FILED
MAR 29 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

GLENN ROCCA,

Appellee,

vs.

DONALD ROSS,
and
JAMES GLEASON and GREATER MARKETS, INC., d/b/a The Other Place,

Appellants.

Filed March 29, 1978

357
2-58643

Appeal from Black Hawk District Court - Blair Wood, Judge.

Defendants appeal from the trial court's granting plaintiff's motion for new trial. - Affirmed.

George Lindeman, of Lindeman & Yagla, Waterloo, and Frederick G. White, of Kennedy, Kepford, Kelsen & White, Waterloo, for Appellants.

Max E. Kirk & William C. Ball, of Ball & Nagle, Waterloo, and Judd E. Truax, Cedar Falls, for Appellee.

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

PER CURIAM

This is an appeal from the trial court's granting of plaintiff's motion for new trial in a law action claiming compensatory and punitive damages. Plaintiff claimed damages against the defendant, Donald Ross, based upon an assault and battery. Plaintiff also claimed damages against James Gleason, the manager, and Greater Markets, Inc., the owner of the bar and restaurant where the assault and battery occurred. Plaintiff asks judgment for $300,000 for past and future damages and punitive damages in the amount of $300,000. The case was tried to a jury which returned a verdict against the defendant Ross assessing compensatory damages in the amount of $5000. The jury returned a verdict in favor of Gleason and Greater Markets, Inc. Special interrogatories were answered that Gleason was not negligent and did not aid and abet the assault and battery. Plaintiff filed a motion for new trial against all defendants which was sustained. Defendant Ross did not appeal. This appeal concerns defendants James Gleason and Greater Markets, Inc.

The motion for new trial was sustained, the trial court citing its reasons as follows: "The court considers the amount of the verdict compared with the aggravated nature of the assault, the small amount of provocation, and the strong evidence of participation of defendant Gleason, and upon the entire record, finds that substantial justice has not been afforded the plaintiff and that fairness demands granting of a new trial herein."

The issue for determination on appeal is whether the trial court abused its discretion in granting a new trial. The following principles apply to our review. It is the inherent right of the trial court to grant a new trial where substantial justice has not been effectuated. Schneider v. Keokuk Gas Service Company, 250 Iowa 37, 92 N.W.2d 439 (Iowa 1958); Moore v. Bailey, 163 N.W.2d 435 (Iowa 1968). The trial court has wide but not unlimited discretion in ruling on a motion for a new trial. Rule 14(f)(3), Rules of Appellate Procedure. A verdict should not be set aside as either too large or too small simply because the reviewing court would have reached a different conclusion. Waterloo Savings Bank v. Waterloo, Cedar Falls and Northern R.R., 244 Iowa 1364, 1376, 60 N.W.2d 572, 579 (1953).

> Whenever it appears that the jury has, from any cause, failed to respond truely to the real merits of the controversy, it has failed to do its duty, and when the superior and more comprehensive judgment of the trial court dictates the jury verdict failed to administer substantial justice to the parties in the case, a new trial should be granted.

Lappe v. Blocker, 220 N.W.2d 570, 572 (Iowa 1974) quoting from Hartford Fire Insurance Co. v. Lefler, 257 Iowa 796, 801, 135 N.W.2d 88, 91 (1965). The supreme court has noted, however, that the discretion must have some support in the record. Lappe, supra.

It is only where there is a clear showing that the trial court abused its discretion in granting plaintiff a new trial that interference with that order is justified. Larew v. Iowa State Highway Commission, 254 Iowa 1089, 120 N.W.2d 462 (1963). The abuse of discretion must be such that the trial court acted in such an arbitrary and capricious manner that instead of effectuating justice, it has in fact thwarted it. Hartford Fire Insurance Co., supra.

It is not necessary that reversible error was committed in order for the court to grant a second trial in the interest of justice. If such were the rule, the inherent power of the court to correct a failure of justice would be meaningless. See Lappe, supra at 572; Comer v. Burns, 255 Iowa 251, 122 N.W.2d 305 (1963). Further, the appellate court is slower to interfer with the grant of a new trial than with its denial. Rule 14(f)(4), R. App. P. If any ground of a motion for new trial is good, the grant by the trial court must be upheld. Vojak v. Jensen, 161 N.W.2d 100, 105 (Iowa 1968). In considering the sustaining of the motion for new trial the appellate court may rely on any ground urged in the motion even though it is not one upon which the trial court bases its order. Vojak, supra; Smith v. Ullerich, 259 Iowa 797, 803, 145 N.W.2d 1 (1966).

With the above principles in mind, we have reviewed the evidence. The operative facts are as follows: plaintiff, Rocca, on November 17, 1972, went with a friend, Darold Harms, to a tavern-restaurant located in Cedar Falls, known as The Other Place. This tavern was owned by defendant Greater Markets, Inc., and managed by defendant, James Gleason. Rocca and Harms took seats at the middle of the service bar, ordered a pitcher of beer and began drinking. While seated at the bar, Rocca was approached by Michael McCarthy, who asked Rocca and Harms

to assist him in starting his car which was stalled in the parking lot behind the tavern. Rocca and Harms agreed to assist McCarthy and asked the barmaid, Brenda Leonard, to save their seats since they would be right back.

They started McCarthy's car and returned to the bar. Rocca discovered that defendant, Donald Ross, was occupying his stool at the bar. The barmaid had forgotten to save their seats. Rocca and Harms had left a partial pitcher of beer and their beer glasses on the bar by their seats. Rocca asked Ross to move from his seat. Ross refused and an argument insued. Rocca is 5'9" tall and weighed 165 lbs; Ross at 6'9" weighed 220 lbs. The barmaid asked Ross to move and he refused. The barmaid asked defendant Gleason, the bar manager, for assistance. Ross gave up the bar seat to Rocca after Gleason threatened to call the police. He moved to the standing bar, about five or six feet behind Rocca and Harms. Rocca invited Ross to join him at the bar and offered to buy Ross a beer. This was refused.

Later, after more arguing, name calling, and insulting remarks, Ross came over to Rocca and threw a glass of beer into Rocca's face. Rocca proceeded to wipe the beer off his face. He called for assistance from the bar manager, Gleason, asking him to get Ross out before anything else happened. Rocca then turned his back to Ross and sat facing the service bar.

Ross then saw Gleason beckoning to him from the kitchen area. Ross went over to Gleason and had a conversation with him. Although Gleason denies it, witnesses testified that Gleason at that time told Ross he should hit Rocca over the head with his cane. Ross returned to his place at the standing bar behind Rocca. While Rocca was seated facing the service bar, Ross approached him from the rear and struck him on the head with a beer pitcher. After the first blow, Rocca fell backwards from the barstool to the floor. Ross continued to strike Rocca's head with the beer pitcher four or five times. The pitcher was broken with the last blow struck as Rocca lay on the floor of the bar.

Rocca was rendered unconscious, having sustained a compound depressed skull fracture. The skull fracture caused plaintiff to sustain a convulsive disorder causing seizures which will require medication for the rest of his life. He has suffered a personality change, loss of physical coordination and mental impairment.

He continues to have problems with his left foot coordination. He has headaches ranging from slight to lasting a day or more. Other consequences suffered are problems with his speech, blank spots in his memory and no tolerance for alcoholic beverages or loud noises. The actual medical expenses of plaintiff at time of trial were $2,626.90.

The record in this case substantiates the trial court's determination that a new trial should be granted plaintiff. The assault was vicious, having been commenced without warning when Rocca sat with his back to Ross. It continued after Rocca had fallen to the floor and ended only with the breaking of the beer pitcher. The provocation compared to the severity of the assault was small. Gleason's participation was shown by testimony from several witnesses. We find that these reasons given by the trial court for granting a new trial are supportive.

We have reviewed all of the arguments of defendants Gleason and Greater Markets, Inc., in support of the jury verdict and answers to special interrogatories. We have also reviewed each of plaintiff's assertions of trial court error in rulings or instructions. The trial court was in the best position to determine whether the verdict administered substantial justice to the parties. We do not find from a review of the record a clear showing that the trial court abused its discretion in granting plaintiff a new trial against all defendants.

AFFIRMED.

All judges concur, except Allbee, C.J., and Carter, J., who dissent.

ALLBEE, C.J. (dissenting)

Because the jury verdict for defendants James Gleason and Greater Markets, Inc. is amply supported by evidence, I would reverse trial court's grant of a new trial and order entry of judgment in their favor. See Lappe v. Blocker, 220 N.W.2d 570, 572-573 (Iowa 1974).

The jurors heard and weighed the evidence of 11 witnesses who testified to circumstances surrounding the occurrence; they heard conflicting testimony concerning the argument involving Rocca and Ross, the insults and threats exchanged, Gleason's claimed complicity, and the assault. Their verdict was within the evidence. A grant of new trial cannot be permitted under the guise of a claim that the verdict failed to effectuate substantial justice simply because the trial judge's view of the proper result differed from that of the jury. As the supreme court said in Lantz v. Cook, 256 Iowa 409, 413, 127 N.W.2d 675, 677 (1964):

> In jury trials controverted issues of fact are for the jury to decide. That is what juries are for. To hold that a judge should set aside a verdict just because he would have reached a different conclusion would substitute judges for juries. It would relegate juries to unimportant window dressing. That we cannot do. . . .
>
> The record discloses no prejudicial error in the trial. The verdict was within the evidence. The jury has spoken. The parties had a fair trial. The court may not arbitrarily substitute its opinion for the conclusion of the jury.

Finally, any inadequacy in the jury award to plaintiff as against Ross does not create grounds for the grant of a new trial on the distinctive claims lodged against Gleason and Greater Markets, Inc.

CARTER, J., joins in this dissent.