

STATE OF MICHIGAN

COURT OF APPEALS

IN RE THOMAS ESTATE.

KIMBERLY KAY OUIMETTE,

Appellee/Cross-Appellant,

v

BUMAN THOMAS,

Appellant/Cross-Appellee,

and

JOSEPH E. GIDCUMB, personal representative of the
estate of Christopher W. Thomas, BEATRICE
KUNTZ, JASON WHEELER, BRANDON
SHIFLETT, CHRISTINA SHIFLETT and MARIA
LOUISE SHIFLETT,

Appellees.

UNPUBLISHED

August 16, 1996

No. 176413

LC No. 103945

Before: Doctoroff, P.J., and Wahls and Smolenski, JJ.

PER CURIAM.

Buman Thomas appeals as of right the order of the Genesee Probate Court distributing wrongful death proceeds from the estate of his son, decedent Christopher Thomas. Kimberly Kay Ouimette, on behalf of her minor children Maria, Christina and Brandon Shiflett, filed a cross-appeal from the same order.

In March 1993, Ouimette filed a petition on behalf of her children to reopen the estate of Christopher Thomas, who died on November 9, 1979. She alleged that three of her children Maria, Christine and Brandon Ouimette (Shiflett) were the natural children and heirs of decedent and were denied wrongful death proceeds when decedent's estate was settled in 1982. At that time, Buman Thomas, the decedent's father, gave written testimony to the probate court indicating that decedent had only two heirs at law: himself and Gail Thomas, decedent's natural mother. As a result, Buman Thomas was paid \$8,870.95 and Beatrice Kuntz was paid \$2,878.95 of the \$18,500 wrongful death settlement after attorney fees were paid. However, Ouimette alleged that in 1979, Buman and Gail Thomas along with Beatrice Kuntz signed affidavits submitted to the federal government stating that decedent was the father of Ouimette's three children.

The trial court granted the petition to reopen the estate and determined that Kuntz could keep the proceeds she originally received from decedent's estate, but ordered Buman Thomas to repay all the proceeds except for \$1,000, which the trial court awarded Thomas as compensation for the loss of his close relationship with his son. The court also determined that Thomas was entitled to reimbursement for \$1,100 in funeral expenses and \$703 in medical bills associated with decedent's death. The remainder of the proceeds were ordered distributed equally to Ouimette's three children. The trial court further ordered Thomas to pay compounded interest from March 9, 1982, the date the estate was settled for the wrongful death proceeds wrongfully paid to him.

I

Buman Thomas first contends that the trial court erred when it only awarded him \$1,000 of the decedent's wrongful death proceeds. Thomas claims his relationship to decedent was superior to that of the minor children because at the time of decedent's death, decedent was residing with and wholly dependent on Thomas. In connection with this argument, Ouimette asserts on cross-appeal that the court erred in awarding Thomas \$1,000 in spite of his wrongdoing and "unclean hands."

We find that the trial court did not abuse its discretion when it distributed \$1,000 of the wrongful death proceeds to Buman Thomas for loss of society and companionship. *Hoogewerf v Kovach*, 185 Mich App 577, 579; 463 NW2d 160 (1990) (citing MCR 2.613(C)). Nor did the court clearly err in its findings of fact in this regard. *Id.*

The loss of society and companionship addresses the compensation for the destruction of family relationships that results when one family member dies. *In re Claim of Carr*, 189 Mich App 234, 239; 471 NW2d 637 (1991). As we stated in *Carr*, "[t]he only reasonable measure of the actual destruction caused is to assess the type of relationship the decedent had with the claimant in terms of objective behavior as indicated by the time and activity shared and the overall characteristics of the relationship." *Id.* The record indicates that although decedent was dependent on his father, he also had a close relationship with his three children. The trial court's distribution of a majority of the wrongful death proceeds to them was fair and equitable considering the children's loss of their father at such an early age.

Thomas argues that the equitable doctrine of laches should have precluded Ouimette from filing her claim thirteen years after decedent's estate was settled. However, because Thomas failed to raise the issue before the trial court, this particular argument is not preserved for appellate review. *Froede v Holland Ladder Co*, 207 Mich App 127, 137; 523 NW2d 849 (1994).

Finally, with respect to Ouimette's contention on cross-appeal, the trial court did not abuse its discretion in awarding Buman Thomas \$1,000 of the wrongful death proceeds despite his misrepresentation concerning the children's existence to the trial court in light of the close relationship Thomas and decedent shared.

II

Thomas next contends that the trial court erred in compounding interest from March 9, 1982, the date the estate was settled. We agree.

Pursuant to MCL 600.6013; MSA 27A.6013, interest on a money judgment in a civil action is to be awarded "from the date of filing the complaint to the date of satisfaction of the judgment." *McKelvie v Auto Club Ins*, 203 Mich App 331, 337; 512 NW2d 74 (1994); *Wendt v Auto-Owners Ins Co*, 156 Mich App 19, 26; 401 NW2d 375 (1986). The intent behind the statute is to compensate a plaintiff for delay in receiving money and the expense and inconvenience involved in litigation. *McKelvie, supra*, p 338. Damages from the loss of use of a settlement amount from the date of injury to the date a complaint is filed may be assessed as part of the damage reward. *Wendt, supra*, p 26. Absent statutory or contractual obligations, a judgment does not accrue interest because interest was not permitted by common law. *Matich v Modern Research Corp*, 430 Mich 1, 6-7; 420 NW2d 67 (1988).

This Court has determined that the statute should be liberally construed in favor of a plaintiff because the statute is remedial in nature. *McKelvie, supra*, p 339. Also, because the statute was passed under the RJA, it is subject to liberal interpretation. MCL 600.102; MSA 27A.102; *Denham v Bedford*, 407 Mich 517, 528-529; 287 NW2d 168 (1980). However, a plaintiff is not entitled to prejudgment interest when such an award exceeds the purpose of compensating the plaintiff for a delayed payment. *McKelvie, supra*, p 339.

Under the rules of statutory construction, the Legislature is presumed to have intended the plain meaning it expressed. *Frasier v Model Coverall Service, Inc*, 182 Mich App 741, 744; 453 NW2d 301 (1990). The plain language of MCL 600.6013; MSA 27A.6013, mandates payment of interest from the date the complaint was filed and precluded interest from an earlier date. Therefore, the trial court lacked authority under the statute to award Ouimette interest before the date she filed her petition.

Although Ouimette could not collect interest before her petition was filed under MCL 600.6013; MSA 27A.6013, we note that in some instances, Michigan courts have permitted a party to collect interest on a judgment beyond the date that a complaint was filed. In *Taylor v Klahm*, 40 Mich App 255, 266; 198 NW2d 715 (1972), this Court affirmed the trial court's award of interest to the plaintiff beyond the date of the filing of the complaint where the defendant wrongfully obtained money

from the plaintiff's decedent and placed the money beyond the reach of the decedent's estate. This court reasoned that the allowance of the interest in the case was within the trial court's sound discretion and the trial court did not abuse its discretion. *Id.*, pp 266-267.

Most noteworthy, this Court in *In re Swantek Estate*, 172 Mich App 509, 517; 432 NW2d 307 (1988), held that there was no statutory authority for the trial court to award pre-petition interest for money fraudulently withheld from the decedent's estate. However, the Court remanded the case to the trial court for imposition of a constructive trust that allowed the decedent's estate to collect pre-petition interest. *Id.*, p 517. A constructive trust is an equitable remedy that the court may impose where the facts justify it and may be fashioned even if the petitioner did not seek such relief. *Id.* A constructive trust places legal title in the trust to the trustee for the benefit of another who in good conscience is entitled to the beneficial interest. *Id.* The *Swantek* court imposed a constructive trust to prevent unjust enrichment of the respondent. *Id.* A jury found that respondent obtained funds from the decedent by undue influence and by fraudulent misrepresentation. *Id.*, pp 514-515. This Court found that the respondent was deemed to hold the money of the decedent in trust for decedent and the estate from the time the respondent improperly withdrew the funds from the decedent's bank account and deposited the funds into his personal account. *Id.*, p 517. Most importantly, this Court determined that the decedent's estate was entitled to interest from the time the respondent withdrew the funds from the decedent's account. *Id.*, p 518.

Here, although the trial court lacked statutory authority to award petitioner pre-petition interest, the imposition of a constructive trust would equitably compensate petitioner for the loss of use of the wrongful death proceeds for over a decade. As in *Swantek*, the record in this case indicated that Thomas, through fraudulent misrepresentation, obtained money from the decedent's wrongful death proceeds. *Swantek, supra*, p 515. Buman Thomas made a material representation to the probate court that decedent had no children in or out of wedlock with knowledge that the court and decedent's estate would rely upon his statement. This representation was in fact relied upon by the probate court and decedent's estate when distributing the wrongful death proceeds. Therefore, an equitable trust is justified and would allow Ouimette to obtain interest for the loss of use of the proceeds that rightfully should have been awarded to her on behalf of the children.

We also find that the trial court was justified in compounding the interest. In the absence of statutory authority, or an explicit agreement between the parties, or some special circumstance dictating otherwise, the rule in Michigan is that interest shall be calculated on the basis of simple interest rather than compounded interest. *Wiselogle v Mich Mutual Ins Co*, 212 Mich App 612, 618; 538 NW2d 98 (1995), lv pending. Yet, courts of equity sometimes allow the compounding of interest in order to accomplish a just and equitable settlement where there are peculiar relations between the parties or fraudulent conduct of the debtor. *Norman v Norman*, 201 Mich App 182, 185; 506 NW2d 254 (1993) (quoting 47 CJS, Interest & Usury, § 6, pp 31-32). Although the *Norman* Court recognized this exception to the general rule, it refused to consider whether it was the rule in Michigan because that case did not present a special circumstance. *Id.*, p 187. The court noted that if this exception were to be applied, it should be reserved for the most compelling situations. *Id.*, pp 187-188.

The circumstances in this case present an adequate ground for awarding compounded interest. It was undisputed that Buman Thomas collected a majority of the wrongful death proceeds with full knowledge that decedent's three natural children received none of these proceeds. This situation resulted from Thomas' affirmative act of misrepresenting the existence of the children to the probate court and failure to give Ouimette notice of the proceedings. Under these circumstances, the only way to make Ouimette whole is to award compounded interest. We therefore remand this issue to the trial court so that a constructive trust may be imposed over the wrongful death proceeds that were rightfully payable to Ouimette in 1982.

III

On cross-appeal, Ouimette contends that the trial court erred in not setting the interest at a rate that a prudent investor could have earned on the money. Because Ouimette's children were minors, it was not an abuse of discretion for the trial court to set a five percent interest rate on wrongful death proceeds that should have been paid to them in 1982. *Reigle v Reigle*, 189 Mich App 386, 393-394; 474 NW2d 297 (1991). It was within the court's sound discretion to determine that interest should reflect a rate comparable to interest earned by court-appointed conservators acting on behalf of children who typically place the money in bank accounts that emphasize security rather than investment return. Furthermore, the five percent rate was consistent with the general interest statute, MCL 438.31; MSA 19.15(1). *Norman, supra*, p 186.

IV

Ouimette argues that the trial court committed error when it determined that Beatrice Kuntz was entitled to keep \$2,878.95 in wrongful death proceeds from the decedent's estate. We disagree. The record indicates that Kuntz did sign a statement to the Social Security Administration stating that she believed that her son, the decedent, was the father of Maria, Christine and Brandon. However, she did not make an affirmative representation to the trial court, as did Thomas, that decedent had no natural children. Kuntz was also the natural mother of decedent and as an heir at law, she was entitled to receive compensation for loss of society and companionship. Accordingly, we find that the trial court did not abuse its discretion in awarding Kuntz \$2,878.95 of the wrongful death proceeds. *Hoogewerf, supra*, p 579.

V

Ouimette next contends that the trial court should not have permitted reimbursement to Buman Thomas for funeral and medical expenses he incurred associated with decedent's death because Thomas did not request payment for such expenses in the original wrongful death proceedings in 1982. However, Ouimette abandoned this issue on appeal by failing to cite any legal authority in her appellate brief to support her argument. *Mallard v Hoffinger Industries*, 210 Mich App 282, 286; 533 NW2d 1 (1995).

VI

Finally, Ouimette argues that trial court erred in refusing her request to award triple damages pursuant to MCL 600.2919a; MSA 27A.2919(1) for Buman Thomas' concealment and conversion of the decedent's wrongful death proceeds. We disagree.

Pursuant to MCL 600.2919a; MSA 27A.2919(1), a person that is damaged as a result of another person's act of knowingly buying, receiving or aiding in the concealment of any stolen, embezzled or converted property may recover three times the amount of actual damages sustained. *Hovanesian v Nam*, 213 Mich App 231, 237; 539 NW2d 557 (1995). The trial court denied Ouimette's claim of triple damages because the court determined that the statute was not applicable to the case.

Michigan case law applying or interpreting this statute is sparse. Nonetheless, a plain reading of the statute reveals that the property must already be either "stolen, embezzled, or converted" before the statute is applicable. *Hovanesian, supra*, p 237. Even assuming in the instant case it was established that Thomas acted to conceal the existence of the children from the court and converted the wrongful death proceeds, he was not concealing "stolen, embezzled, or converted property" with the knowledge that the property was "stolen, embezzled, or converted property" as stated in the statute. Therefore, we find that MCL 600.2919a; MSA 27A.2919(1) is not applicable to this case. Although the trial court reached the same conclusion for a different reason, we may affirm the trial court's decision on a different ground. *Gray v Pann*, 203 Mich App 461, 464; 513 NW2d 154 (1991).

Affirmed in part and remanded for imposition of a constructive trust on the wrongful death monies rightfully paid to Ouimette that were previously paid to Buman Thomas. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Myron H. Wahls
/s/ Michael R. Smolenski