

IN THE COURT OF APPEALS OF IOWA

No. 3-471 / 92-1664

FILED

NOV 29 1993

CLERK SUPREME COURT

DAVID MCPEAK, Administrator of the Estate of
Michelle Anne McPeak, Deceased, and DAVID MCPEAK
AND LOUANN MCPEAK,

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Appellants,

vs.

SAND CORP., and MARK SWASAND,

Appellees.

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

The plaintiffs appeal the district court's ruling
granting the defendants' motion for a new trial on the
grounds the jury's award was excessive. **REVERSED.**

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

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

Heard by Schlegel, P.J., Hayden, J., and McCartney,
S.J.* Donielson, J., takes no part.

*Senior judge from the 2nd judicial district serving on
this court by order of the Iowa Supreme Court.

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SCHLEGEL, P.J.

The plaintiffs appeal the district court's ruling granting the defendant's motion for a new trial. The plaintiffs contend the district court erred in granting a new trial on the grounds the jury's award was excessive.

The defendant, Mark Swasand, was driving his automobile, owned by the defendant Sand Corp., on Highway 17 near Eagle Grove, when Swasand struck Michelle McPeak, the eight-year-old daughter of David and Louann McPeak. Michelle died as a result of the accident. David and Louann, on behalf of Michelle's estate, sued both Swasand and Sand Corp.

The first trial was held on November 14, 1990. The jury found the defendants seventy-five percent at fault and Michelle twenty-five percent at fault for the collision. The jury awarded McPeaks \$50,000, plus \$10,654.26 for loss of consortium, and unreimbursed medical expenses pursuant to Iowa Rule of Civil Procedure 8. In a special verdict, the jury allocated the entire \$10,654.26 to plaintiffs for loss of future consortium and awarded them nothing for their past loss of consortium.

David and Louann filed a motion for new trial following the first verdict, alleging the jury's failure to award any damages for past loss of consortium was clearly inconsistent with the evidence and the jury's award of damages for future loss of consortium. The district court denied the motion for new trial, and McPeaks appealed. The

court of appeals held the jury's failure to award damages for past loss of consortium could not be reconciled with its determination that McPeaks were entitled to damages for future loss of consortium. The court of appeals ordered a new trial on the limited issue of damages for past loss of consortium.

A second trial was held on August 26, 1992. The sole issue before the jury was the assessment of damages McPeaks suffered for their past loss of consortium. The jury awarded McPeaks damages in the amount of \$159,000. Swasand and Sand Corp. filed a motion for new trial, arguing the verdict was excessive. The trial court agreed and ordered a new trial. The trial court, in its decision, noted the first verdict was considerably smaller than the second. McPeaks have appealed. We reverse.

McPeaks argue the amount of the second jury's verdict was not excessive. They maintain they were extremely close to Michelle and their whole lives were wrapped around Michelle's various activities. They note Michelle's great popularity in town and her excellent performance in school. In addition, McPeaks contend the district court should not have ordered a new trial, since there was no evidence that the jury, in awarding McPeaks \$159,000, acted out of passion or prejudice or otherwise did not respond to the evidence. McPeaks argue the district court erred in relying on the first verdict as a basis for invalidating the second verdict.

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We review for an abuse of discretion. In order to show an abuse of discretion, one generally must show that the 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, 326 A.2d 138, 140 (Vt. 1974)). "In ruling upon motions for new trial the trial 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). "The court is slower to interfere with the grant of a new trial than with its denial." Iowa R. App. P. 14(f)(4).

In considering the size of verdicts we have repeatedly referred to passion and prejudice, shock the conscience, failure to administer substantial justice, the rule of fair compensation, and lack of support in the evidence. [Citations omitted.] It seems fundamental the most important of these is support in the evidence. If the verdict has supports [sic] 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.

(Emphasis added.) Mazur v. Grantham, 255 Iowa 1292, 1303, 125 N.W.2d 807, 813-14 (Iowa 1964).

Our review of the record in the present case reveals nothing to suggest the jury acted out of passion or prejudice or to suggest the jury otherwise failed to respond to the evidence. The trial court made no finding

of passion or prejudice, shock to the judicial conscience, failure to effectuate substantial justice, or lack of evidentiary support for the jury's award. The trial court failed to employ any objective means at all to support its conclusion that the jury's award was excessive.

The trial court based its determination of excessiveness of the award solely on the amount of the verdict. Where nothing appears in the trial court's ruling to support its conclusion that an award is excessive other than the size of the verdict, an order granting a new trial should be set aside and the verdict reinstated. See Mazur, 255 Iowa at 1303-04, 125 N.W.2d at 813-14. To justify setting aside the decision of the jury, some reason must fairly appear in the record for doing so. Id. at 1304, 125 N.W.2d at 814. Where no such reason exists, the trial court may not merely substitute its judgment concerning excessiveness of the award for that of the jury. Id.

Having carefully examined the record before us, we do not find any reason or combination of reasons that indicate a reasonable ground for granting a new trial, and the defendants fail to point to any. While the jury's award for past loss of consortium in the present case may be substantial, so was the loss to the plaintiffs.

In dealing with claims for loss of services, particularly since deprivation of companionship and society may now be compensated for, we are faced with matters for which there is no fixed or calculable standard. We must necessarily leave much to the good judgment of the jury.

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Pagitt v. City of Keokuk, 206 N.W.2d 700, 707 (Iowa 1973).

The jury's verdict is in accordance with the evidence adduced in this case. Support exists in the evidence for a substantial verdict. "For us to interfere merely substitutes our judgment for that of the jury, this should be done with extreme caution." Mazur, 255 Iowa at 1304, 125 N.W.2d at 814. We cannot say the jury's verdict is excessive.

Accordingly, we reverse the district court's order granting defendants' motion for a new trial and reinstate the jury's verdict.

REVERSED.