

FILED

AUG 25 1981

CLERK SUPREME COURT 94

IN THE COURT OF APPEALS OF IOWA

IRENE JORDAN,

)

Plaintiff-Appellee,

)

Filed August 25, 1981

vs.

)

BOWDITCH, INC.,

)

Defendant-Appellant.

)

1-216
2-65882

Appeal from Scott District Court - Margaret S. Briles, Judge.

Defendant appeals with permission and challenges trial court order granting partial new trial. AFFIRMED IN PART; REVERSED IN PART.

Gerry M. Rinden, Rock Island, Illinois, for defendant-appellant.

Michael J. McCarthy of McCarthy & Hart, Davenport, Iowa, for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant appeals with permission and challenges trial court order granting partial new trial.

The trial of this action on a combined dram shop-negligence theory resulted in a verdict for the plaintiff in the sum of \$2,500. The evidence reflects that plaintiff had been attacked by another patron in defendant's bar and received cuts on her face and neck which produced a six-inch scar on her face and a two-inch scar on her neck. As a result, she incurred medical expenses of \$237.08 and no lost income.

The trial court, acting upon plaintiff's motion for new trial, found that the verdict "does not fairly and adequately compensate the plaintiff for the damages suffered." It thereafter ordered a new trial on the issue of damages only.

I. Defendant contends that under the holding in Waddell v. Peet's Feeds, Inc., 266 N.W.2d 29 (Iowa 1978), the amount to be awarded plaintiff was an issue of fact to be determined by the jury. It is accordingly urged that the trial court, under said circumstances, should not be permitted to substitute its judgment for that of the jury on this issue. We do not believe that Waddell completely removed the discretion vested in trial courts to grant new trials as a result of inadequate verdicts under undisputed evidence. In the present case, the extent of plaintiff's injuries (facial scarring) was much more clearly established than were the plaintiff's arthritic disabilities in Waddell. We conclude that in the present case the trial court did not abuse its discretion in ordering a new trial, even if the evidence is viewed in the light most favorable to the defendant.

II. In the alternative, defendant urges that under the principles announced in Allbee v. Berry, 254 Iowa 712, 716, 119 N.W.2d 230, 234 (1963), the new trial should be on all issues. We agree. If within thirty days of the filing of the procedendo in the district court, plaintiff consents in writing to a new trial of all issues, such new trial shall be granted. Failing this, judgment shall be entered for plaintiff on the jury verdict in the first trial. Costs of appeal are assessed equally between the parties.

AFFIRMED IN PART; REVERSED IN PART.