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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROBERTA J. HOWES,)

Plaintiff-Appellant,)

vs.)

MINNIE ENGELENA TAPKIN,)

Defendant-Appellee.)

Filed September 6, 1984

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4-238
83-1593

Appeal from the Iowa District Court for Jones County--Larry J. Conmey, Judge.

Plaintiff, Roberta Howes, appeals from trial court's denial of her motion for new trial following a defendant's verdict in her personal injury action. AFFIRMED.

William C. Fuerste and Douglas Henry, of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, Iowa, for plaintiff-appellant.

Brendan T. Quann, of O'Connor, Thomas, Hammer, Bertsch & Norby, Dubuque, Iowa, for defendant-appellee.

Considered by Snell, P.J., Hayden and Sackett, JJ.

SACKETT, J.

Plaintiff was a passenger in a motor vehicle which was struck by an automobile operated by defendant, Minnie Tapkin. Plaintiff filed suit against the defendant alleging that defendant was negligent in the operation of her motor vehicle and that as a proximate result of the negligence plaintiff sustained permanent and disabling personal injuries. The matter was submitted to a jury that returned a verdict for the plaintiff in the amount of $322.90. Plaintiff filed a motion for a new trial alleging that the trial court should grant a new trial because the inadequate damages appear to have been influenced by passion or prejudice.[1] The trial judge overruled the motion and plaintiff appeals.

The following principles govern our consideration in cases of this kind:

1. In granting or denying new trials, the trial court has wide but not unlimited discretion.

2. The fact finder is not obligated to accept expert testimony, even if it is uncontradicted, although testimony should not be arbitrarily and capriciously rejected.

3. In determining if a verdict is either excessive or inadequate, each case must be determined on its own special facts.

4. Courts should see that a verdict fairly and adequately compensates a plaintiff for damages suffered, but the amount of damages to be awarded is peculiarly a jury, not a court, function.

5. The fact that a court may have reached a different result is no ground for setting aside a jury verdict and awarding a new trial.

Waddell v. Peet's Feed, Inc. 266 N.W.2d 29, 32 (Iowa 1978).

The accident in question happened on December 20, 1979. Neither plaintiff nor the driver of the car in which she was riding indicated that they suffered any injuries following the accident. Plaintiff's motor vehicle was drivable and she

[1] Other grounds were urged but they are not at issue in this appeal.

drove the car immediately after the accident. Plaintiff went to a family dinner and returned to her home that evening. She did not see a doctor until the next day when she went to the hospital emergency room. Examination at that time indicated spasm and tenderness in the right side of the neck. There was no evidence of neurological injury and her strength sensory examination was normal. X-rays revealed no new injury. Plaintiff had been injured in 1971 when she cracked or broke three vertebrae and was in a body cast for 80 days.

Plaintiff was nervous and was having marital problems prior to her accident. She experienced nervous and marital problems after the accident which she attempted to relate to the accident. The plaintiff claimed to be disabled and unable to prepare the family Christmas meal in 1979. Plaintiff's testimony was contradicted by the testimony of her college-age son. The plaintiff received physical therapy following the accident. The testimony of plaintiff's physical therapist indicated she detected muscle spasm in plaintiff and that tension, stress and emotional problems can cause muscles to tighten up. The therapist also testified she felt plaintiff's problems at home contributed to her spasm.

Plaintiff introduced an exhibit summarizing her medical bills. The exhibit listed fifteen different providers of medical services, including emergency room, doctor, therapist, drugs and counselor, and the amount of expense incurred with each. The total of the claimed expenses was $1,264.34. The total of seven of the first eight items on the billing was equal to the amount of the verdict. The seven items represented charges incurred from December 21, 1979 through December of 1981. The balance of the items were incurred after 1981.

In a case involving the granting or denial of a motion for new trial, where it is alleged the verdict was too large or too small, precedents are of little value. Each case must be decided by relating its own unique circumstances to certain well-established principles. Kaiser v. Stathas, 262 N.W.2d 522, 523 (Iowa 1978).

While the jury as a trier of fact is not warranted in arbitrarily or capriciously rejecting the testimony of a witness, neither is it required to accept and give effect to testimony which it finds to be unreliable, although it may be uncontradicted. Testimony may be unimpeached by any direct evidence to the contrary and yet be so contrary to natural laws, inherently improbable or unreasonable, opposed to common knowledge, inconsistent with other circumstances established in evidence, or so contradictory within itself, as to be subject to rejection by the court or jury as trier of fact. Kaiser at 526.

The trial court has wide, but not unlimited discretion in ruling on a motion for a new trial. Ordinarily the jury should be allowed to settle disputed fact questions, but that too is a limited power and one which must be exercised within the framework of the evidence in any particular case. Moore v. Bailey, 163 N.W.2d 435, 436 (Iowa 1968).

The record before us contains a number of factual issues that the jury needed to decide before reaching their verdict. They first had to determine whether or not the plaintiff was actually injured in the accident. They then were required to determine whether or not the injuries of which plaintiff complained were caused by the accident or whether they were the result of the prior accident or of plaintiff's nervous stress. They also had the problem of determining whether or not plaintiff suffered a disability that prevented her from performing her ordinary work or if she did in fact pursue her ordinary routine following the accident. The jury also had to determine how long the condition caused by the accident existed and whether or not the continuance of the condition was a result of the accident or of plaintiff's hypertension, fears and menstral problems.

The itemization of bills contained the total supplied to each provider. Most totals were the result of the provider providing medical services on separate instances over a period of some time. The jury thus had the additional problem,

especially in lieu of the confusing evidence of determining which if any items were the proximate result of the injury.

There is no evidence of passion or prejudice by the jury. There is nothing to show that the jury did not respond to the instructions given. The record made by the plaintiff is confusing and raised serious question as to plaintiff's credibility, her injuries and proximate cause thereof. The record revealed that plaintiff's continued problems and resulting therapy may well have been the result of stress rather than accident related injuries. A rational trier of fact could reasonably conclude that most, if not all, of the complaints made by plaintiff were not caused by the accident.

In considering an appeal from the granting of a new trial, we accord the trial court considerable discretion. Nevertheless, the discretion is not unlimited, and we reverse upon a finding that it has been abused. Waddell v. Peet's Feed, Inc., 266 N.W.2d 29, 31 (Iowa 1978). Courts are not permitted to select one alternative theory when another, just as reasonable and just as well supported by the evidence, would uphold it. Waddell at 32.

In the following cases the Supreme Court has granted new trials or affirmed the lower court in doing so where juries have returned verdicts equal to special damages.

In DeMoss v. Brown Cab Co., 218 Iowa 77, 78 (1934) a new trial was granted where plaintiff sustained serious injuries and incurred hospital, medical and surgical bills but jury only awarded plaintiff the amount of his hospital bill.

In Strever v. Woodard, 160 Ia. 332, 338, 141 N.W. 931, 933 (1913) a new trial was granted where jury awarded plaintiff $1.00, despite uncontroverted evidence of substantial damage.

Where plaintiff suffered shock, numerous severe lacerations, fractured jaw, broken collar bone, shoulder separation, a fractured foot and had a scar on

forehead and jury returned verdict of $821.40, the amount of plaintiff's special damage Supreme Court held trial court should have sustained motion for new trial. Allbee v. Berry, 254 Iowa 712, 716-717, 119 N.W.2d 230, 234 (1963).

In Householder v. Town of Clayton, 221 N.W.2d 488, 493 (Iowa 1974), special damage to vehicle and medical expenses of $9,805.22 was shown. Plaintiff suffered two broken bones, a separated shoulder and other injuries requring several weeks' hospitalization and two and one-half months convalescence. The jury awarded $8,000. A new trial was ordered because the award was for less than plaintiff's undisputed special damages.

In Feldhahn v. DeVenter, 253 Iowa 1194, 115 N.W.2d 862 (1962), hospital ambulance and therapy bills totaled $1,127.56, and plaintiff was hospitalized over 20 days. She was on crutches for six months and used a cane for eight months thereafter. She incurred an expense of $500 for a housekeeper during convalescence. Court held where an award of $1,372.44 was made for pain, suffering and permanent disability, the trial judge abused his discretion in overruling plaintiff's motion for new trial.

In Webster v. City of Colfax, 250 Iowa 181 93 N.W.2d 91 (1958), plaintiff suffered a broken hip and underwent surgery where a Smith-Peterson nail was inserted in the thigh to reduce the fracture. Plaintiff was in a wheelchair for three months and on crutches for two months and she suffered a 50% loss of ability in muscle function. Hospital and doctor expenses were $623.23, the amount of the jury award. The trial judge was affirmed on granting a new trial.

We have carefully reviewed the cases and find them distinguishable. They involve serious injuries manifested by objective complaints and readily ascertainable special damages. The plaintiff here suffered questionable injuries based on subjective complaints and confusing proof as to alleged special damages.

Plaintiff alleges no error in the trial itself. The trial judge refused to grant a new trial. The record made by plaintiff herself supports the rejection by the jury of many of her complaints. If the jury rejected testimony with reference to the duration of the injury, as it had the right to do, there is no basis to set the verdict aside and grant a new trial.

AFFIRMED