

FILED

SEP 21 1978

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MARJORIE BOONE,

)

Appellee,

)

Filed September 21, 1978

vs.

)

CARROLL EDWARD LETTINGTON,

)

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2-61369

Appellant.

)

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

Defendant appeals the granting of a new trial after the jury returned a "no damage" award to plaintiff for injuries allegedly sustained in an automobile collision in which defendant admitted liability. Affirmed.

James Q. Blomgren, of Whitfield, Musgrave, Selvy, Kelly & Eddy, of Des Moines, counsel for appellant.

John R. Ward, of Des Moines, counsel for appellee.

Submitted to Donielson, Acting C. J., Snell, Oxberger and Carter, JJ.

PER CURIAM

Plaintiff Marjorie Boone was granted a new trial on the issue of damages sustained as a result of an automobile collision after the jury returned a "no damage" award in favor of defendant Carroll Lettington. Lettington prior to trial had admitted liability. Lettington appeals charging the trial court abused its discretion in granting a new trial. We affirm.

We need not be able to say Boone was entitled to a directed verdict in order to affirm the trial court's exercise of its discretionary power to order a new trial. *Coleman v. Brower Construction Co.*, 254 Iowa 724, 730, 119 N.W.2d 256, 259 (1963). Nor is it necessary that we find reversible error was committed at trial. The supreme court has repeatedly held trial courts should grant a new trial when they are convinced the verdict fails to render substantial justice or it appears the jury has not responded truly to the real merits of the controversy. *White v. Walstrom*, 254 Iowa 646, 652, 118 N.W.2d 578, 582-83 (1962).

As Coleman states:

We should not disturb the order appealed from unless we can say there was no reasonable ground for the trial court to believe the jury reached an unjust result which may be obviated upon a second trial.

254 Iowa at 731, 119 N.W.2d at 259. Aware that the trial court had a greater discretion to order a new trial in the interest of justice than this court has upon review, we recognize the superior position of the trial court to "observe the effect of the evidence and the general conduct of the trial." Coleman, *supra*. The trial court reviewed the jury's verdict and concluded there had been a failure of justice. We hold the granting of the new trial was a reasonable exercise of the trial court's discretion.

AFFIRMED.

Danielson, Acting C. J., dissents.

DONIELSON, Acting C. J. (dissenting)

I dissent. While defendant admitted his negligence was the proximate cause of the accident, a factual question was created as to whether plaintiff's injuries were proximately caused by defendant's negligence or a pre-existing condition in plaintiff and strenuous duties at her two jobs. Another factual question presented was whether her hospitalization for dizziness and a pain in her left arm 17 months after the accident was related to the accident in any way. Where the dispute is primarily factual, and there is substantial evidence to support the jury's determination of these facts, the judge should not grant a new trial because reasonable persons might disagree with the jury's conclusion. *Kaiser v. Stathas*, 263 N.W.2d 522, 525 (Iowa 1978); *Lantz v. Cook*, 256 Iowa 409, 413, 127 N.W.2d 675, 677 (1964).

It was for the jury to decide on the basis of the medical evidence before it whether the collision was the proximate cause of plaintiff's injuries. If the jury rejected the testimony asserting this, as it had a right to do, its verdict should not be set aside. *Waddell v. Peet's Feeds, Inc.*, 266 N.W.2d 29, 32 (Iowa 1978). I would reverse the trial court and reinstate the jury verdict.