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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

LORENE J. DUNBAR, Appellant,	)	Filed December 28, 1977
v.	)	
NORTHWESTERN BELL TELEPHONE COMPANY, Appellee.	)	302 / 2-59511

Appeal from Polk District Court - John N. Hughes, Judge.

Appeal from judgment on jury verdict for defendant telephone company in suit for wrongful termination of telephone service. Affirmed.

Glenn E. Pille, of Critelli & Pille, of Des Moines, for appellant.

Keith E. Luchtel and L. R. Voigts, of Nyemaster, Goode, McLaughlin, Emery & O'Brien, of Des Moines, for appellee.

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

CARTER, J.

Plaintiff in this action seeks damages from defendant for alleged wrongful disconnection of the telephone service provided to her residence. Defendant counterclaimed for payment of past due charges for telephone service provided at another location. The action was tried to a jury which returned a verdict for defendant on both plaintiff's claim and the counterclaim.

On appeal plaintiff contends that she should have a new trial on her claim because the jury's verdict was contrary to the evidence and the court's instructions. No appeal is taken from defendant's judgment on the counterclaim. Her motion seeking such relief in the trial court was denied.

It appears without dispute that defendant on several occasions threatened to disconnect the telephone service it provided to plaintiff's residence at 3126 Second Avenue if she did not pay delinquent charges for telephone services incurred at 3616 University. It also appears without dispute that defendant's obligation to its customers, established by tariffs filed with the appropriate public regulatory body, did not authorize such action by defendant as long as the account at 3126 Second Avenue was current.[1] In spite of this fact defendant did, on July 2, 1975, disconnect plaintiff's telephone service at 3126 Second Avenue, at a time when the rates and charges for services at that address were current and, in fact, paid somewhat in advance. These advance payments were refunded to plaintiff but her telephone service was not reestablished until August 26, 1975, the date upon which the present action was filed.

I. Based upon the foregoing facts, plaintiff urges that defendant's liability was clearly established and that she was therefore entitled to recover damages in some amount. Defendant does not seriously dispute that the basic elements of a claim for wrongful disconnection of plaintiff's telephone service were established. It asserts, however, that under the trial court's marshalling instruction (no. 7) plaintiff had the burden of proving that some damage to her was proximately caused by the action of defendant. It argues that the jury could have found that plaintiff failed to establish any such damage.

[1] It would appear that such an act would be contrary to the general law in this area. See, e.g., Burner v. Interstate Power Co., 244 Iowa 298, 57 N.W.2d 55 (1953); 64 Am. Jur. 2d § 70.

The elements of damage for which plaintiff sought recovery included personal injury, pain and suffering due to hypertension, medical expenses, loss of credit rating, and annoyance and inconvenience. As to those elements other than annoyance and inconvenience we believe defendant is correct in asserting that based on the record evidence, it was for the jury to determine if there were any such damages proximately caused by the act of defendant. With respect to the alleged annoyance and inconvenience, this is less clear. Plaintiff makes the appealing argument that there is some annoyance and inconvenience per se from the loss of one's telephone service, and that under the evidence the jury was therefore required to allow her some recovery for this element of her claim.

As observed in Cumberland Telephone & Tel. Co. v. Hobart, 89 Miss. 252, 254-55, 42 So. 349, 350-51 (1906):

> The inconvenience, the annoyance, and the trouble of being without [a telephone] . . . is a damage which no one can accurately estimate. It is such inconvenience and annoyance as is only to be fully appreciated when one is deprived of its use; its loss is a great and distinct damage, yet such damage as is not susceptible of exact measurement. . . . The damage sustained by the loss of a telephone in its very nature is largely composed of inconvenience and annoyance. That a person deprived of the use of a telephone is materially damaged, all will concede."

Other authorities recognize that recovery for such inconvenience and annoyance should not be denied because of an inability to show the loss sustained with absolute exactness and certainty. See cases collected in Annot. 23 A.L.R. 952, 953-57; 74 Am. Jur. 2d Telecommunications § 65. But we believe that these authorities recognize that the amount of recovery to be allowed in such cases is to be determined by the jury.

Plaintiff's argument, although appealing, fails to dwell upon one consideration which we believe is significant. This is the undisputed fact that plaintiff was not required to pay for the service while it was disconnected and, more importantly, that she would have been required to make such payment had the service not been interrupted. This means that plaintiff, in order to show a right to compensatory damages, had to satisfy the jury not only that her phone service had some value but also that such value, when expressed in dollars, exceeded the usual and ordinary charge for the service. If the value did not exceed such charge then she has not demonstrated that she suffered any compensable loss. Even if it is conceded that the telephone service had some value it does not follow that this was the minimum measure of plaintiff's recovery. For this reason we do not believe the determination of the jury as to this unliquidated claim was beyond any possibility presented by the evidence. Plaintiff's motion for new trial was properly denied on this ground.

II. Plaintiff also asserts that the trial court erred in instructing the jury that no inference should be drawn against the defendant as a corporation which would not be indulged in in an action between individuals. It is urged that this instruction unduly limits defendant's obligation as a public utility to provide a high degree of care to its customers. We believe that this instruction does no more than advise the jury that corporations are entitled to fair and equal treatment in the courts. It in no way purports to limit defendant's obligation to plaintiff as a public utility. This assignment of error is without merit.

III. Lastly, plaintiff contends that the trial court erred in admitting defendant's exhibit B in evidence. This was a written summary of a telephone call received by defendant's business office. Plaintiff did not object to the offer as being hearsay. The objection was based on lack of relevancy and "authentication." We believe the writing was material and relevant to the issues presented on defendant's counterclaim. With respect to the claimed lack of "authentication" the trial court inquired of counsel at the time this objection was made "are you talking about lack of foundation as a business record or what?" Counsel did not elaborate upon the objection already made. Under these circumstances, there was no error in overruling the objection. **E.g.,** State v. Lunsford, 204 N.W.2d 613, 616 (Iowa 1973).

We have considered all issues presented and find no basis for reversal.

AFFIRMED.