FILED
DEC 28 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

HAROLD WADDELL,

Appellant,

v.

PEET'S FEEDS, INC.,

a Corporation,

Appellee.

Filed December 28, 1977

348
2-60036

Appeal from Pottawattamie District Court - E. F. Hanson, Judge.

Appeal from trial court's grant of new trial based upon inadequacy of jury award for personal injuries. Reversed.

James E. Thorn and John D. Sens, of Johnson, Stuart, Tinley, Peters & Thorn, of Council Bluffs, for appellant.

C. R. Hannan, of Council Bluffs, and David A. Johnson, of Omaha, Nebraska, for appellee.

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

PER CURIAM

This action was commenced by Harold Waddell to recover for personal injuries suffered by him in a fall from a catwalk located on defendant Peet's Feeds' premises. The jury gave a verdict for plaintiff in the amount of $11,526.95. Plaintiff moved for a new trial, and defendant moved for judgment notwithstanding the verdict. Trial court granted a new trial on all issues. Defendant appeals, demanding that judgment be entered on the verdict, and plaintiff cross-appeals, claiming the new trial should be on the issue of damages alone.

We deal first with defendant's appeal. In reviewing this matter, we are cognizant of the principles set out in Householder v. Town of Clayton, 221 N.W.2d 488 (Iowa 1974), Moore v. Bailey, 163 N.W.2d 435 (Iowa 1968), and rules 14(f)(3) and (4), Rules of Appellate Procedure.

At trial, the jury was instructed that it could award damages for past medical expenses of $2226.95, loss of $2300 in earnings, past and future pain and suffering, loss of earning capacity, and future medical expense. Examination of the numbers involved reveals plaintiff was awarded a verdict substantially in excess of the items for which specific amounts were provided. What the jury intended the sum beyond the specific figures to compensate plaintiff for is purely a matter of conjecture.

The jury is not bound by the testimony of any witness. Daboll v. Hoden, 222 N.W.2d 727, 736 (Iowa 1974). Assessment of damages is the jury's function. Pagitt v. City of Keokuk, 206 N.W.2d 700, 704 (Iowa 1973). While the evidence would have supported a larger verdict, it must not be set aside as inadequate simply because trial court, or the reviewing court, would have reached a different result. Trial court abused its broad discretion in granting a new trial. On remand, judgment shall be entered on the jury's verdict.

Our resolution of defendant's appeal makes consideration of the cross-appeal unnecessary.

REVERSED.

DONIELSON, J., dissents.

DONIELSON, J. (dissenting)

I dissent. I cannot agree with the result reached by the majority because I do not find any abuse of discretion by the trial court in granting a new trial.

The undisputed evidence established that plaintiff had already incurred hospital and medical expenses of $2,226.95 and suffered a loss of earnings of $2300, for a total of $4,526.95. The only medical evidence at trial was presented by the plaintiff. Both the jury and the trial court heard an orthopedic surgeon testify that the plaintiff had 35 percent permanent disability of the right foot and 25 percent disability of the left foot with advancing arthritis which, in his opinion, resulted from the accident.

The medical expert testified that, based upon reasonable medical certainty, the plaintiff would need an additional operation on his right foot although he was undecided about the left one. The surgeon also concluded that plaintiff would be unable to work for some four to five months. On the basis of plaintiff's $1,000 per month salary, this would entail a $4,000 to $5,000 future loss of earnings. The defendant introduced no medical evidence to dispute that presented by the plaintiff.

Although testimony regarding the anticipated cost of surgery at some future time was somewhat vague, it is clear that the present cost of such surgery would be $1500 for hospitalization, $500 to $600 for surgeon's fees and $150 for anesthesiologist's fees. Therefore, on the basis of the only evidence presented, it is apparent that the actual past and future expenses would range from $10,676.95 to $11,776.95. The jury returned a verdict for plaintiff in the amount of $11,526.95. Essentially, this left little or no recovery for the substantial disability of the feet and nothing for pain and suffering.

Although the majority notes that it is "cognizant" of the relevant legal principles regarding the granting of new trials, it holds that the trial court abused its discretion in granting a new trial in the instant case. I cannot agree. [1]

In Riley v. Wilson Concrete Co., 184 N.W.2d 689, 690 (Iowa 1971), the court stated:

[1] This factual situation is remarkably similar to or perhaps even stronger than that of Kaiser v. Stathas filed by this Court on November 10, 1977, and accepted for further review by the Supreme Court on December 16, 1977. Inferentially I conclude that it seems likely we will have further guidance concerning abuse of judicial discretion in the granting of a new trial for an unjust result.

> "In ruling upon a motion for new trial, broad but not unlimited discretion is vested in the trial court and we are slower to interfere with the grant of a new trial than with its denial. Rule 344(f)(3)(4), Rules of Civil Procedure. [Rules 14(f)(3) and (4), Rules of Appellate Procedure] Erickson v. Thompson, 257 Iowa 781, 791, 135 N.W.2d 107 (1965). We will 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. Coleman v. Brower Construction Co., 254 Iowa 724, 731, 119 N.W.2d 256 (1963)." (emphasis added)

The court has also defined the term "abuse of discretion" in the following manner:

> "Discretion is an elastic term, and an attempt to define or classify it is a difficult undertaking. 'Abuse of discretion' does not necessarily imply a dishonest motive or act; it is not ordinarily a term of reproach. There is no hard and fast rule by which to determine whether a court has abused its discretion. It arises from action beyond the bounds of fair discretion, exceeding the bounds of reason. It has been defined as 'an erroneous conclusion and judgment, one clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.' " Best v. Yerkes, 247 Iowa 800, 815-816, 77 N.W.2d 23 (1956).

After a review of the facts of the instant case and the relevant legal principles, I conclude that the trial court had more than sufficient grounds to believe that the jury reached an unjust result. Since I find no abuse of discretion, I would affirm the district court.