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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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| **MARY KAY REESE,** | ) | |
| Plaintiff-Appellant, | ) | Filed March 9, 1988 |
| vs. | ) | 309 |
| **TERRY G. ROBERTS,** | ) | 7-532<br>86-1815 |
| Defendant-Appellee. | ) | |

Appeal from the Iowa District Court for Marion County (21989), James W. Brown, Judge.

Plaintiff appeals the trial court's denial of her motion for a new trial asserting the jury verdict in her favor, against defendant, was inadequate. **AFFIRMED.**

John E. Orrell, Jr., of Hopkins & Huebner, Des Moines, for plaintiff-appellant.

Ross H. Sidney and Iris J. Post of Grefe & Sidney, Des Moines, for defendant-appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

**HAYDEN, P.J.**

Plaintiff, Mary Kay Reese, appeals the trial court's denial of her motion for a new trial. She asserts the jury verdict in her favor against defendant, Terry Roberts, was inadequate.

The facts in this case are as follows. Ms. Reese and Mr. Roberts had been cohabiting prior to the incident which gave rise to this personal injury action, but Ms. Reese was in the process of moving out. On February 3, 1984, the parties went to the residence of a Mr. and Mrs. Burghorn to pick up a bed Ms. Reese had purchased. While there, Ms. Reese consumed approximately four to six wine coolers; Mr. Roberts did not consume any alcoholic beverages. When the parties returned to Roberts' home, an argument commenced. In the course of this argument, Mr. Roberts requested that Ms. Reese leave and she refused. After a further exchange of heated words, Mr. Roberts forcibly removed Ms. Reese from the home. In the process of being dragged from the home, Ms. Reese hit her right foot on a wooden plank being used as a temporary sidewalk and sustained two slight fractures on that foot, just above the base of her toes.

Ms. Reese visited the hospital the next day and thereafter was required to wear a "wooden shoe" on her right foot and was on crutches for five to seven weeks. She received additional treatment on August 13, 1984. Subsequently, she did not receive further treatment for this injury until July 30, 1986, shortly before trial.

Ms. Reese incurred medical bills in the amount of $423.76 and had lost wages in the amount of $237.12. Additionally, at trial, Dr. Blair (who first treated Ms. Reese on September 19, 1986) testified that he recommended surgery on her right foot to eliminate the persistent pain she was experiencing. He estimated the total cost of this surgery would be $1,750.00. Ms. Reese testified she intended to undergo the surgery.

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The jury found that Ms. Reese's damages totaled $2,410.88 and that both parties were 50% negligent. Ms. Reese thereupon requested a new trial, asserting the jury's award was inadequate. She contended the jury erroneously awarded her only special damages, for lost wages and past and future medical expenses, and nothing for pain and suffering. The trial court denied her motion and this appeal followed.

The well-settled legal principles governing our review in this case are, as stated in Yoch v. City of Cedar Rapids, 353 N.W.2d 95 (Iowa App. 1984):

> 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. Iowa R. App. P. 14(f)(3). Our task is to determine whether the trial court abused its discretion in not granting a new trial in light of the award made, not whether a higher verdict would have been justified under the evidence. 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. Waddell v. Peet's Feeds, Inc., 266 N.W.2d 29, 32 (Iowa 1978). Precedents in this field are of little value and each case must be decided by relating its own unique circumstances to certain well-established principles. Kaiser v. Stathas, 263 N.W.2d 522, 523 (Iowa 1978).

Id. at 98. A jury award will be reduced or set aside only if it: (1) is flagrantly excessive or inadequate; (2) is so out of reason as to shock the conscience or sense of justice; (3) raises a presumption it is a result of passion, prejudice or other ulterior motive; or (4) is lacking in evidentiary support. Olsen v. Drahos, 229 N.W.2d 741, 742 (Iowa 1975). The most important of these four tests is support in the evidence. Id.

Ms. Reese asserts the evidence does not support the jury verdict since she allegedly was not awarded any damages for pain and suffering. She relies on Allbee v. Berry, 254 Iowa 712, 119 N.W.2d 230 (1963), for the proposition that if the defendant's liability was established, an award for only special damages is grossly inadequate. Id. at 717, 119 N.W.2d at 233.

We are persuaded, however, the facts in this case are distinguishable from those in Allbee and that, therefore, Allbee is not applicable here. In Allbee, "the issue of liability was contested throughout the proceedings but the evidence on damages was uncontradicted." Yoch, 353 N.W.2d at 99. The verdict rendered in Allbee was the apparent result of a compromise regarding the defendant's liability and did not involve a dispute over the amount of damages. Allbee, 254 Iowa at 718, 119 N.W.2d at 233.

Ms. Reese contends the evidence regarding her damages was equally undisputed, but we cannot agree. Mr. Roberts disputed whether she truly incurred significant pain and suffering, noting that she did not receive medical treatment which suggested surgery until just before trial and had not sought any medical treatment for nearly two years prior to that time. Mr. Roberts also contended this delay and the timing of the recommendation of surgery suggested that Ms. Reese did not actually intend to undergo the surgery, despite her protestations to the contrary.

We do not know, therefore, whether the jury accepted or rejected the testimony as to the necessity for or the likelihood of future surgery. See Waddell v. Peet's Feeds, Inc., 266 N.W.2d 29, 32 (Iowa 1978). Thus, we cannot say whether the $1,750.00 awarded over and above Ms. Reese's medical bills and lost wages were meant to compensate her for pain and suffering or merely to cover future medical expenses. As such, we conclude the trial court was correct not to set aside the jury verdict and grant a new trial. It was for the jury to decide these controverted issues of fact, Kaiser v. Stathas, 263 N.W.2d 522, 525 (Iowa 1978), and it did so.

**AFFIRMED.**