court held this was error, stating:

> . . . . Even if the court had instructed the jury to return a verdict for plaintiff for $749 or nothing, and if the verdict actually returned by the jury for $133.50 had been rendered in the face of such instruction, even then the court could only set the verdict aside, except that it might impose a condition upon the defendant that he submit to the larger judgment or submit to a new trial. This is the utmost extent to which we have ever gone in such cases. It is argued that a finding in favor of the plaintiff for any sum is equivalent to a special finding that he was entitled to recover, and that, where the amount of his recovery was a mere matter of computation under the law, the court might state such amount in its instructions; and, if so, that it might equally insert the amount in the verdict after its return if the jury ignored such instruction. But if a jury were instructed to return a verdict for $749 or nothing, and if in the face of such instructions it returned a verdict for $133.50, it could as well be argued that the refusal of a jury to allow $749 was equivalent to a special finding that he was not entitled to recovery at all. So that a verdict for the plaintiff for a less amount than was warranted under the instructions might furnish ground to either party to ask that it be set aside.

I believe the stipulated special damages in this case make it more similar to Rueber v. Negles than to Reilly v. Straub, 282 N.W.2d 688 (Iowa 1979), which is relied upon by the majority. I do not agree with the majority's interpretation of Reilly, therefore, I would reverse and remand for a new trial.