

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-354 / 88-1723

CLARA CARTER,

Appellee,

vs.

WITTENBECK MEMORIAL CO., INC.,

Appellant.

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Appeal from the Iowa District Court for Polk County,
Harry Perkins, Judge.

Appellant contends that the trial court erred by refusing to order a new trial or a remittitur because the award to the appellee was the product of passion and prejudice and was excessive. **AFFIRMED.**

Kenneth W. Rittgers, Des Moines, for appellant.

Scott Hartsook, Des Moines, for appellee.

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

SCHLEGEL, J.

A jury awarded the plaintiff \$15,000 for emotional distress caused by a mistake in the inscription of a gravestone. On appeal, the defendant contends that the trial court erred by refusing to order a new trial--or, in the alternative, a remittitur--because the verdict was the product of passion and prejudice and was excessive.

Shortly after her husband died in January 1986, Clara Carter, the plaintiff, contracted with the defendant monument company to inscribe the date of his death on a gravestone the couple had previously bought and intended to share. This job was to be completed by Memorial Day. The work was not actually done until mid-June, however, and then the date of death was mistakenly inscribed under the plaintiff's own name rather than her husband's. The defendant apologized and said the error would be corrected as soon as possible, but in fact a new stone was not lettered and set until September 12, 1986, three days after this lawsuit was filed. In due course a jury awarded the plaintiff \$15,000 for the severe emotional distress she claims to have suffered because of the mistaken inscription and the long delay in obtaining a new stone.

Noting that the plaintiff presented no evidence of physical or economic damage, the defendant urges that an award of \$15,000 is clearly excessive for the unintentional breach of a \$58 contract to inscribe a gravestone. The

defendant submits that the jury was moved by passion and prejudice after hearing the plaintiff, an elderly lady who had lost her husband of nearly forty years, emotionally tell of having nightmares in which she was the one who, in keeping with the mistaken inscription, had died first.

The present action involved a breach of contract and was tried at law. Our scope of review is on assigned error only. Iowa R. App. P. 4.

Defendant contends that the jury's verdict is excessive. A jury's verdict will not be set aside or altered unless it: (1) is flagrantly excessive or inadequate; or (2) is so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption that is the result of passion, prejudice or other ulterior motive; or (4) is lacking in evidentiary support. Schnelby v. Baker, 217 N.W.2d 708, 724 (Iowa 1974).

Iowa law clearly allows emotional distress as an element of damages for breach of contract where the contract is personal in nature and emotional distress was within the contemplation of the parties. Meyer v. Nottger, 241 N.W.2d 911, 921 (Iowa 1976). The only question is whether this is the type of contract where a claim for emotional distress was within the contemplation of the parties.

In Meyer, the court defined what is meant by a contract that would contemplate emotional distress. The court stated:

When we have a contract concerned not with trade and commerce but with life and death, not with profit but with elements of personality, not with pecuniary aggrandizement but with matters of mental concern and solicitude, then a breach of duty with respect to such contracts will inevitably and necessarily result in mental anguish, pain and suffering. In such cases the parties may reasonably be said to have contracted with reference to the payment of damages therefor in event of breach. Far from being outside the contemplation of the parties they are an integral and inseparable part of it.

Id. at 920.

The court in Meyer further stated: "[t]he above principles are equally applicable to contracts for the performance of professional funeral services." Id.

There are many services associated with the death of a loved one. Whether or not every single one of these can give rise to a claim for damages--from the embalming of the corpse to the floral arrangements--is a question for a well-reasoning jury. There are certain services which are inextricably intertwined with the interment of a human being. One is the services relating to the casket, another relates to the handling of the corpse, and most certainly those dealing with the headstone can be included also.

There was substantial evidence that the contract to inscribe the date of death under the deceased's name was breached. There was also substantial evidence that Mrs. Carter suffered serious emotional distress as a result of this breach. She suffered an unnecessary waiting period. She was faced with the grim reality of one of her worst

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fears; that she would die before her husband. Finally, those fears materialized in the form of nightmares that haunted Mrs. Carter up to the date of trial. Perhaps this court would not have awarded damages to the same extent as the jury in this case, but that is not the scope of our review. Given the emotional nature associated with funerals, this verdict was not "flagrantly excessive," it does not "shock the conscience," and there is no reason to believe it resulted from "passion or prejudice." The trial court was correct in denying defendant's motions for a new trial and remittitur.

AFFIRMED.

Oxberger, C.J., concurs; Donielson, J., dissents.

DONIELSON, J. (dissenting)

I respectfully dissent.

Our supreme court has held:

[R]ecovery of damages may be had in appropriate cases for mental distress, absent physical trauma, arising out of the breach of a contract to perform funeral services.

Meyer v. Nottger, 241 N.W.2d 911, 921 (Iowa 1976) (emphasis added). I am not convinced an agreement to inscribe a headstone, entered into after the internment of plaintiff's husband, is the type of case envisioned in Meyer for awarding mental distress damages in the absence of any evidence of physical trauma. In any case, a new trial should have been ordered in this matter. A new trial may be granted if the jury award is excessive and unsupported by sufficient evidence. Young v. Gibson, 423 N.W.2d 208, 210 (Iowa App. 1988). The evidence in this case does not support an award of \$15,000 for any damages suffered by plaintiff. I would find the award excessive and would order a new trial in this action.