



IN THE COURT OF APPEALS OF IOWA

DONALD S. HAUGH, Jr.,

) Filed September 27, 1983

Plaintiff-Appellant,

)

vs.

)

3-248
2-69284

NICHOLAS S. KRPAN,

)

Defendant-Appellee.

)

Appeal from Polk District Court, A. M. Critelli, Judge.

Plaintiff appeals from the amount of damages awarded him in this malpractice suit against a lawyer. **AFFIRMED.**

George A. Wilson, III, of Dreher, Wilson, Adams, Jensen, Sayre & Gribble, Des Moines, for plaintiff-appellant.

No appearance for defendant-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel, and Sackett, JJ. Hayden, J., takes no part.

OXBERGER, C.J.

Plaintiff appeals from the amount of damages awarded him in this malpractice suit against a lawyer. Defendant failed to appear in trial court, and a default order was entered against him. On appeal, plaintiff asserts that (1) in determining the amount of plaintiff's damages, the trial court improperly considered the merits of the case, that is, whether under the applicable substantive law plaintiff would have been entitled to recover under certain of his theories; (2) the trial court could not find that the abstracts misplaced by defendant were worth \$200 each when the only evidence on the point was plaintiff's testimony that they were each worth \$500; (3) as the question of damages was fully tried in district court, this court should determine the correct amount of damages and enter judgment for that amount, rather than remanding for further proceedings; (4) there was not substantial evidence to support the trial court's award of substantially smaller compensatory damages than requested by plaintiff; and (5) the defendant's default established that plaintiff was entitled to punitive damages as a matter of law, and there was not substantial evidence to support the trial court's refusal to award punitive damages. We affirm.

Plaintiff hired defendant, a Des Moines lawyer, to assist him following his arrest for burglary in the first degree. The charge resulted from a fight at plaintiff's girl friend's house. The defendant said he could get plaintiff out of jail quickly, but was unable to do so as soon as he had promised. Defendant also pleaded plaintiff guilty to a reduced charge of simple assault, with a \$100 fine, when plaintiff had instructed him to plead guilty only if the punishment imposed would be the actual time plaintiff had already spent in jail. Subsequent to his release, plaintiff engaged defendant to file a related dram shop claim for injuries resulting from a tavern fight. Krpan failed to file the claim.

Plaintiff filed a malpractice suit, asking compensatory damages of \$27,400, and punitive damages of \$75,000.

The defendant failed to appear in district court, and an order of default was entered against him. The court held a hearing on the amount of damages. The court concluded that plaintiff had been injured in the amount of \$898. The claim for punitive damages was denied. Damages were not allowed for defendant's failure to file plaintiff's dram shop claim because the plaintiff did not plead that the six-month notice required by section 123.93 of the code had been given. Therefore, the court reasoned, the claim could not have been successful and plaintiff did not suffer any damages from defendant's failure to file.

I. Actual Damages

Our present rules place us within the general principle that in an inquiry of damages upon default, all the plaintiff's material allegations are taken as true and the determination of the amount of damages to be awarded is all that remains to be done. See Iowa R. Civ. P. 102 and Hallett Construction Co. v. Iowa State Highway Com'n, 154 N.W.2d 71, 74 (Iowa 1967). The burden is on the plaintiff to prove the damages with some reasonable amount of certainty. B-W Acceptance Corp. v. Saluri, 258 Iowa 489, 497, 139 N.W.2d 399, 404 (Iowa 1966). The court's duty, then, is to determine not only the plaintiff's substantive right to recover, but the extent of that right, as they are both essential elements of the judgment. Pope v. United States, 323 U.S. 1, 12, 65 S. Ct. 16, 22, 89 L. Ed. 3, 11, 12 (1944). We must keep in mind, however, that even though a defendant defaults, he is still within the pale of the law and is entitled to just treatment. Rayburn v. Maher, 227 Iowa 274, 285, 288 N.W.2d 136, 141 (Iowa 1940).

Plaintiff, Haugh, asserts that through default Krpan admitted the damage allegations and therefore his claim, as stated in his brief, should be awarded. However, the trial court, as was proper, ordered the default and set the damages

issue for hearing. See Iowa R. Civ. P. 232. Haugh's claim is an unliquidated claim. Merely because he has placed a monetary amount on the item of damage for which the claim is made does not entitle him to that sum. Hallett Const. Co. v. Iowa State Highway Com'n, 139 N.W.2d 421, 427 (Iowa 1966). It seems clear that Haugh has established a substantive right to recover and has suffered some measure of actual damages. The issue remaining is what is that amount.

First of all we agree with the trial court that Haugh's computation of "loss of freedom" damages was both unrealistic and unsupported by any evidence. The evidence supports the trial court's finding that the damages sustained were for a two-day period, not three. Taking the allegation of Haugh's income as true, we affirm the ruling as to the lost wages (\$208 for 2 days). Secondly, we affirm the amount of retainer that the trial court found refundable. We find no evidence to support the allegation that Krpan did not expend the \$410 on behalf of his client. Therefore, the \$190 refund was appropriate. Thirdly, the \$1200 amount that Haugh posted is not out of line with a \$10,000 bond. We agree that Krpan may have made loose promises to Haugh about getting a property bond for little or nothing; but since the cost of bond is left to the sound discretion of the clerk of court, we fail to see how Haugh was damaged in this respect. Therefore, we affirm the trial court's finding that no damages are to be awarded in regard to the bond premiums.

Regarding the abstracts, other than opinion testimony by Mr. Haugh that they were worth \$1,000, the record is silent on the issue. Without question, the trier of facts is at liberty to accept or reject any or all opinion evidence and instead determine valuations that are fair and reasonable. Schantz v. Schantz, 163 N.W.2d 398, 404 (Iowa 1968). We see no reason to disagree with the trial court's finding concerning the value of the abstracts.

Haugh further contends that he should receive \$10,160 in damages from a dram shop claim that Krpan failed to file. We find no merit in that claim. We

agree with the trial court that the dram shop action was barred before it was brought to Krpan's attention because of the six-month notice requirement of Iowa Code §123.93. Haugh correctly stated that under certain circumstances the notice requirement is not an absolute prerequisite to a dram shop claim. However, Haugh did not establish that any of those circumstances were present here. See Shasteen v. Sojka, 260 N.W.2d 48, 51 (Iowa 1977).

In consideration of the foregoing, we reject Haugh's argument that the trial court erred looking to the substantive law. The evidence considered by the trial court was necessary and proper to establish an accurate assessment of damages. We therefore affirm the trial court's ruling as to all the actual damages.

II. Punitive Damages

We agree with the trial court that punitive damages are allowable upon a showing of malice which may be established by wrongful conduct committed with a reckless disregard of another's rights. Meyer v. Nottger, 241 N.W.2d 911, 922 (Iowa 1976). We further agree that even though Krpan's conduct falls short of commendable, it does not amount to the atrocious conduct that would support a punitive damages claim. We affirm that portion of the trial court's ruling.

III. Final Judgment

Since we have affirmed the trial court's ruling, this issue as stated by Haugh is no longer applicable.

AFFIRMED.