IN THE COURT OF APPEALS OF IOWA

No. 1-509 / 91-138

FILED
JAN 29 1992
CLERK SUPREME COURT

439

DAVID McPEAK, Administrator of the Estate of Michelle Ann McPeak, Deceased, and **DAVID McPEAK**, and **LOUANN McPEAK**,

Appellants,

vs.

SAND CORP., and **MARK SWASAND**,

Appellees.

Appeal from the Iowa District Court for Webster County, Gary L. McMinimee, Judge.

Plaintiffs challenge the adequacy of the jury's award in an action based on the wrongful death of their minor child. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

T. Todd Becker of Tom Riley Law Firm, P.C., Cedar Rapids, and Kurt J. Stoebe of Stoebe Law Office, Humboldt, for appellants.

Theodore T. Duffield of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, Des Moines, for appellees.

Heard by Donielson, P.J., and Hayden and Sackett, JJ.

DONIELSON, P.J.

On August 13, 1988, Mark Swasand was driving a car owned by his family corporation. He was headed north on highway 17 in Eagle Grove, Iowa, when he struck Michelle McPeak, age eight, as she was crossing the street. Michelle was initially taken by ambulance to a hospital in Fort Dodge, Iowa, and was later flown to Iowa Methodist Hospital in Des Moines, Iowa. Michelle died the next day, August 14, 1988, as a result of injuries she sustained in the collision.

Michelle's parents instituted this action for damages on their own behalf and on behalf of Michelle's estate. The case was tried to a jury, which returned a verdict finding defendants, Mark Swasand and Sand Corporation, seventy-five percent at fault and Michelle twenty-five percent at fault for the collision. The jury assessed damages at $50,000 for Michelle's estate and awarded her surviving parents $10,654.26 on their loss of consortium claims. This award consisted of $654.26 for past damages, reflecting the exact amount of the parents' unreimbursed medical expenses, and $10,000 for future loss of consortium. The jury awarded plaintiffs no damages on their claim for past loss of consortium.

Following the denial of their motion for new trial, Michelle's parents have appealed. They assert that the jury's recognition of their damages for future loss of consortium cannot be reconciled with the jury's denial of

damages for past loss of consortium. They also assert that, as a matter of law, the amount awarded for future loss of consortium was inadequate. Finally, they assert that the trial court erred in instructing the jury by treating David McPeak and LouAnn McPeak as one parental unit, thereby ignoring that each parent suffered an individual loss of consortium. Plaintiffs request a new trial on damages.

I. **Scope of Review.** In determining whether the trial court should have granted a new trial, we review for an abuse of discretion. Witte v. Vogt, 443 N.W.2d 715, 716 (Iowa 1989). In ruling on motions for new trial, the court has a broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties. Iowa R. App. P. 14(f)(3). In order to show an abuse of discretion, one generally must demonstrate that the trial court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976)(quoting Weeks v. Burnor, 132 Vt. 603, 606, 326 A.2d 138, 140 (1974)).

II. **Inadequacy of Damages.** We first address plaintiffs' argument that the trial court erred in refusing to grant them a new trial based on the inadequacy of the jury's award of damages. Under Iowa Rule of Civil Procedure 244(d) and (f), an aggrieved party may be granted a new trial when the jury awards excessive or inadequate

damages appearing to have been influenced by passion or prejudice, or when the verdict is not sustained by sufficient evidence, or is contrary to law. The question of whether an award is inadequate is dependent upon the facts of each case. Householder v. Town of Clayton, 221 N.W.2d 488, 493 (Iowa 1974).

A verdict should not be set aside as inadequate merely because the court would have reached a different figure. See Cowan v. Flannery, 461 N.W.2d 155, 158 (Iowa 1990)(quoting Kautman v. Mar-Mac Community School District, 255 N.W.2d 146, 147-48 (Iowa 1977)).

> It is not for us to invade the province of the jury. In fact a verdict will not be set aside or altered unless it is, (1) flagrantly excessive or inadequate; or (2) so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is the result of passion, prejudice or other ulterior motives; or (4) is lacking in evidential support.
>
> If the verdict has support in the evidence the others will hardly arise, if it lacks support they may all arise. The real question in most cases, and here, is the amount and sufficiency of evidence to support the award made. Certainly where the verdict is within a reasonable range as indicated by the evidence the courts should not interfere with what is primarily a jury question.
>
> Although the evidence may have justified a higher award, such is not controlling. The determinative question posed is whether under the record, giving the jury its right to accept or reject whatever portions of the conflicting evidence it chose, the verdict effects substantial justice between the parties.

Id.

A. Past Loss of Consortium. Plaintiffs assert the jury's failure to award damages for past loss of consortium does not effect substantial justice between the parties.

Despite defendants' argument to the contrary, we find plaintiffs' argument properly preserved for our review. We find the trial court abused its discretion in refusing to address the merits of plaintiffs' argument and in failing to grant a new trial. Because we find the jury's award unsupported by the record evidence, we remand this case for a new trial on the issue of damages for past loss of consortium.

Plaintiffs filed a timely motion for new trial in which they stated:

> The jury's verdict that Plaintiffs David and Louann McPeak suffered damages of $10,000 together for the ten-year loss of their eight-year-old daughter's comfort, affection and other intangible benefits is grossly inadequate and against the weight of the evidence. (Emphasis added.)

At the hearing on the motion, plaintiffs elaborated on their argument, showing the trial court how the jury had awarded $10,000 for future loss of consortium and nothing for the two years of past loss of consortium.

In ruling on plaintiffs' motion for new trial, the court stated:

> In this Court's view, the claim for past consortium was not raised during the time for filing motion for new trial and is not germaine [sic] to any issue asserted in the Motion for New Trial. Accordingly, this Court does not have the authority to grant a new trial on this ground. Julian v. City of Cedar Rapids, 271 N.W.2d 707, 708 (Iowa 1978).

We find the new trial motion sufficient. Clearly, the reference in plaintiffs' motion to a ten-year time period for the calculation of damages necessarily included both

past as well as future loss of consortium. Michelle was eight at the time of her death, and the wrongful death action was tried more than two years after her death. Iowa law does not recognize, plaintiffs did not seek, and the trial court did not instruct on a claim for damages for the loss of Michelle's consortium beyond her eighteenth birthday. As such, the reference to a "ten-year" loss must be read to imply both future and past loss of consortium.

We find plaintiffs' timely filed motion for new trial was sufficiently clear to alert the trial court to plaintiffs' argument concerning the inadequacy of the jury's award on plaintiffs' claim for past loss of consortium damages. Plaintiffs properly expanded on their written motion at the hearing. The trial court erred in finding that it lacked authority to grant a new trial on plaintiffs' first asserted ground. Plaintiffs' argument was not waived at the trial court or on appeal.

Jury Instruction No. 30 provided in relevant part:

> If you find David and Louann McPeak as parents of Michelle McPeak are entitled to recover damages as the result of the death of Michelle McPeak, it is your duty to determine the amount. In doing so you shall consider the following items:
>
> 1. The reasonable value of the past loss of services, which include loss of companionship and society of the child, from the date of the death to the date the child would have reached the age of eighteen years minus the probable cost of the child's board and maintenance during that time period.
>
> 2. The present value of the future loss of services, which include loss of companionship and society of the child from the present time until the child would have reached the age eighteen

years minus the present value of the probable cost of child support and maintenance during that same time period.

These two instructions were given for loss of consortium damages. The first enumerated paragraph was, ostensibly, to provide the method for determining past loss of consortium damages; the second for future damages. However, it must be noted that the two overlap. That is, the instruction supposedly designed to generate the amount of past loss of consortium damages also directs the jury to calculate the future damages. As such, Instruction No. 30 is designed, inadvertently or otherwise, to generate a figure for past loss that includes the future loss as well. This is the law of the case.

Assuming as we must that the jury followed the instructions given, see Hansen v. Franklin County, 247 Iowa 1287, 1291, 78 N.W.2d 805, 807 (1956), the jury's finding on the amount of past damages should have been at least as large as its finding on the amount of future damages. The jury awarded $10,000 for future loss, and therefore, should have awarded at least $10,000 for past loss, with one possible exception. If the jury followed the instructions, the only method for explaining its verdict is that the jury found the value of Michelle's companionship, society, and services to her parents would have been at least $10,000 lower than the cost of her support for the period between her death and trial. In other words, the jury must have found that Michelle would have cost much more than she

would have been worth. There is absolutely no support in the record for such a finding.

The uncontroverted evidence shows that Michelle was a bright, happy and active young girl who spent a great deal of time with her parents. She did housework with her mother, cooked with her mother, and the two attended Brownies gatherings together. The family went on camping trips together, and participated in little league as well as school related events. Michelle enjoyed playing softball, football, gymnastics and swimming. She liked to sing and dance. Her parents, the record shows, enjoyed watching her take part in these activities.

Michelle was an above average student. Her teacher described her as a respectful child. She was described as a bright and likable girl who always did her work, caused no problems and got along well with other children at school. She was an avid reader who would often read by flashlight under the bed covers after her bedtime. She was always eager to learn more than what she had been taught in school.

Michelle was also described as a joy to be around. She was selected to represent her home town as a "Little Princess", and was also selected to serve as crownbearer for the local high school's homecoming. Her teacher described her as a joy to have as a pupil.

The record hardly represents Michelle as a drain on her parents. The jury's failure to award a minimum of $10,000

in past loss damages necessitates the conclusion that the jury did not follow the instructions or, alternatively, made a finding for which there is no support in the record. A new trial should have been granted pursuant to plaintiffs' motion. We reverse the trial court and remand this case for a new trial on the issue of past damages for loss of consortium.

B. Future Loss of Consortium. Plaintiffs next argue the trial court erred in refusing to grant them a new trial on the issue of damages for future loss of consortium. Plaintiffs assert that a fair and impartial jury could not have reviewed the evidence and returned a verdict in the amount of $10,000 for future loss of consortium. We are unable to find an abuse of the trial court's discretion in declining to grant Plaintiffs' motion on this issue. We, therefore, affirm the trial court.

III. Separate Assessments of Damage. Finally, plaintiffs assert the trial court erred in combining the parents as one parental unit on the verdict form. Plaintiffs argue that Michelle's relationship with her mother differed from her relationship with her father. As such, plaintiffs contend that each parent suffered a distinct and individual loss which was not reflected by the verdict form. We see no merit in this argument. We do not believe plaintiffs were prejudiced by the jury's failure to determine each parent's loss of consortium separately. We

find no abuse of the trial court's discretion in refusing to grant plaintiffs' motion for a new trial on this ground.

The costs of this appeal are taxed to defendants.

For all the reasons stated, the judgment of the district court is affirmed in part, reversed in part, and remanded for a new trial on the issue of past loss of consortium damages.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Hayden, J., concurs; Sackett, J., concurs in part and dissents in part.

SACKETT, J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I would affirm the trial court in all respects.