

FILED

JUN 28 1979

CLERK SUPREME COURT

204

IN THE COURT OF APPEALS OF IOWA

JOHN KOPECKY, JR., ADMINISTRATOR)
OF THE ESTATE OF JOHN KOPECKY,)

Appellant,)

Filed June 28, 1979

vs.)

87

DEAN MARVIN HARTMAN and)
DANNY HARTMAN,)

2-62108

Appellees.)

Appeal from Linn District Court - Clinton E. Shaeffer, Judge.

Plaintiff, administrator of the estate of the decedent, appeals from a judgment in favor of the estate, alleging insufficiency of the evidence to support certain findings and inadequacy of the damage award. - Reversed and remanded.

Benjamin W. Blackstock, of Eells, Blackstock, Affeldt & Harms, Cedar Rapids,
for Appellant.

Michael S. Vestle, Cedar Rapids, for Appellees.

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

PER CURIAM

Plaintiff, administrator of the estate of John Kopecky, appeals from a judgment in favor of the estate, alleging that substantial evidence did not exist to support certain findings by the trial court and that, consequently, the damage award was insufficient. Plaintiff further claims that the trial court erred in failing to find that defendant acted willfully and maliciously and that, therefore, punitive damages were appropriate. In relation to this claim, plaintiff asserts that where punitive damages are appropriate, such damages may, under Iowa law, be imputed to the owner of a vehicle. We reverse on the issue of malice and remand for a new trial.

Plaintiff administrator is the son of John Kopecky. Kopecky was struck while crossing a street by a pick-up truck owned by Danny Hartman and driven by Dean Hartman, defendants in this action. Plaintiff claims that Dean Hartman was operating the truck with the consent of his brother, Danny, that Dean willfully and maliciously struck Kopecky, that Kopecky suffered serious, permanent injuries as a result of the accident, that Dean is liable for actual and punitive damages, and that both actual and punitive damages can be imputed to Danny. The trial court found that Dean was not operating the vehicle with the consent of his brother and that, therefore, the action against Danny should be dismissed, that Dean was negligent but not willful and malicious in the operation of the motor vehicle, and that actual damages due to negligence were recoverable but punitive damages were not. Further, the court found that John Kopecky's injuries were not permanent and that a particular hospital stay was due to a cardiac irregularity unrelated to the accident. Plaintiff petitioned for an award of \$250,000 actual damages and \$250,000 punitive damages. The court found that Kopecky's medical expenses amounted to \$10,597.60 and awarded the estate a total judgment of \$35,000.

This action was tried at law and our review is not de novo. Iowa R. App. P. 4; Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454, 456 (Iowa 1978); Knauss v. Kemen Industries, Inc., 267 N.W.2d 56, 57 (Iowa 1978). The trial court's findings of fact have the force of a special verdict, Iowa R. App. P. 4, and are binding on appeal if supported by substantial evidence. Iowa R. App. P. 14(f)(1); Abrisz, 270 N.W.2d at 456; Knauss, 267 N.W.2d at 57; Manson State Bank v. Tripp, 248 N.W.2d 105, 107 (Iowa 1976). A finding of

fact is supported by substantial evidence if it may be reasonably inferred from the evidence, Briggs Transportation Co. v. Starr Sales Co., 262 N.W.2d 805, 808 (Iowa 1978), or if reasonable minds would accept it as adequate to reach a conclusion. General Tel. Co. of the Midwest v. Iowa State Commerce Comm'n., 275 N.W.2d 364, 370 (Iowa 1979). Evidence is construed in a light most favorable to judgment, whether contradicted or not, and a reviewing court will not weigh the evidence or pass on the credibility of the witnesses. Carson v. Mulnix, 263 N.W.2d 701, 705 (Iowa 1978).

I. We find, as the plaintiff contends, that the evidence is insubstantial to support the trial court's finding that Dean Hartman acted without malice. Evidence of malice is rarely direct and may be circumstantial. Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 859 (Iowa 1973). Testimony of witnesses showed that John Kopecky was crossing the street in a southerly direction and that he was three to five feet from the north curb when the pick-up truck headed towards him. A pile of dirt and a barricade jutted out from the south curb. Testimony indicates that 37 feet of space remained between the dirt pile on the south and the curb on the north and that this space was large enough to allow two cars to pass.

Mary Hill and her son Kenneth were witnesses to the accident. Both testified that as the pick-up approached the intersection, it accelerated in speed and veered away from the dirt pile towards Kopecky. The pick-up failed to stop for a stop sign. Mary Hill stated that Kopecky, upon seeing the approaching truck, began to wave his arms and yell "No!" After the pick-up struck Kopecky, it accelerated speed and continued for a block, where it then stalled. Both the Hills heard Kopecky cry "Stop that man in the truck. He's trying to kill me." Kenneth Hill then ran after the pick-up and, upon reaching it after it had stopped, blocked the door to prevent Dean Hartman from leaving. Hill asked Hartman why he hit the old man, to which Hartman replied "Because I hate his guts." Two other witnesses overheard this remark. Hartman then proceeded to kick his way out of the truck feet first through the window and to flee. Hill and Russell Maresh, a neighbor who came to administer assistance to Kopecky, overtook Hartman and held him. When Hartman was later questioned about the accident by Detective Joel Kessler, he refused to talk.

Kopecky's son testified that, while his father had had no previous difficulties with Dean Hartman, he, himself, had. Approximately three weeks before the elder Kopecky

was struck, the younger Kopecky, while crossing the same intersection, was met by Hartman who accelerated, hesitated, and accelerated his motor vehicle as Kopecky attempted to cross the street. Kopecky then retreated from the street, at which time Hartman continued to abuse Kopecky with foul language. Kopecky re-entered the street, after which Hartman backed his car into an alley at a full rate of speed, parked it and continued to verbally abuse Kopecky.

The only evidence which supports the trial court's finding that Hartman had not acted willfully and maliciously is the self-serving testimony of Dean Hartman, who stated that he had swerved to miss the dirt pile, that he had lost his brakes and was unable to stop in time after seeing Kopecky, that, after striking Kopecky, it took him a block to bring the truck under control, and that he climbed out of the window to call an ambulance for Kopecky. He maintained that those witnesses who testified as to Hartman's statement that he hated Kopecky had all lied. Although Dean Hartman's testimony is somewhat supported by Danny Hartman's testimony that the brakes were not in good condition, it is negated by the testimony of two police officers who stated that the brakes were in working condition when they tested them at the scene of the accident. All in all, Hartman's version of the accident is not substantial enough to support the trial court's finding. We conclude that Dean Hartman acted willfully, maliciously and with reckless disregard for the rights of another. Meyer v. Nottger, 241 N.W.2d 911, 922 (Iowa 1976); Hagenson v. United Telephone Co. of Iowa, 209 N.W.2d 76, 82 (Iowa 1973); McCarthy v. J. P. Cullen & Son Corp., 199 N.W.2d 362, 369 (Iowa 1972).

Consequently punitive damages are permissible. Id. Punitive damages are not awarded as a matter of right; rather, it is for the trier of fact to determine, based on the special facts of each case, whether punitive damages should be allowed. Young v. City of Des Moines, 262 N.W.2d 612, 620 (Iowa 1978); Speed v. Beurle, 251 N.W.2d 217, 219 (Iowa 1977); Grefe v. Ross, 231 N.W.2d 863, 868 (Iowa 1975); McCarthy, 199 N.W.2d at 368.

II. Plaintiff administrator challenges the adequacy of the actual damages awarded. He maintains, in part, that the trial court awarded damages based upon an April 7, 1975 death date rather than the correct date of death of July 8, 1975. This argument is without merit. A reading of the trial court's findings shows the court

mispoke once when stating that the decedent died in April but that it was aware of the fact decedent died in July and made an award of damages accordingly.

Plaintiff further maintains that the trial court's award was inadequate because it was based upon an erroneous finding that injuries suffered by decedent were not permanent and that certain injuries were not the result of this accident. In reviewing the record, we believe that, although the questions are close ones, the evidence substantially supports the trial court's findings on both matters.

A reviewing court will not disturb an award of damages unless the award is 1) flagrantly inadequate, 2) so unreasonable as to shock the conscience or sense of justice, 3) presumed to be the result of passion or prejudice or 4) lacking in evidentiary support. Olsen v. Drahos, 229 N.W.2d 741, 742 (Iowa 1975); Holmquist v. Volkswagen of America, 261 N.W.2d 516, 524 (Iowa Ct. App. 1977). Damages are adequate if they fairly and reasonably compensate the injured party for injuries sustained. Householder v. Clayton, 221 N.W.2d 488, 493 (Iowa 1974). The award in this case of \$35,000, where the decedent suffered out-of-pocket expenses of approximately \$10,500, is supported by the evidence and adequately compensates decedent for actual expenses and for the pain and suffering he experienced in the last ten months of his life. While we recognize the detrimental impact that this accident had upon decedent's physical and mental condition, we are unable to say the award is flagrantly inadequate or shocking to one's sense of justice. Furthermore, no passion or prejudice is present. The award of actual damages is affirmed.

III. We further disagree with plaintiff and find that substantial evidence existed to support the trial court's finding that Dean Hartman operated the pick-up truck belonging to Danny Hartman without Danny's consent. When ownership of a motor vehicle is admitted, an inference is created that the vehicle was being operated with the consent of the owner. Schneberger v. Glenn, 176 N.W.2d 782, 784-85 (Iowa 1970); McKirchy v. Ness, 256 Iowa 744, 747, 128 N.W.2d 910, 912 (1964). An owner must make a sufficient showing to overcome this inference. Id. The inference is not a strong one and does not change the burden of proof. Id.

Here the evidence shows that Danny Hartman clearly instructed his ex-wife, Debbie Wallace, not to lend the truck until the brakes had been repaired and insurance obtained. Despite his instructions and without Danny's knowledge, Debbie did give the

keys to Dean. Even though Dean had borrowed the truck before, he always obtained the one set of keys from Danny. Evidence sufficiently supports the trial court's conclusion that no consent was present here. Consequently, the liability of Dean Hartman cannot be imputed to Danny.

IV. Generally new trials are granted on all the issues and not just on the issue of damages unless defendant's liability has been clearly fixed. Householder v. Town of Clayton, 221 N.W.2d 488, 493 (Iowa 1974). In this case, defendant's liability has been established. Thus, a new trial is necessary to review only the issue of punitive damages with respect to the defendant Dean Hartman.

REVERSED ON THE ISSUE OF MALICE AND REMANDED FOR THE AWARDING OF PUNITIVE DAMAGES.