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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

NILES KAISER,	)	November 10, 1977
Appellee,	)	
vs.	)	253
JAMES R. STATHAS,	)	2-58082
Appellant.	)	

Appeal from Dubuque District Court - Karl Kenline, Judge.

Defendant appeals the granting of a new trial on the ground of inadequacy of verdict. - Reversed and remanded for reinstatement of jury verdict.

James H. Reynolds, of Reynolds, Kenline, Breitbach, McCarthy, Clemens & McKay, of Dubuque, for Appellee.

William C. Fuerste, of Fuerste, Carew, Coyle, Juergens & Sudmeier, of Dubuque, for Appellant.

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

SNELL, J.

Defendant James R. Stathas appeals a trial court order granting plaintiff Niles Kaiser a new trial in an action for personal injuries and property damage suffered in an automobile accident. Kaiser brought suit against defendant Stathas for injuries and damages which occurred when a car driven by defendant struck, from behind, plaintiff's parked car in which plaintiff was seated. In his petition, Kaiser sought damages for expenses, lost wages and pain and suffering. The jury returned a verdict in favor of plaintiff in the amount of $7500. Plaintiff then moved for a new trial alleging the verdict was inadequate and inequitable under the facts. The trial court granted Kaiser's motion on both grounds and defendant Stathas appealed.

On appeal, Stathas alleges the trial court abused its discretion in granting plaintiff's motion for new trial in that the verdict was neither inadequate nor inequitable. In ruling upon motions for new trial, the trial court has a broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties. Rule 14(f)(3), Rules of Appellate Procedure. Further, we are slower to interfere with the grant of a new trial than with its denial. Rule 14 (f)(4), R. App. P.

At the time of the accident, Kaiser complained of pains in his back and knee. X-rays taken at the hospital immediately after the accident showed a straightening of the cervical spine, which the examining physician testified indicated a muscle spasm and an acute sprain. Plaintiff was hospitalized about seven days as a result thereof. Upon his release, plaintiff saw two orthopedists, one of whom prescribed exercises for the knee and a brace for the back.

Several months later, plaintiff returned to the orthopedist complaining of pain in the knee; x-rays showed a bone chip associated with a preexisting case of Osgood-Schlatter's disease which antedated the accident. The physician testified the trauma of the accident may have caused the knee condition to become symptomatic. Plaintiff had the bone chip surgically removed.

Approximately fourteen months after the accident, while picking up a baseball under some bleachers, plaintiff was unable to straighten up. This

necessitated another three weeks' hospitalization. Kaiser testified he lost seventeen weeks' work after the accident and another twelve weeks after the knee operation.

The evidence showed plaintiff incurred hospital and medical expense of $614.60 on his neck injury, $703.50 on his knee surgery, and $1,571.70 on his back injury. He claimed lost wages of 17 weeks amounting to $3,917.65 due to disability from his neck injury and 12 weeks amounting to $2,765.45 from his knee surgery. Further, his car was damaged beyond repair for a loss of $305. He also asserted a loss of $2000 in additional expense in obtaining his college education since he was unable to complete his work as originally planned. If the jury had awarded damages for all these claims the sum would have been $11,877.90 without any award for pain and suffering.

Our task is not to determine whether a higher verdict would have been justified under the evidence, but whether the trial court abused its discretion in granting a new trial because of inadequacy of the award actually made. Moore v. Bailey, 163 N.W.2d 435, 436 (Iowa 1968). Ordinarily the jury should be allowed to settle factual disputes and the verdict should not be set aside simply because the reviewing court would have reached a different conclusion. Precedents in this field are of little value and each case must be decided by relating its own facts to the general principles. **Moore**, supra.

Although the trial court has broad discretion, the discretion so accorded must have some support in the record. Lappe v. Blocker, 220 N.W.2d 570, 572 (Iowa 1974). Where the disputes are primarily factual, and there is substantial evidence to support the jury's determination of these facts, the judge should not grant a new trial because reasonable men might disagree with the jury's conclusion. Northrup v. Miles Home, Inc., 204 N.W.2d 850, 861 (Iowa 1973). A litigant is entitled to a fair trial, but only one. Jones v. Iowa State Highway Commission, 185 N.W.2d 746, 749 (Iowa 1971). Where the verdict is amply supported by the evidence, a trial court abuses its discretion by granting a new trial on the ground that it would have reached a different result. **Lappe**, supra.

From a review of the record, we find the trial court erred in granting

plaintiff's request for a new trial. A factual question was created as to whether plaintiff's injuries were all proximately caused by defendant's negligence or whether part were the result of his own strenuous exercise program. This is especially true of the claims associated with the lower back injury incurred at the baseball game. Plaintiff testified he exercised four hours a day which was well in excess of the 30 to 60 minutes of exercise prescribed by plaintiff's orthopedists. Prior to the injury sustained at the baseball game plaintiff for some time was also employed at jobs demanding strenuous physical labor contrary to the advice of his physician.

Another factual question was presented whether the accident was the cause of the knee surgery which corrected a preexisting bone condition. Further, the jury was not bound to accept plaintiff's claims in toto for lost wages.

Reversed and remanded for reinstatement of the jury verdict.

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

DONIELSON, J. (dissenting)

I dissent. The majority is quick to point out that in ruling upon motions for new trial, the trial court has a broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties. Rule 14(f)(3), Rules of Appellate Procedure. Further, we are slower to interfere with the grant of a new trial than with its denial. Rule 14 (f)(4), R. App. P.

I disagree with the majority because I cannot say that on the basis of this record, the trial court abused its broad discretion in granting a new trial. Plaintiff sustained injuries to his knee, neck and back. As enumerated in the majority opinion, the total special damages resulting from medical expenses, property damages, added educational expenses and lost wages totalled $11,877.90. The jury verdict of $7,500 was $4,377.90 less than the total amount of these damages, with no allowance for pain and suffering.

As the court stated in Householder v. Town of Clayton, 221 N.W.2d 488, 493 (Iowa 1974):

> "The trial court has considerable discretion in ruling on a motion for new trial on the ground of the inadequacy of a verdict. Whether damages are so inadequate as to warrant a new trial is usually left for the trial court to decide, and its discretion in granting or refusing to grant a new trial will not ordinarily be disturbed on appeal unless an abuse of discretion is shown. Rule 344(f)(3), R.C.P.; Schall v. Lorenzen, 166 N.W.2d 795 (Iowa 1969); Gilbert v. Kinnarid, 229 Iowa 141, 294 N.W. 272; Herrman v. O'Connor, 209 Iowa 1277, 227 N.W. 584; Strayer v. O'Keefe, 202 Iowa 643, 210 N.W. 761.
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> "The question as to whether damages awarded in a given case are inadequate must be determined on the peculiar facts of that case. 25A C.J.S. Damages § 196, p. 267. . . ."
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> "The test of adequacy is for the court to determine what will fairly and reasonably compensate an injured party for the injury sustained. 25A C.J.S. Damages, supra. . . ."

In Householder, the plaintiff incurred medical expenses and suffered property damages, resulting in the proof of special damages of $9,805.22. He also suffered several broken bones and other injuries, requiring several weeks' hospitalization. In the face of the proof of such special damages, the jury award was in the amount of $8,000. Finding these damages inadequate, the supreme court in Householder granted a new trial on all the issues, concluding that the jury award constituted a compromise on the question of liability and therefore, the refusal of the trial court to grant a new trial constituted an

abuse of discretion. Householder, supra, at 493-494; see Allbee v. Berry, 254 Iowa 712, 719, 119 N.W.2d 230 (1963).

There is no evidence in the instant case to support a theory of compromise on the question of liability. It is purely a case of inadequate damages and the trial court so held.

I am aware that the majority concludes that a new trial was unjustified in this case because a factual question was created as to whether plaintiff's injuries were all proximately caused by defendant's negligence or were the result of his own exercise program. In spite of that factual dispute, I believe that the trial court did not abuse its discretion in granting a new trial, and accordingly, I would affirm the district court.