

IN THE COURT OF APPEALS OF IOWA

FILED

SEP 21 1982

CLERK SUPREME COURT

GAYE L. ERICKSON,

)

Plaintiff-Appellant,
Cross-Appellee,

)

)

vs

)

LOWELL E. NIELSEN,

)

Defendant-Appellee,
Cross-Appellant.

)

Filed September 21, 1982

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2-70

2-65866

Appeal from Woodbury District Court - Lawrence W. McCormick, Judge.

Plaintiff appeals from a jury verdict in her favor for personal injuries alleging that: 1) the jury verdict was inadequate; 2) the jurors engaged in misconduct; and 3) the trial court admitted inadmissible evidence. Defendant cross-appeals, alleging the case should have not been tried on the ground that it stood dismissed for want of prosecution under Iowa Rules of Civil Procedure 215.1. AFFIRMED.

Paul W. Deck, Sioux City, Iowa, for plaintiff-appellant, cross-appellee.

Emmanuel S. Bkakakis, Sioux City, Iowa, for defendant-appellee, cross-appellant

Heard en banc.

Plaintiff, Gaye L. Erickson, appeals from a jury verdict in her favor for personal injuries alleging that: 1) the jury verdict was inadequate; 2) the jurors engaged in misconduct; and 3) the trial court admitted inadmissible evidence. Defendant, Lowell E. Nielsen, cross-appeals, alleging the case should have not been tried on the ground that it stood dismissed for want of prosecution under Iowa R. Civ. P. 215.1. We affirm the trial court's judgment.

Plaintiff initiated this action in May of 1977 seeking recovery for injuries sustained in a traffic accident which occurred in June, 1975. She alleged she suffered injuries to her right knee and lower back as a result of defendant's negligence in allowing his truck to roll back into the car in which she was a passenger. In March of 1978, while this law suit was pending, plaintiff suffered other injuries in a fall from the front steps of her apartment. She testified that the knee injury allegedly caused by defendant's negligence contributed to her fall; however, she did not seek damages from this defendant for the injuries suffered in the fall. Defendant introduced evidence at trial which tended to show that plaintiff had slipped on some ice on the steps and that plaintiff's injured knee was not, in fact, the cause of the 1978 incident. The jury returned a verdict awarding plaintiff damages of \$1,500. Plaintiff moved for a new trial, alleging that the damages were inadequate and that the jury had engaged in various forms of misconduct. Trial court overruled the motion and this appeal followed.

I. Scope of Review. Since this is an action at law, our review is on assigned errors only. Iowa R. App. P. 4.

II. Propriety of Trial Court's Ruling Granting Reinstatement to Plaintiff Pursuant to Iowa Rules of Civil Procedure 215.1. We will initially address defendant's contention that this case was dismissed due to plaintiff's failure to comply with the terms of the order reinstating her petition. Plaintiff filed her petition in this action on May 17, 1977. The parties performed some discovery in the period

subsequent thereto. At the end of 1978 the suit became subject to the possibility of dismissal for want of prosecution under Iowa Rules of Civil Procedure 215.1. In December, 1978, trial court granted a continuance to July 1, 1979, upon a stipulation of both parties that trial could be held by that date. July 1, 1979, however, passed without the action coming to trial. On December 4, 1979, plaintiff filed a motion to reinstate the action pursuant to rule 215.1. A hearing on December 17, 1979, before Judge Davis, resulted in trial court's reinstatement of the action "providing plaintiff shall comply with all requests for discovery, as may be approved by the court today, by January 2, 1980." This order was not filed until January 24, 1980. The reason for the delay in the filing of Judge Davis's order is unexplained by the record.

On February 11, 1980, plaintiff filed a trial certificate which defendant resisted on the basis that plaintiff had failed to comply with Judge Davis's conditional order for reinstatement of January 24, 1980. Judge Pendleton, to whom the matter was presented, did not rule on the parties' motions, but allowed the parties time to contact Judge Davis and have him interpret his order of January 24, 1980. Judge Pendleton set the trial date for April 15, 1980. Neither party nor Judge Davis offered any further explanation of the January 24th order as to what discovery requests were "approved" by him.

Defendant thereafter sought a writ of certiorari on this issue. Justice McCormick of the Iowa Supreme Court stated that a trial court ruling would be necessary before determination could be made at the appellate level as to whether the writ could be sustained.

On April 4, 1980, Judge Pendleton formally ruled on defendant's resistance to the trial certificate, noting that defendant had not challenged the jurisdiction of the court or had not requested a dismissal of the action for failure to comply with Judge Davis's January 24th order. Judge Pendleton, accordingly, overruled defendant's resistance to the trial certificate. Defendant's application for writ of

certiorari was subsequently denied by the Iowa Supreme Court and the matter came to trial on April 15, 1980.

We begin our analysis with Iowa Rules of Civil Procedure 215.1 which provides, in part:

The trial court may, in its discretion, and shall upon a showing that such dismissal was a result of oversight, mistake or other reasonable cause, reinstate the action or actions so dismissed. Application for such reinstatement, setting forth the grounds therefore, shall be filed within six months from the date of dismissal.

Defendant concedes that plaintiff's application to reinstate was filed within six months from the date of dismissal within the meaning of rule 215.1. Defendant, however, urges that the order of December 17, 1979, was conditional upon plaintiff's compliance with all discovery requests, but that plaintiff did not comply with the conditional order and, therefore, should be barred from trying the action. We are not persuaded by defendant's argument.

As indicated, Judge Davis granted plaintiff's motion for reinstatement with the condition that plaintiff comply with the discovery request by January 2, 1980. The order was not filed until January 24, 1980, and plaintiff's counsel did not receive a copy of the order until January 25, 1980. Upon receipt of that order, plaintiff complied with discovery by February 5, 1980.

We first note that the January 24, 1980, order refers to discovery matters "approved" by the court but gives no indication of what matters were approved. This court will not guess as to what trial court approved. Further, the January 24, 1980, order does not state whether the action was reinstated under the discretionary or under the mandatory provisions of rule 215.1. Even in absence of "oversight, mistake or other reasonable cause" the court may, in its discretion, reinstate the action. See Wharff v. Iowa Methodist Hospital, 219 N.W.2d 18, 25 (Iowa 1974).

"Our review in those peripheral areas in which trial court's discretion is invoked under rule 215.1 R.C.P. will be that employed in reviewing rulings under rule 236, R.C.P. The exercise of a lower court's discretion is not reviewable; it is only the alleged abuse of that power which is reviewable on appeal. * * * [citing authority]. Generally, abuse of discretion will be found only where there is no support for the decision in the hearing evidence. * * * [citing authorities]."

Id. We believe the court could have reasonably concluded that it was impossible for plaintiff to comply with the conditional reinstatement order since she did not receive notice of it until 22 days after the date specified in the order. On these facts, this court finds that trial court did not abuse its discretion in reinstating this action on January 24, 1980.

Also in his argument defendant urges us to find that Judge Pendleton's order constituted "illegal modifications, alterations or vacations of Judge Davis's conditional reinstatement order" which stood as a final disposition of the case once plaintiff failed to meet the January 22 date. We find this argument totally untenable and without merit. Judge Pendleton specifically allowed the parties time in which to contact Judge Davis and request further explanation of his order. There is no evidence in the record to indicate that defendant did so; we believe this constitutes a waiver on defendant's part. We thus conclude that this case was properly reinstated under Iowa Rules of Civil Procedure 215.1.

III. Propriety of the Trial Court's Rulings on Admissibility of Evidence.

Plaintiff contends that trial court erred in admitting over objection evidence concerning collateral matters. She argues that new controversial matters were brought into the case which resulted in confusion of issues, constituted unfair surprise, and caused prejudice wholly disproportionate to any value or usefulness of the offered evidence. The allegedly objectionable evidence related to plaintiff's fall at her residence on March 10, 1978, and the subsequent settlement of her claims against her landlord for the fall.

The record shows that evidence of the 1978 injury first surfaced in plaintiff's direct examination wherein plaintiff testified that her "knee went out." Plaintiff

elaborated upon the nature and treatment of her head and shoulder injuries stemming from the fall. She went into detail about her hospitalization for the fall, surgery on her shoulder and the insertion of two pins in her shoulder as a result of the March 10, 1978 injury. She testified that she suffered a concussion from the fall and showed the jury the protruding bone on her head resulting therefrom. She further stated that she had to undergo "a lot of EEG's."

Before defendant's cross-examination of plaintiff was completed, the court permitted plaintiff to call Dr. Blume, plaintiff's treating physician. At that point defendant had not cross-examined plaintiff on the March 10, 1978, accident. In plaintiff's examination of Dr. Blume, counsel brought out the fact that Dr. Blume knew of the March 10, 1978, accident and that he was, in fact, involved in the surgery on plaintiff. During direct examination Dr. Blume was asked by plaintiff's counsel whether the 1975 knee injury caused the 1978 accident to which he replied that "[i]t may have some correlation." In defendant's cross-examination, counsel sought to introduce a medical report involving plaintiff's treatment for the March 10, 1978, accident. Plaintiff's counsel stipulated and stated that plaintiff would not object to its introduction.

Plaintiff also stated on cross-examination that she did not seek damages for the injury sustained in the fall, but rather wanted to show that the knee was responsible for the fall. The statement that she did not seek damages as a result of the fall appeared to be contrary to her answers to interrogatories. Defense counsel presented plaintiff with a copy of her answers to interrogatories. Especially pertinent is interrogatory number 23, wherein plaintiff states that she was hospitalized from March 10, 1978, to March 17, 1978, as a result of the accident which is the subject matter of this litigation. This hospital confinement was directly related to her fall on the steps on March 10, 1978. Throughout trial plaintiff remained adamant that she felt that the accident, which is the subject matter of this litigation, was the reason for her knee giving out and causing the injuries of the March, 1978, fall.

Late during the trial plaintiff made a motion in limine to prevent the introduction of evidence of the March 10, 1978 injury. Trial court overruled this motion.

"Generally, when a party makes no objection to reception of evidence at trial, the matter will not be reviewed on appeal." Wirtanen v. Provin, 293 N.W.2d 252, 257 (Iowa 1980). In this case plaintiff herself introduced matters concerning the March 10, 1978, injury and her attendant injuries. She additionally stated in discovery that she was hospitalized in March of 1978 as a result of defendant's alleged negligence. Defendant attempted to show that plaintiff's knee going out on March 10, 1978 was not the cause of her injury but rather, that she slipped and fell on ice. Plaintiff, after introducing and establishing the relevance of the March 10, 1978, injury can not now claim that defendant's introduction of evidence as to the cause of the 1978 injury was improper.

The much more difficult issue is whether trial court erred in admitting evidence of settlement of the claim against plaintiff's landlord for the 1978 fall. Defendant elicited testimony regarding the settlement in his cross-examination of plaintiff. Plaintiff's counsel at that time did not object to that line of interrogation. Only after the defense counsel had addressed the issue twice on cross-examination did plaintiff make the following objection:

I think I have been more than gracious in allowing the attorney to cover this fall of March 10th, 1978; therefore, at this moment I feel this question is immaterial, irrelevant, incompetent, and he's been trying to interject into this case a collateral issue, that she's testified that she has no claim or making no claim under her petition for any shoulder injury due to that fall.

We believe plaintiff had, in fact, "graciously" opened the door for defendant to introduce evidence of the settlement.

If the administration of the exclusionary rules of evidence is to be fair and workable the judge must be informed promptly of contentions that

evidence should be rejected, and the reasons therefor. The initiative is placed on the party, not on the judge. The general approach, accordingly, is that a failure to object to an offer of evidence at the time the offer is made, assigning the grounds, is a waiver upon appeal of any ground of complaint against its admission.

McCormick on Evidence, (2nd ed. 1972) § 52. See also Oakes v. Peter Pan Bakers, Inc., 258 Iowa 447, 138 N.W.2d 93 (1965). The admission of the additional evidence of settlement was not prejudicial to the plaintiff since it was cumulative of matters already in the record to which plaintiff made no objection. See Luse v. Waco Community School District of Henry County, 258 Iowa 1087, 1098, 141 N.W.2d 607, 614 (1966). Further, plaintiff failed to request a limiting instruction. See, e.g., Law v. Hemmingson, 249 Iowa 820, 835, 89 N.W.2d 386, 397 (1958). We accordingly conclude that plaintiff waived any assignment of error on the basis of the admission of evidence relating to settlement of the 1978 claim. Thus, while we note the highly prejudicial nature of settlement evidence, we do not reach the merits of this issue. See 29 Am. Jur. 2d § 310 (1967); compare Nepple v. Weifenbach, 274 N.W.2d 728, 733 (Iowa 1979) (evidence of the amount of settlements of prior injuries held inadmissible).

IV. Propriety of Trial Court's Ruling in Denying Plaintiff's Motion for a New Trial. Plaintiff also asserts that trial court erred in overruling her motion for a new trial because: 1) the verdict failed to administer substantial justice; and 2) there was jury misconduct which prevented plaintiff from having a fair trial. We affirm the trial court's ruling.

In the present case, the maximum the jury could return for special damages as outlined by the jury instructions was \$1,957.77; the verdict returned was for \$1,500. The analysis of whether a party should be granted a new trial for an allegedly inadequate jury verdict was detailed in Householder v. Town of Clayton, 221 N.W.2d 488 (Iowa 1974).

The inadequacy of damages may be cause for setting aside a jury verdict and granting a new trial in a proper case. [citations]. The trial

court has considerable discretion in ruling on a motion for new trial on the grounds of the inadequacy of a verdict. Where the damages are so inadequate as to warrant a new trial is usually left for the trial court to decide, and its discretion in granting or refusing to grant a new trial will not ordinarily be disturbed on appeal unless an abuse of discretion is shown. [citations]. The question as to whether damages awarded in a given case are inadequate must be determined on the peculiar facts of that case. [citations]. * * * The test of adequacy is for the court to determine what will fairly and reasonably compensate an injured party for the injury sustained. [citations].

Id. at 492-93.

In Householder, the court in reversing the trial court's refusal to grant a new trial found that "[t]he undisputed facts indicate the minimum out-of-pocket loss to Householder was the amount of \$9,805.22" and the jury returned a verdict of only \$8,000. In the present case the amount of damages was stipulated as being reasonable, but there was an issue of proximate cause. "[T]he jury had to decide whether the various items of damages complained of were proximately sustained as a result of defendant's negligence as the court instructed." Kaiser v. Stathas, 263 N.W.2d 522, 525 (Iowa 1978). Thus, the jury had to determine from the evidence whether any portion of the damages claimed by plaintiff was due to any physical ailment or disability which may have been caused by her back injury and neck fusion in 1951, from an auto accident in 1957, or from surgery performed in 1973 on plaintiff's back or what portion, if any, of the damages sustained was due to any disability caused by a previous condition which was aggravated by this accident. The amounts established in instruction 20 were only maximums, not minimums, and were disputed. This court cannot say that the trial court abused its discretion in denying plaintiff's motion for a new trial merely upon the basis of the jury's return of a \$1,500 verdict when the amount of special damages was in dispute.

Plaintiff next assigns as error trial court's failure to grant a new trial based upon juror misconduct. In support of her contention, plaintiff attaches affidavits

of jurors. The standard for our review on an alleged juror misconduct is detailed in Wirtanen v. Provin, 293 N.W.2d 252, 259 (Iowa 1980). It is unnecessary for us to delineate further the elements for our review. Plaintiff asks this court to infer juror misconduct from the allegedly inadequate verdict returned. We have already found this assertion to be unpersuasive. After reviewing plaintiff's contentions of juror misconduct, we find no merit in them.

We affirm the decision of the trial court on all points.

AFFIRMED.