

STATE OF MICHIGAN
COURT OF APPEALS

TRUDY BUTCHER, Personal Representative of
the Estate of Delbert Butcher,

UNPUBLISHED
June 14, 2012

Plaintiff-Appellant,

v

No. 301960
Oakland Circuit Court
LC No. 2004-062107-NO

MVA CONTRACTING CORPORATION,

Defendant,

and

DEANNA ZALBA,

Appellee.

Before: JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ.

PER CURIAM.

Plaintiff appeals by leave granted¹ two orders. The first order granted appellee relief from a November 30, 2005 order approving a wrongful death settlement, allocating damages and distributing settlement proceeds. The second order reallocates the distribution of wrongful death proceeds. We affirm.

I. FACTS

The decedent, Delbert Butcher, died in a work-related accident in November, 2002. Appellee is the decedent's sister. Plaintiff is the decedent's wife. In October, 2004, plaintiff brought a wrongful death action against defendant, whose employee allegedly caused the accident. The complaint noted that, at the time of his death, the decedent was survived by his father, two stepdaughters, three step-grandchildren, plaintiff, and his sister. Although the complaint referred to the decedent's sister, it did not identify appellee by name.

¹ *Estate of Delbert L Butcher v MVA Contracting Corp*, unpublished order of the Court of Appeals, entered September 19, 2011 (Docket No. 301960).

The parties do not dispute that plaintiff's attorney in the wrongful death action, Jeffrey Dulany, did not serve a copy of the complaint on appellee. On November 16, 2005, Dulany filed a motion for approval of settlement. The motion for approval of settlement did not identify appellee as the decedent's survivor. On November 30, 2005, the trial court entered an order authorizing the settlement; this order indicated that plaintiff and Earl Butcher (the decedent's father) were entitled to damages under MCL 600.2922, but made no mention of appellee. The amount of the settlement was \$1.1 million, of which plaintiff received \$726,077.26, the amount remaining after payment of attorneys fees and costs. Earl Butcher received \$5,000. The lower court dismissed the action pursuant to stipulation on December 7, 2005.

On February 12, 2010, appellee filed a motion for relief from the settlement order. In her motion, appellee noted that the original complaint referred to her, but that she was never served with a copy of the complaint nor notified of the hearing to distribute the settlement proceeds. According to appellee's motion, appellee was unaware of the settlement until 2008, when she discovered that Earl Butcher's funeral and burial expenses had been prepaid. Suspecting that Earl Butcher's funeral and burial were financed by a settlement, appellee began to investigate; with the help of her attorney, appellee examined records from Macomb County Probate Court (where the decedent's estate was probated) and Oakland County Circuit Court (where this case originated). Appellee's investigation uncovered the wrongful death suit and the settlement. Appellee moved to set aside the settlement order under MCR 2.612(C)(1)(a), (c), and (f) or MCR 2.612(C)(3).²

The trial court held a hearing on appellee's motion on February 24, 2010. At the close of the hearing, the court issued an order granting appellee's motion for relief from judgment, but also ordered that the wrongful death settlement would remain intact pending an evidentiary hearing, the purpose of which would be to determine whether appellee was entitled to receive any of the proceeds, and if so, how much.

At the May 20, 2010 evidentiary hearing, appellee admitted that she was aware that plaintiff had spoken to an attorney in 2003 or 2004. Dulany admitted that appellee was never given notice of the wrongful death suit, but testified that the failure to provide appellee with notice was unintentional, describing it as negligence on his part. Dulany noted that it was his duty to notify all persons who might have a claim under the Wrongful Death Act, and admitted that he did not do so. According to Dulany, although appellee was identified in the complaint, his failure to notify her of the complaint's filing "was an error because she should have been listed as a person entitled, or possibly entitled to receive damages under the Wrongful Death Act" Plaintiff also testified at the evidentiary hearing. Plaintiff indicated that she did not discuss the case with appellee, but told appellee about the lawsuit. However, plaintiff testified that she might not have told appellee that the lawsuit was a wrongful death suit.

At the close of the evidentiary hearing, the court made the following finding:

² Appellee also filed a separate lawsuit against Dulaney and plaintiff. At oral arguments, the parties indicated that the case is currently stayed pending a decision in this appeal.

[I]t is especially difficult if a Court is called upon to do things in reverse, when it is given a particular figure which has been adjudicated without reversal as having been reflective of a particular loss and now the Court is called upon to go back and basically, unless I incidentally mimic that allocation, reverse that ruling.

I don't see how I could otherwise put it any other way. If the Court allocates one dollar of this [\$729,000] to the sister I must necessarily declare contrary to a ruling by another Court, by this very Court that the wife suffered [sic] amount, including one dollar. There is no way around that. I don't see it.

The Court, looking at this nevertheless for what it is, the Court finds that the evidence has been presented most especially through the sister and the wife that [sic] the relationship that each had with their brother and husband. And again, I present my condolences for the loss for both of you not that a theoretical wife is—suffered [75%] and a theoretical sister suffers [25%] but that this wife suffered [75%] and this wife [sic] suffered [25%] whether it is economic or non-economic of [\$729,000].

So, [\$182,250] I believe would be the figure representative of the sister and the remainder to the wife.

II. APPELLEE'S MOTION FOR RELIEF FROM JUDGMENT

Plaintiff first argues that the trial court erred in setting aside the wrongful death settlement. We disagree.

We review for an abuse of discretion a trial court's decision to grant relief from judgment.³ “An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes.”⁴

Appellee moved for relief from judgment under MCR 2.612(C)(1)(a) and (c),⁵ which authorize relief on the bases of:

³ *Rose v Rose*, 289 Mich App 45, 49; 795 NW2d 611 (2010).

⁴ *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

⁵ Appellee also moved for relief from judgment under MCR 2.612(C)(3), which states that “[t]his subrule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding; to grant relief to a defendant not actually personally notified . . . or to set aside a judgment for fraud on the court.” However, appellee did not file this action as an independent action. Accordingly, MCR 2.612(C)(3) is not a proper basis for relief in this case.

(a) Mistake, inadvertence, surprise, or excusable neglect.

* * *

(c) Fraud (extrinsic or intrinsic), misrepresentation, or other misconduct of an adverse party.

Plaintiff argues that appellee's claim is improper under subrules (a), (c) because her motion for relief from judgment was first filed in 2010, over four years after the settlement order was entered. We agree. MCR 2.612(C)(2) states that:

The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken.

Accordingly, appellee is time-barred from relief under the terms of subrules (a) and (c).

However, appellee also based her motion on MCR 2.612(C)(1)(f), which states that relief from judgment may be granted for “[a]ny other reason justifying relief from the operation of the judgment.” Subrule (f) is not subject to the same one year time restriction as subrules (a) through (c).⁶ This Court addressed when relief from judgment is proper under subrule (f) in *Heugel v Heugel*.⁷ The *Heugel* Court explained:

In order for relief to be granted under MCR 2.612(C)(1)(f), the following three requirements must be fulfilled: (1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice.⁸

However, the *Heugel* Court noted that subrule (f) “provides the court with a grand reservoir of equitable power to do justice in a particular case and vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.”⁹ Accordingly, the *Heugel* Court also held that relief from judgment under subrule (f) may be proper “even where one or more of the bases for setting aside a judgment under subsections a

⁶ See MCR 2.612(C)(2).

⁷ 237 Mich App 471; 603 NW2d 121 (1999).

⁸ *Id.* at 478-479.

⁹ *Id.* at 481 (citations omitted).

through e are present, when additional factors exist that persuade the court that injustice will result if the judgment is allowed to stand.”¹⁰

We emphasize that, as a practical matter, under subrule (f) and cases interpreting it, only a limited number of cases will present facts under which a party is eligible for relief from judgment under subrule (f).¹¹ This case, however, presents facts where relief from judgment is appropriate under subrule (f).

First, the requirement that, in order to obtain relief under subrule (f), “extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice,”¹² was met. “The caselaw construing MCR 2.612(C)(1)(f) contemplates that extraordinary circumstances warranting relief from a judgment generally arise when the judgment was obtained by the improper conduct of a party.”¹³ Here, plaintiff’s and Dulany’s failure to notify appellee of the wrongful death suit and settlement was improper because their conduct violated the Wrongful Death Act. MCL 600.2922(2) requires that the personal representative serve all persons who might be entitled to damages with the complaint and notice regarding the matter. A decedent’s siblings are among those who might be entitled to damages.¹⁴ Such persons are also entitled to notice of any hearing regarding the distribution of proceeds of a settlement or judgment.¹⁵ Moreover, section 7 of the statute provides:

A person who may be entitled to damages under this section must present a claim for damages to the personal representative on or before the date set for hearing on the motion for distribution of the proceeds under subsection (6). The failure to present a claim for damages within the time provided shall bar the person from making a claim to any of the proceeds.¹⁶

In light of section 7 of the statute, the Wrongful Death Act’s notice requirements are significant, because, without notice, a person who may be entitled to damages would be unable to present a

¹⁰ *Id.*

¹¹ See *Rose v Rose*, 289 Mich App 45, 62; 795 NW2d 611 (2010) (“Subrule (f) indisputably widens the potential avenues for granting relief from a judgment. But the competing concerns of finality and fairness counsel a cautious, balanced approach to subrule (f), lest the scale tip too far in either direction.”).

¹² *Heugel*, 237 Mich App at 479.

¹³ *Rose*, 289 Mich App at 62.

¹⁴ MCL 600.2922(3)(a).

¹⁵ MCL 600.2922(6)(b).

¹⁶ MCL 600.2922(7).

claim in advance of the hearing and any claim against the proceeds would be barred. This is what occurred here. It is undisputed that neither plaintiff nor her attorney served appellee with a copy of the complaint. It is also undisputed that appellee was not given notice of the hearing regarding settlement proceeds. Accordingly, the failure to notify appellee of the wrongful death suit or settlement in violation of the Wrongful Death Act was an extraordinary circumstance under which relief from judgment is proper pursuant to subrule (f).

Second, regarding the requirement that “the reason for setting aside the judgment must not fall under subsections a through e,”¹⁷ plaintiff argues that because appellee based her motion for relief from judgment in part on subrules (a) and (c), the trial court abused its discretion to the extent it relied on subrule (f) in granting appellee’s motion. We disagree. As the *Heugel* Court noted, relief from judgment under subrule (f) is proper “even where one or more of the bases for setting aside a judgment under subsections a through e are present, when additional factors exist that persuade the court that injustice will result if the judgment is allowed to stand.”¹⁸ Here, such factors are present. Appellee was not given notice of the wrongful death lawsuit, in violation of the Wrongful Death Act. Consequently, appellee was unaware that a wrongful death suit had been filed, let alone that she was entitled to damages. As soon as appellee became aware that a lawsuit had been filed, and that she might be entitled to a portion of the proceeds, she filed her complaint and subsequently filed her motion for relief from judgment.¹⁹ Accordingly, even though one basis for relief from judgment under subrule (a) was arguably present here (mistake by Dulaney), we are convinced that setting aside the judgment is nonetheless appropriate.

Plaintiff argues in her reply brief that this case “presents no ‘additional factors’ beyond the mistake alleged against Dulany and [plaintiff]” that would justify setting aside the judgment. *Kaleal v Kaleal*,²⁰ in which this Court for the first time interpreted the contours of subrule (f), is instructive on this point. In *Kaleal*, this Court noted that “[t]he exact parameters of [subrule (f)] have never been delineated. Nor can they be. The trial courts must be empowered to draw from their long experience, both with the particular case and from the bench, to determine whether *any* variables in the case warrant this extraordinary relief.”²¹ Similarly, in *Heugel*, this Court

¹⁷ *Heugel*, 237 Mich App at 478.

¹⁸ *Id.* at 481.

¹⁹ Plaintiff contends that appellee became aware of the settlement in 2008, not in 2009 as she claims. However, the record indicates that appellee came across evidence that gave rise to her suspicion of a settlement in 2008, but that it was not until 2009, after her investigation of court records, that she confirmed both that there was a settlement and that she might be entitled to a portion of the proceeds. Moreover, plaintiff’s assertion does nothing to change the undisputed fact that appellee was never given notice of the original complaint or notice of the settlement order in violation of the Wrongful Death Act.

²⁰ 73 Mich App 181; 250 NW2d 799 (1977).

²¹ *Id.* at 189 (emphasis added).

explained that subrule (f) empowered courts “a grand reservoir of equitable power to do justice,” and “vests power in courts adequate to enable them to vacate judgments *whenever such action is appropriate to accomplish justice.*”²² In short, plaintiff too narrowly construes *Heugel*. It would, simply put, be unjust to allow the original settlement to stand, as doing so would deny appellee the opportunity to recover proceeds she might have obtained had she received notice of the wrongful death suit and settlement.

Third, regarding the requirement that “the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside,” plaintiff’s rights have been affected inasmuch as the settlement amount to which she is entitled has been reduced. However, setting aside the judgment has not affected her rights more significantly than would have occurred had the Wrongful Death Act not been violated in the first instance. At minimum, the trial court’s decision to set aside the judgment was not outside the range of principled outcomes.

III. REALLOCATION OF SETTLEMENT PROCEEDS

Plaintiff next argues that the trial court erred in allocating 25% of the settlement proceeds to appellee. We disagree.

We review for clear error a trial court’s distribution of wrongful death settlement proceeds.²³ Such a decision is clearly erroneous when “the reviewing court is left with a definite and firm conviction that a mistake has been made.”²⁴

MCL 600.2922(6) states that “[i]n every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances.” MCL 600.2922(6)(d) provides for the distribution of wrongful death proceeds to “those persons designated in subsection (3) who suffered damages . . . in the amount as the court or jury considers fair and equitable considering the relative damages sustained by each of the persons and the estate of the deceased.”

This Court has previously held:

A claim for loss of society and companionship under the wrongful death act addresses compensation for the destruction of family relationships that results when one family member dies. The only reasonable means of measuring the actual destruction caused is to assess the type of relationship the decedent had

²² *Heugel*, 237 Mich App at 481 (emphasis added).

²³ *Reed v Breton*, 279 Mich App 239, 241; 756 NW2d 89 (2008).

²⁴ *Id.* (citations omitted).

with the claimant in terms of objective behavior as indicated by the time and activity shared and the overall characteristics of the relationship.²⁵

Appellee is the decedent's only surviving sibling. It appears from the evidence presented at the evidentiary hearing that the two had a close, personal, and healthy sibling relationship. Although plaintiff produced evidence that appellee's and the decedent's relationship was temporarily strained, plaintiff admitted that her immediate family otherwise had a good, close family relationship with appellee. Plaintiff also admitted that appellee and the decedent loved and cared for one another. Accordingly, the trial court declined to consider the short period of estrangement between appellee and the decedent, and we are not persuaded that it was error for it to do so. In short, plaintiff has not shown that the amount of the settlement allocated to appellee was clearly erroneous.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra

²⁵ *McTaggart v Lindsey*, 202 Mich App 612, 616; 509 NW2d 881 (1993) (citations omitted).