

FILED

DEC 27 1983

IN THE COURT OF APPEALS OF IOWA CLERK SUPREME COURT

**JOHN S. WALTERS and
VIRGINIA L. WALTERS,**

Plaintiffs-Appellees,

vs.

**JOHN BURCHE a/k/a
IOAN A. BURCHE,**

Defendant-Appellant.

Filed December 27, 1983

3-336
2-69402

Appeal from Scott District Court - J. Hobart Darbyshire, Judge.Defendant appeals from a judgment for plaintiffs in a tort action. **AFFIRMED.**

Patrick J. Kelly, Davenport, for defendant-appellant.

Seymore M. Raben, Davenport, for plaintiffs-appellees.

Considered by Snell, P.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

Defendant appeals from a judgment for plaintiffs in a tort action. We affirm.

Plaintiffs filed suit on October 25, 1979, seeking damages for the collapse of the foundation of their home allegedly caused by the defendant's diversion of water from his lot onto plaintiffs' property. Defendant's answer was filed December 10, 1979. In April of 1982, defendant dismissed his attorney and proceeded to represent himself. On April 27, he filed a counterclaim alleging that plaintiffs' suit was groundless and was filed to harass defendant. On April 29, defendant filed a demand for a jury trial. The case had since February been scheduled for trial on May 13. The court dismissed the counterclaim and denied the jury trial request on the grounds that they were untimely filed. In a trial to the court plaintiffs were awarded a judgment of \$14,326.

On appeal defendant asserts: (1) the trial court erred in dismissing his counterclaim; (2) the trial court erred in denying his request for a jury trial; (3) there was insufficient evidence to support a verdict for the plaintiffs; (4) the damages awarded are excessive; and (5) the trial court erred in denying defendant's motion for a new trial on all the grounds listed above and also on the ground that defendant had newly-discovered evidence.

Our review of this action at law is on assigned error. Iowa R. App. P. 4.

I.

The Counterclaim. Defendant argues that the trial court should have allowed him to amend his answer to seek damages from the plaintiffs for harassment. Iowa Rule of Civil Procedure 88 dealing with amendments to pleadings provides:

A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is required

and the action has not been placed upon the trial calendar, the party may so amend it any time within twenty days after it is served. Otherwise, a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

Ordinarily courts have great discretion in allowing amendments. Ackerman v. Lauver, 242 N.W.2d 342, 345 (Iowa 1976). Allowance of an amendment is the rule and denial is the exception. Galbraith v. George, 217 N.W.2d 598, 601 (Iowa 1974). The question in this case is whether justice required the trial court to allow defendant to assert his counterclaim.

We find no abuse of discretion in the trial court's denial of the amendment. The request came approximately 2-1/2 years after defendant's answer was filed and shortly prior to the date when the case was set for trial. The amendment would have injected new issues into the case on the eve of trial. While the parties were prepared to address the question of whether the damages to plaintiffs' property were caused by the water diverted by the defendant, plaintiffs were not prepared to defend their motivation and intent in filing the lawsuit. The language of Rule 88 was amended to eliminate the prohibition against allowing an amendment which would change the issues in the case. Nevertheless, we believe this is a factor to consider in determining whether justice requires the court to allow the amendment. Plaintiffs may well have required a continuance to defend themselves against a new accusation of malicious prosecution or abuse of process. This addition of issues to the case at such a late point after a substantial delay is sufficient to justify the trial court's refusal to allow the defendant to amend his answer.

II.

Demand for a Jury Trial. Belated requests for jury trials are covered by Iowa Rule of Civil Procedure 177(d). The granting or denial of the request under

this rule rests with the discretion of the trial court. It has been held that denial of the request is not an abuse of discretion where the request is several months late and the case has already been assigned for trial as a nonjury case. Egan v. Egan, 212 N.W.2d 461, 464 (Iowa 1973); Schupbach v. Schuknecht, 204 N.W.2d 918, 920 (Iowa 1973). We hold the trial court did not abuse its discretion in denying defendant's belated request for a jury trial.

III.

Sufficiency of the Evidence. The findings of fact by the trial court have the effect of a special verdict and are equivalent to a jury verdict. An appellate court will not disturb them if they are supported by substantial evidence. We construe the evidence in the light most favorable to the judgment, whether contradicted or not, and we do not weigh the evidence or pass on the credibility of witnesses. Carson v. Mulnix, 263 N.W.2d 701, 705 (Iowa 1978).

There was ample evidence in this case to support the findings. A city engineer testified that defendant's landscaping diverted the natural drainage of water. He also opined that the extra water on plaintiffs' property caused the damage to their house. Another witness testified that he saw water running to plaintiffs' home from defendant's ditch on the night the damage occurred. One of the plaintiffs testified that he had not had any water problem before defendant dug the ditch nor had there been a problem since the city relocated the ditch. The court was justified in concluding from this and other competent evidence that defendant is liable for the damage.

IV.

Damages. Defendant claims that even if he is liable, the damages allowed by the court are excessive. The principle underlying allowance of damages is to place the injured party in the same position he would have been in if no injury had occurred. Schiltz v. Cullen-Schiltz & Associates, Inc., 228 N.W.2d 10, 20 (Iowa 1975). Defendant claims that the damages in this case exceed the actual value of the improvement immediately prior to the injury. However, where the injury is

such that the premises may be restored to as good a condition as before, the measure of recovery is the fair and reasonable expense of restoration. Id. at 21. The court's judgment follows closely the damages proven by plaintiffs as the cost of restoring their home and is not excessive.

V.

Motion for a New Trial. Since we find the prior assertions of error made by the defendant to be without merit, we cannot say the trial court erred in denying defendant a new trial on those grounds. In addition, defendant argues that he should have been given a new trial to allow him to present some newly-discovered expert testimony on the issue of causation. In order to prevail on this ground defendant must show among other things that the evidence was discovered after the trial and could not have been discovered before the conclusion of trial in the exercise of diligence. Yoder v. Iowa Power and Light Co., 215 N.W.2d 328, 335 (Iowa 1974). Defendant admits, however, that the expert testimony could have been discovered before the conclusion of the trial. The court did not err in denying the motion for a new trial.

In several of defendant's arguments, he has maintained that established rules of law should be set aside in this case because defendant, a layman, was not aware of the rules. Defendant dismissed his counsel and chose to represent himself. The court did not err in refusing to give him advantages denied to other litigants. We refuse to hold that judicial time should be wasted in a new trial because defendant was unaware at the time of trial that expert testimony would be beneficial to his case.

AFFIRMED.