FILED
NOV 19 1979
CLERK, SUPREME COURT

180

IN THE COURT OF APPEALS OF IOWA

LORAS KEMP, CONSTANCE KEMP, and LORAS KEMP, as Next Friend of LENNY KEMP, Minor,

Plaintiffs-Appellees,

vs.

IDA A. HIRSCH,

Defendant-Appellant.

Filed November 19, 1979

289
2-63091

Appeal from Dubuque District Court - Karl Kenline, Judge.

Defendant appeals trial court's granting of a new trial in plaintiffs' negligence action on ground of inadequacy of verdict. - Reversed and remanded for reinstatement of jury verdict.

William C. Fuerste, of Fuerste, Carew, Coyle, Juergens & Sudmeier, Dubuque, for defendant-appellant.

H. F. Reynolds, of Reynolds, Kenline, Breitbach, McCarthy, Clemens, McKay & Naughton, Dubuque, for plaintiffs-appellees.

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

PER CURIAM

Defendant appeals from the trial court's granting of a new trial in plaintiffs' negligence action on the grounds that the jury's verdict in favor of one plaintiff was inadequate and that the verdict against the other plaintiffs was contrary to law and unsupported by the evidence. We reverse and remand for reinstatement of the jury's verdict.

This action arose out of an intersection collision between plaintiffs' and defendant's automobiles. Plaintiff Constance Kemp claimed damages for injuries sustained as a result of the accident, which the evidence shows were aggravations of injuries incurred in previous accidents. Plaintiff Loras Kemp claimed loss of consortium caused by Constance's injuries and also claimed damages for injuries to the couple's minor son, Lenny. The jury returned a verdict in favor of Constance for her injuries in the amount of $2500 and in favor of defendant on the other two claims. The plaintiffs filed a motion for a new trial on the grounds that the verdict for Constance was inadequate, inequitable, influenced by passion and prejudice, and due to the jury's failure to consider and respond to the evidence and the court's instructions. The motion also contended that the verdict in favor of defendant on the other two claims was contrary to law and unsupported by sufficient evidence. The trial court granted the motion for a new trial setting aside the jury verdict, and defendant appealed from that order.

In ruling on a motion for a new trial, the trial court has broad discretion, but that discretion is not unlimited. The determining consideration is whether the verdict effectuates substantial justice between the parties. Lappe v. Blocker, 220 N.W.2d 570, 572 (Iowa 1974); Iowa R. App. P. 14(f)(3). While we are slower to interfere with the granting of a new trial than with a denial, Iowa R. App. P. 14(f)(4), we will not hesitate to do so on a finding that the trial court has abused its discretion. Waddell v. Peet's Feeds, Inc., 266 N.W.2d 29, 31 (Iowa 1978); Kaiser v. Stathas, 263 N.W.2d 522, 527 (Iowa 1978); Northrup v. Miles Homes, Inc., 204 N.W.2d 850, 861 (Iowa 1973). When there is substantial evidence supporting a jury verdict, the trial court's granting of a new trial on the ground that it would have reached a different result constitutes an abuse of discretion. Kaiser, 263 N.W.2d at 525 (quoting Lappe, 220 N.W.2d at 573).

The evidence showed that Constance Kemp's special damages amounted to $518.81.

She also claimed damages for pain and suffering. The jury's award of $2500 clearly covered the amount claimed as special damages. Consequently, the contention of inadequacy must be based on the jury's award for pain and suffering.

Constance's physician testified that she was permanently disabled as a result of all of the accidents to the extent of twenty-five percent of her body; five percent attributable to the accident in the case at bar. However, the jury was not required to accept that expert testimony, even though it was uncontradicted, provided it did not arbitrarily and capriciously reject the testimony. Eickelberg v. Deere & Co., 276 N.W.2d 442, 447 (Iowa 1979); Waddell, 266 N.W.2d at 32. The jury was presented with many factual issues regarding the proximate cause of Constance's injuries, and the amount of pain and suffering incurred as a result of injuries proximately caused by this accident, as opposed to previous accidents. When the dispute over damages is largely factual, and there is substantial evidence supporting the jury's resolution of this factual dispute, a new trial is not warranted merely on the ground that reasonable men might disagree with the jury's conclusion. Northrup, 204 N.W.2d at 861. The subjective determination of an award of damages for pain and suffering, an award that is peculiarly speculative because of its incapability of pecuniary measurement by witnesses, is a function especially within the province of the jury. Waddell, 266 N.W. at 32; Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 525 (Iowa App. 1977). In light of the evidence regarding Constance's injuries incurred in previous accidents and the evidence showing the relatively minor impact of the collision in the case at bar, we think that there was substantial support for the jury's determination that approximately $2000 was sufficient to adequately compensate Constance for her pain and suffering arising out of injuries directly connected with the accident in this case.

There was no evidence of any passion or prejudice by the jury. There was evidence to support the jury's verdict and the jury acted within the bounds of the instructions by the trial court. Apparently, the trial court concluded that the evidence warranted a larger verdict, and thus substituted its judgment for that of the jury in granting the motion for a new trial. However, on the basis of the evidence presented, we cannot conclude that the verdict failed to administer substantial justice between the parties. Thus, the trial court abused its discretion in granting the motion. Waddell, 266

N.W.2d at 32; Kaiser, 263 N.W.2d at 527; Lappe, 220 N.W.2d at 573.

We are not holding that a trial court may never overturn a jury's verdict on the issue of damages. However, this is not a case in which a plaintiff was not compensated in full for special damages. Neither is this a case in which the injuries sustained were clearly the result of the one accident that gave rise to the cause of action. This is simply a case in which the trial court concluded that the award for pain and suffering was inadequate. There was no claim of misconduct or unfairness. Plaintiff was accorded a fair trial, and she is only entitled to one. Thornberry v. State Board of Regents, 186 N.W.2d 154, 161 (Iowa 1971); Jones v. Iowa State Highway Commission, 185 N.W.2d 746, 749 (Iowa 1971).

We feel compelled to repeat the paragraph in Lantz v. Cook, 256 Iowa 409, 413, 127 N.W.2d 675, 677 (1964), that is so often quoted in cases such as this:

> 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.

We think the above analysis applies equally to Loras Kemp's claim for loss of consortium, since there was sufficient support in the record for the jury's determination that the evidence did not substantiate such a claim based on the accident in the case at bar. Thus, the trial court abused its discretion in overturning the jury's verdict and ordering a new trial on that claim.

The claim for Lenny's injuries is a different matter. In fact, the evidence did not reveal the extent of any injuries sustained by Lenny as a result of the accident. The jury could have concluded from the evidence that Lenny suffered no injuries, or if he did, the injuries were so slight that compensation in the form of damages was not warranted. The evidence only revealed expenses for outpatient examination to determine if Lenny had in fact incurred any injuries from the accident. While such expenses were clearly incurred as a result of defendant's negligence, it must also be shown that they were made necessary by that negligence. Stanley v. State, 197 N.W.2d 599, 606 (Iowa 1972). In light of the paucity of evidence showing any injuries to Lenny as a result of the accident, the jury could have reasonably concluded that the examination expenses were not necessary, or even if necessary, were not significant

enough to warrant recovery. Consequently, the jury's verdict in favor of defendant on the claim of injuries to Lenny was not inconsistent with the award of damages to Constance, was sustained by sufficient evidence, and was not contrary to law. The trial court abused its discretion in overturning the jury verdict for defendant on the claim of damages for injuries to the Kemp's minor son, Lenny, and in ordering a new trial on that claim.

REVERSED AND REMANDED FOR REINSTATEMENT OF JURY VERDICT.

Oxberger, C.J., and Donielson, J., dissent.

OXBERGER, C.J. (dissenting)

The trial court's discretion, when ruling on a motion for new trial, is broad. Iowa R. App. P. 14(f)(3). Trial courts should grant new trial "'whenever their superior and more comprehensive judgment teaches them that the verdict of the jury fails to administer substantial justice.'" Torrence v. Sharp, 246 Iowa 460, 464, 68 N.W.2d 85, 88 (1955) (quoting Dewey v. Chicago & N.W.R. Co., 31 Iowa 373, 378 (1871)). I do not believe the trial court abused its discretion by granting new trial. Rather, deference to the trial court's superior ability to view the justness of the jury verdict is in order and its action should be affirmed.

Additionally, in regard to Lenny's claim, the majority seems to say the minimal evidence on injuries to Lenny substantiates a finding the examination expenses were unnecessary or not significant enough to warrant recovery. I think evidence of injury has slight materiality to the question whether examination was made necessary by defendant's negligence and I think the record sufficiently establishes the examination and x-rays were prudent and necessary.

Donielson, J., joins in this dissent.