IN THE COURT OF APPEALS OF IOWA

No. 6-1022 / 06-0173
Filed April 11, 2007

TERI PHELAN-RUDEN, Individually and as Next of Kin and Executor of the JERRICA ANN-HILLEMAN-RUDEN ESTATE, and JEFF RUDEN,
Plaintiffs-Appellants,

vs.

MARLA SUDDRETH and CRAIG ALLEN MCCOID,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

Plaintiffs appeal from the district court's denial of their motion for additur or in the alternative a new trial. **AFFIRMED**.

Stephen D. Lombardi of Lombadi Law Firm, and Todd Miler of Miler Law Firm, West Des Moines, for appellants.

John B. Grier of Cartwright, Druker & Ryden, Marshalltown, for appellees.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

MILLER, J.

Plaintiffs Teri Phelan-Ruden in her capacity as the executor of the estate of Jerrica Anne Hilleman-Ruden, and Phelan-Ruden and Jeff Ruden individually, appeal from the district court's denial of their motion for additur or a new trial. Upon our review for the correction of errors at law, Iowa R. App. P. 6.4, we affirm the district court.

Jerrica Hilleman-Ruden is the daughter of Teri Phelan-Ruden and Jeff Ruden. When she was eleven years old, Jerrica was killed in a skiing accident while on a weekend trip with her friend Jordan, Jordan's mother Marla Suddreth, and Suddreth's companion (now husband) Craig McCoid. Phelan-Ruden, as Jerrica's executor, and Phelan-Ruden and Ruden in their individual capacities, filed a wrongful death action against Suddreth and McCoid. As executor, Phelan-Ruden sought damages for loss to the estate, and Phelan-Ruden and Ruden sought damages, individually, for loss of consortium.

Following trial a jury found Suddreth to be 100% at fault for the plaintiffs' damages. The jury awarded the plaintiffs $10,545 in interest on burial expenses and $2,433.95 in medical expenses, but did not award any damages for present value of Jerrica's estate or for past or future loss of services to Phelan-Ruden or Ruden. The plaintiffs filed a motion pursuant to Iowa Rule of Civil Procedure 1.1004, seeking additur or, alternatively, a new trial on the issue of damages. They asserted, in relevant part, that awarding damages for full burial and medical expenses but failing to award any damages for present value of the estate or loss of consortium demonstrated that the verdict was inadequate, influenced by passion or prejudice, not sustained by sufficient evidence, contrary to law, and

inconsistent. The district court denied the request for additur or a new trial. This appeal followed.

On appeal, the plaintiffs assert the damages awarded by the jury are inadequate, are inconsistent, are a product of jury nullification, and fail to award the minimum value for a life set forth in Iowa Code section 910.3B (2003). They assert this matter should be remanded for a new trial on the issue of damages only, but that if we order a new trial on all issues we should consider additional jury instruction and evidentiary claims. Finally, they assert the district court erred when it refused to submit a jury instruction on pre-death pain and suffering.

New Trial. The district court may grant a new trial if the substantial rights of the moving party have been materially affected because the jury's verdict is not supported by sufficient evidence, is contrary to law, or makes an inadequate damage award that appears to have been the result of passion or prejudice. Iowa R. Civ. P. 1.1004(4), (6). A court must not "disturb a jury verdict for damages unless it is 'flagrantly excessive or inadequate, so out of reason so as to shock the conscience, the result of passion or prejudice, or lacking in evidentiary support.' " *Kuta v. Newberg*, 600 N.W.2d 280, 284 (Iowa 1999) (citations omitted). The district court has broad discretion to determine if the verdict effectuates substantial justice between the parties. Iowa R. App. P. 6.14(6)(*c*). We accordingly review its denial of the plaintiffs' motion for an abuse of discretion. *Vaughan v. Must, Inc*., 542 N.W.2d 533, 542 (Iowa 1996).

Whether damages in a given case are adequate depends on the particular facts of that case. *Witte v. Vogt*, 443 N.W.2d 715, 716 (Iowa 1989). The plaintiffs point out they presented uncontradicted evidence that Jerrica was an

intelligent, talented, motivated, and caring child; that they presented expert testimony from Dr. Richard Stevenson regarding the present value of Jerrica's future accumulated estate and the value of lost services to her parents; and that the defendants did not present any expert testimony on damages. Suddreth contends that, although Jerrica had many positive attributes, the district court correctly determined "the jury was also presented with conflicting testimony that would have allowed it to conclude that an estate of any size was unlikely," and "[t]he jury was well within its rights to conclude that, despite the admirable nature of Jerrica and her relationship with both parents, the pecuniary value of the loss of that relationship was outweighed by the saving in the cost of raising her over the same period with which damages were claimed."

Suddreth asserts the jury could have considered evidence that there was a history of out-of-wedlock conception, single motherhood, and gambling in Jerrica's family, and concluded Jerrica was likely to emulate these traits and characteristics.[1] She points out the present value of Jerrica's estate testified to by Dr. Stevenson would have resulted in a future estate of approximately $48 million dollars, and that the jury could have relied on common sense to reject the expert's opinion on this item of damages. Finally, she notes that, while Dr. Stevenson testified the present value of Jerrica's lost services was $5,840, he also testified the cost of raising a child from twelve years of age to eighteen years of age was between $75,000 and $100,000.

[1] There was evidence that Jerrica's mother had been married four times and was pregnant at the time of her first two marriages, that Jerrica's sister was allowed to stay at home with her boyfriend without supervision and became a single teenage mother, and that Jerrica's family had reported gambling losses on their tax returns.

We are not unsympathetic to the questions posed by the plaintiffs: "How can this bright, obedient, intelligent and industrious child's accumulated estate be worth nothing? How can the loss of a healthy obedient child have no net value to the parents she lived with?" However, after reviewing the record, including the instructions submitted to the jury, we must agree there was evidence from which a reasonable fact finder could conclude the plaintiffs had failed to prove an entitlement to damages for either a net value of Jerrica's past and future lost services, or a present value of her estate. As to the former, the testimony from the plaintiffs' own expert is sufficient to support a conclusion that the value of any lost services—economic, emotional, or otherwise—did not exceed the cost to raise Jerrica to adulthood. As to the latter, Suddreth correctly notes that the jury was not required to accept Dr. Stevenson's testimony, and that it was entitled to consider Jerrica's family background as well as her personal attributes in assessing whether she would have been able to accumulate an estate. In light of the conflicting evidence, we cannot conclude the district court abused its discretion in denying the plaintiffs' request for additur or a new trial.

Pre-Death Pain and Suffering Instruction. The plaintiffs assert the district court erred in refusing to instruct the jury on pre-death pain and suffering, but do not cite to any authority in support of their contention. As Suddreth notes, this waives any error on the issue. *See* Iowa R. App. P. 6.14(1)(*c*); *Goodell v. Humboldt County*, 575 N.W.2d 486, 493 n.8 (Iowa 1998). Moreover, even if we were to consider the claim, we would find it to be without merit.

A district court cannot submit a jury instruction "on 'an issue having no substantial evidential support . . . .' " *Thompson v. City of Des Moines*, 564

N.W.2d 839, 846 (Iowa 1997) (citation omitted). Even viewing the evidence in the light most favorable to the plaintiffs, *Hoekstra v. Farm Bureau Mut. Ins. Co*., 382 N.W.2d 100, 108 (Iowa 1986), the record does not contain sufficient support for the requested instruction. Pain and suffering damages are not recoverable "if death or unconsciousness is instantaneous . . . ." *Kuta*, 600 N.W.2d at 285. Here, it is uncontroverted that Jerrica's death was instantaneous with her injuries. Accordingly, the court did not err in refusing to give the instruction.

Conclusion. We have considered all of the plaintiffs' contentions, whether or not specifically discussed. We find them to be either without merit, or of no further consequence in light of our determination that the district court did not abuse its discretion in denying the plaintiffs' motion for additur or a new trial. The district court's ruling is accordingly affirmed.

AFFIRMED.

Baker, J. dissents.

BAKER, J., (dissenting)

I respectfully dissent. I do not believe that under our decisions we can accept the premise that the life of a healthy eleven-year-old child, regardless of her family background, has no value. I therefore dissent from the majority's holding that there was sufficient evidence from which a reasonable fact finder could conclude the plaintiffs failed to prove an entitlement to damages for the present value of Jerrica's estate.

The failure to award damages for the present value of Jerrica's estate is, in this case, "manifestly inadequate." *See Witte v. Vogt*, 443 N.W.2d 715, 716 (Iowa 1989) ("An inadequate damage award merits a new trial as much as an excessive one."). The jury found the defendants 100% at fault for the plaintiffs' damages. This finding is inconsistent with the jury's failure to award no damages for the present value of her estate, unless, only because she came from an unstable family, Jerrica's accumulated life estate would be worth nothing.

The estate presented expert testimony that the loss to Jerrica's estate would be $325,000. The defendants did not present expert testimony on the question of damages, and in final argument, the defendants' counsel did not argue that no award was appropriate, only that the amount was excessive. The jury was faced with uncontroverted evidence that there was *some loss* to Jerrica's estate. When faced with such uncontroverted evidence, the jury's verdict must bear a reasonable relationship to the proven damages. *See McHose v. Physician & Clinic Serv., Inc.,* 548 N.W.2d 158, 162 (Iowa Ct. App. 1996) ("If uncontroverted facts show the amount of the verdict bears no reasonable relationship to the loss suffered, the verdict is inadequate."). Finding

the defendants 100% at fault bears no reasonable relationship to the jury's failure to award damages for the present value of Jerrica's estate. In such a case, refusal by the district court to grant a new trial or an additur is an abuse of discretion. *Id.*

The present value of a minor's estate is based on an approximation of the amount the minor would reasonably be expected to save and accumulate had she lived out the natural term of her life. *Brophy v. Iowa-Illinois Gas & Elec. Co.,* 254 Iowa 895, 897, 119 N.W.2d 865, 866 (1963). "There is no rule of thumb by which the amount may be measured." *Tedrow v. Fort Des Moines Cmty. Serv., Inc.,* 254 Iowa 193, 202, 117 N.W.2d 62, 67 (1962). Relevant factors include: life expectancy, health, intelligence, and plans for the future. *Id.*

In *Pagitt v. City of Keokuk*, 206 N.W.2d 700, 705 (Iowa 1973), the Iowa Supreme Court discussed the adequacy of evidence of school achievements, hobbies, and interests, presented to predict the future financial success of two boys, who were age nine and eight at the time of their death.

> Admittedly this evidence is little upon which to project a prediction as to what financial success Randy and Steven would have in the 60 years remaining on their life expectancy, but it must be borne in mind we are dealing with two youngsters who had not yet established a pattern of conduct from which reliable estimates of their industry, thrift and earning potential could be made.

In considering the future earning capacity of a twelve-year-old girl, the Iowa Supreme Court held that, simply because there was "not a great deal that can be shown in regard to the future earning and accumulating capacities, . . . her estate [was] not to be denied a recovery in damages." *Tedrow*, 254 Iowa at 202, 117 N.W.2d at 67. In considering damages for the death of a teenage high school student, the court found "[t]he available factors are not numerous: life

expectancy; health of the child; intelligence; alertness; general characteristics; progress in school; expressed plans for the future, and extracurricular activities." *Wiese v. Hoffman*, 249 Iowa 416, 425, 86 N.W.2d 861, 867 (1957). Such evidence, however, was the "best available in view of her age and the fact that she was still a school girl." *Id.* at 426, 86 N.W.2d at 867.

When children meet an untimely death, evidence of their future earning capacity is inevitably "sketchy and leaves much to unforeseen developments." *Pagitt*, 206 N.W.2d at 705. "Within reasonable limits, this uncertainty as to amount should be resolved against the wrongdoer, not his victim." *Id.*

I agree with the majority that the jury was entitled to consider Jerrica's family background as well as her personal attributes in determining whether she would have been able to accumulate a net estate. It seems clear, however, that the jury's award of *nothing* is based upon too much consideration of her family's problems and not enough consideration of the potential of a normal, healthy eleven-year-old girl. The fact that her family experienced problems with out-of-wedlock conception, single motherhood, and gambling does not justify an absolute determination that Jerrica would not have prospered. Using "the apple does not fall far from the tree" analysis alone as a basis to deny any recovery is, as a matter of law, manifestly inadequate.

Jury verdicts which are so "logically and legally inconsistent that they cannot be reconciled" must be set aside. *Ten Hagen v. DeNooy*, 563 N.W.2d 4, 9 (Iowa Ct. App. 1997). "The test is whether the verdicts can be reconciled in any reasonable manner consistent with the evidence and its fair inferences, and in light of the instructions of the court." *Id.*

In personal injury cases, the Iowa Supreme Court has adopted the following guidelines:

> In *Cowan v. Flannery,* we observed that "[w]e have not adopted an inflexible rule that every verdict awarding only damages for medical expenses in a personal injury action is inadequate as a matter of law." Our survey of the cases showed that
>
> [w]e have affirmed the court's granting of a new trial where the evidence material to the damage award is undisputed and the damage award was approximately equal or less than the special damages.
>
> We have reversed the court's denial of a new trial where evidence material to the damage award is undisputed and the award was nearly equal or less than the special damages.
>
> We have affirmed the trial court's denial of a new trial where the evidence of the cause or extent of injury was disputed.
>
> We have also reversed the granting of a new trial based on inadequate damages where the evidence as to the nature, extent and severity of the injuries were disputed.

Fisher v. Davis, 601 N.W.2d 54, 58 (Iowa 1999) (citations omitted).

Where a jury finds the defendant 100% at fault, but fails to award damages for the present value of a normal, healthy eleven-year-old child's estate, the court should adopt a rule that such a result is inconsistent and therefore inadequate as a matter of law. *See Kalvik ex rel. Kalvik v. Seidl*, 595 N.W.2d 136, 139 (Iowa Ct. App. 1999) ("A new trial may be granted, and the jury verdict set aside, when the verdict is so logically and legally inconsistent it is irreconcilable in the context of the case.").

Where inadequate damages appear to have been influenced by prejudice, an inadequate award merits a new trial. Iowa R. Civ. P. 1.1004(4); *Kerndt v. Rolling Hills Nat'l Bank*, 558 N.W.2d 410, 417 (Iowa 1997). The district court's denial of the plaintiff's request for additur or, alternatively, a new trial on the issue

of damages, was an abuse of discretion. *See Tedrow,* 254 Iowa at 202, 117 N.W.2d at 67 (1962) ("Courts have not only the right but the duty to disturb verdicts which appear unconscionable or clearly not warranted by the record."). Accordingly, I would reverse and remand for a new trial limited to the issue of damages.