IN THE COURT OF APPEALS OF IOWA

No. 3-269 / 92-1500

FILED
MAR 24 1994
CLERK SUPREME COURT

KATHY RANK and JERRY RANK,

Appellants,

vs.

KAREN MARIE WALSH,

Appellee.

Appeal from the Iowa District Court for Polk County, Richard A. Strickler, Judge.

Plaintiffs appeal the district court's refusal to grant them a new trial after the jury awarded them no damages in their personal injury action based on an automobile accident. **REVERSED AND REMANDED.**

Michael J. Galligan of Michael J. Galligan Law Firm, P.C., Des Moines, for appellant.

Joseph S. Cortese II of Jones, Hoffman, Huber, Kelly, Book & Cortese, Des Moines, for appellee.

Considered by Donielson, P.J., Hayden, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving by order of the Iowa Supreme Court.

HAYDEN, J.

On September 30, 1989, Jerry and Kathy Rank were involved in an automobile accident with Karen Walsh. Jerry was driving, and Kathy was a passenger. Walsh admitted liability for the accident. Kathy testified she immediately had stiffness in her upper shoulders, back, and neck immediately following the accident.

Kathy went to her family physician, Dr. Mark Purtle, on October 3, 1989. She had tenderness in her back along the spine, as well as the right rib cage. Dr. Purtle diagnosed paraspinous muscle strain. The paraspinous muscles are those muscles located on each side of the spine. Dr. Purtle also ordered X rays of the ribs which confirmed she did not have a fracture. Kathy's total medical bill was $185.50.

Kathy returned to Dr. Purtle on January 12, 1990. She then stated the pain in her back and neck had seemed to be resolved but had then been aggravated by stress at work and the fact she had lifted her sixty-five-pound dog. Kathy saw Dr. Purtle again on March 26, 1990, because of continuing pain in her back and neck. Dr. Purtle testified Kathy's symptoms were caused by the automobile accident. On May 8, 1990, Dr. Purtle referred her to Dr. William Koenig, a physical medicine specialist who treats patients for rehabilitation after injuries. Dr. Koenig determined Kathy had fibrositis syndrome, which is a protracted course of muscular tenderness.

Beginning on July 11, 1990, Kathy was treated by Dr. Mary Radia, a physician rheumatologist. Rheumatology is the specialized study of various forms of muscle and joint diseases. Dr. Radia determined Kathy suffered from myofascial syndrome, which is a localized type of fibrositis. Myofascial syndrome can be related to muscle injuries. Dr. Radia testified Kathy's medical problems were caused by the automobile accident. She also testified Kathy would probably have continuing problems with pain in her back and neck.

At defendant's request, Kathy was examined by Dr. Peter Wirtz, an orthopedic surgeon. He found some tenderness in her back and neck. Dr. Wirtz testified Kathy suffered only a chest injury in the accident and this injury had resolved itself by January 12, 1990. He gave the opinion muscle strains resolve and Kathy would not have had continuing symptoms without another injury.

Plaintiffs filed suit on July 23, 1991, alleging Walsh's negligence in the automobile accident caused Kathy to suffer damages. Walsh admitted negligence, and the case was tried before a jury solely on the issue of damages. The jury returned a verdict awarding plaintiffs no damages.

Plaintiffs then filed a motion for new trial claiming the damages were inadequate. The district court denied the motion. Plaintiffs have appealed.

Plaintiffs contend the district court abused its discretion in denying their motion for new trial. They

claim the evidence shows Kathy sustained an injury in the accident and, at the very least, suffered damages due to medical expenses. They believe the award of no damages was clearly inadequate.

Under Iowa Rule of Civil Procedure 244, the trial court may grant a new trial where the jury verdict was apparently influenced by passion or prejudice resulting in either excessive or inadequate damages, where the verdict is not sustained by sufficient evidence, or is contrary to law. Ort v. Klinger, 496 N.W.2d 265, 269 (Iowa App. 1992).

A trial court has broad, but not unlimited discretion, to determine if a jury verdict effectuated substantial justice between the parties. Id. When the verdict is manifestly inadequate, we consider the refusal of the district court to grant a new trial an abuse of discretion which is subject to reversal. Grodt v. Darling, 472 N.W.2d 845, 847 (Iowa App. 1991).

Although the amount of damages to be awarded is peculiarly a jury, not a court, function, courts should see that a verdict fairly and adequately compensates a plaintiff for the damages suffered. Yoch v. City of Cedar Rapids, 353 N.W.2d 95, 99 (Iowa App. 1984). Damages should be commensurate with the injury, and be sufficient to right the wrong done to the injured party. Id. A verdict will be set aside as inadequate where it appears clearly from uncontroverted evidence that the amount of the verdict bears no reasonable relationship to the loss suffered by the plaintiff. Id.

We determine the district court abused its discretion in not granting a new trial. We note there was no issue in this case on the question of liability. As to proximate cause, all of the medical experts agreed Kathy suffered some type of injury in the automobile accident. Furthermore, she had medical treatment soon after the accident for her injury and thus incurred damages due to defendant's negligence.

Clearly Kathy suffered an injury in the automobile accident. The nature and extent of the injury may be open to debate. Walsh argued the injury was minor and had resolved by Kathy's visit with Dr. Purtle on January 12, 1990. However, even Walsh's expert, Dr. Wirtz, agreed Kathy suffered an injury in the accident. Therefore, the jury's award of no damages was not supported by the evidence. We conclude a new trial should be granted because the jury's award of damages was inadequate under the facts of the case. We make no findings as to what the amount of damages should be.

Plaintiffs also raise a claim the district court erred in allowing defendant's expert, Dr. Wirtz, to testify in person after his evidentiary deposition was taken at the request of the defendant. Plaintiffs cite no authority in support of this argument. This issue is deemed to be waived pursuant to Iowa Rule of Appellate Procedure 14(a)(3). Johnson v. State Farm Auto. Ins. Co., 504 N.W.2d 135, 139 (Iowa App. 1993). Therefore, we do not address this issue on appeal.

We reverse and remand for a new trial. Costs of this appeal are assessed to defendant Karen Walsh.

REVERSED AND REMANDED.