

STATE OF MICHIGAN
COURT OF APPEALS

JOHN B. LIZZA, Personal Representative of the
Estate of KYLE KLINSKE,

Plaintiff/Counter-Defendant,

v

YAMAHA MOTOR CORPORATION, U.S.A.,

Defendant/Cross-Defendant,

and

DAVID JAMES KLINSKE,

Defendant/Counter-Plaintiff/Cross-
Plaintiff-Appellant,

and

ALAN JAMES HAGGARD and KRISTEN
SUZANNE TURTON,

Defendants,

and

TRACY SULLIVAN, RYAN PURDY, and
GRAHAM GEARY,

Appellees.

UNPUBLISHED
January 19, 2010

No. 287274
Oakland Circuit Court
LC No. 2005-069097-NI

Before: Wilder, P.J., and O'Connell and Talbot, JJ.

PER CURIAM.

Defendant-appellant David Klinske appeals by leave granted from the trial court's order distributing the proceeds of a wrongful death action brought by the estate of Klinske's son, Kyle Klinske.¹ The trial court determined that a fair and equitable distribution was to award all the proceeds to Kyle's mother, Tracy Sullivan, and his two surviving half-brothers, Ryan Purdy and Graham Geary,² and to not award any proceeds to Klinske. We affirm.

This action arises from the tragic death of eight-year-old Kyle Klinske, who, while operating a Yamaha motorbike in the front yard of David Klinske's home, lost control of the motorbike and proceeded into a public road where he was struck and killed by a passing motorist. At the time, Klinske was instructing Kyle on how to operate the motorbike, but Kyle was not wearing a helmet and had not obtained any safety certificate to operate an off-road vehicle.

The personal representative for Kyle's estate brought a wrongful death action against several parties, including Klinske. Settlements were reached with all defendants for a gross amount of \$196,000, of which defendant Klinske contributed \$50,000. After the deduction of attorney fees and costs, a net amount of approximately \$120,000 remained to be distributed among those claimants entitled to damages. Klinske, Sullivan, and Kyle's half-brothers all requested a share of the proceeds.

Before conducting an evidentiary hearing to determine how to divide the proceeds, the trial court denied Klinske's motion in limine to preclude other parties from offering evidence of Klinske's negligence or fault in causing Kyle's death. In particular, it ruled that MCL 600.2922(6)(d) required it to distribute the proceeds on the basis of what was fair and equitable; therefore, evidence related to Klinske's fault in causing Kyle's death could be offered and considered to the extent that it was relevant to what was fair and equitable. After conducting a two-day hearing, the court determined that it would be fair and equitable to divide the proceeds in the following manner: (1) 55 percent to Tracy Sullivan; (2) 25 percent to Ryan; (3) 20 percent to Graham; and (4) zero percent to Klinske. In explaining its decision not to award any of the proceeds to Klinske, the trial court stated:

The Court does not doubt that David Klinske loved and cared for his son Kyle. However, the equities of this case weigh in favor of an award of zero to him for the reasons discussed below.

Mr. Klinske was a defendant in the lawsuit for which he now seeks to benefit from. The Court has already ruled that this fact alone does not completely bar defendant from recovering a share of the proceeds. However, after examining all the facts in evidence, the Court finds it would be inequitable for [Klinske] to

¹ We will refer to defendant-appellant as "Klinske" and his son as "Kyle" in this opinion.

² Although occasionally referred to as Kyle's stepbrothers in the lower court proceedings, appellees Ryan Purdy and Graham Geary are also Sullivan's sons and therefore were actually Kyle's half-brothers.

recover when it was his own actions which set in motion the circumstances which took the life of the decedent. It was [Klinske's] actions of failing to properly supervise his eight year old son by allowing him to drive a complicated motorbike without the proper training and safety equipment. The Court finds that it would be unfair and inequitable for [Klinske] to now directly benefit from his negligent actions.

Further, it would appear that Tracy Sullivan sustained a greater loss than [Klinske] due to the fact that Kyle spent the great majority of his life with her and her sons. Although [Klinske] may have spent many weekends with Kyle the Court also notes [Klinske] failed to provide proper support on a regular basis for his son. At one point, Klinske was five months in arrears and Kyle's mother was forced to apply for and obtain food stamps.

Although Mr. Klinske certainly sustained a significant loss as a result of the death of his son, the evidence supports a finding that Tracy Sullivan, Ryan Purdy and Graham Geary sustained a far greater loss due to the amount of time they spent with Kyle over the years. This fact as well as Mr. Klinske's failure to make timely support payments provides a basis to award the estate monies to Tracy Sullivan and her sons Ryan and Graham.

Klinske now argues that the trial court erred by failing to award him a share of the wrongful death proceeds. We disagree.

In reviewing a circuit court's decision concerning the distribution of settlement proceeds in a wrongful death matter, we review the trial court's findings of fact for clear error. *Reed v Breton*, 279 Mich App 239, 241; 756 NW2d 89 (2008); *Hoogewerf v Kovach*, 185 Mich App 577, 579; 463 NW2d 160 (1990). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Reed, supra* at 241-242, quoting *McTaggart v Lindsey*, 202 Mich App 612, 616; 509 NW2d 881 (1993). Due regard is given to the trial court's special opportunity to judge credibility. *Hoogewerf, supra*. The trial court's ultimate distribution of the proceeds, based on its findings, is reviewed for an abuse of discretion. *Id.*

The distribution of wrongful death proceeds is governed by MCL 600.2922(6)(d), which provides:

(6) In 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 including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. The proceeds of a settlement or judgment in an action for damages for wrongful death shall be distributed as follows:

* * *

(d) After a hearing by the court, the court shall order payment from the proceeds of the reasonable medical, hospital, funeral, and burial expenses of the decedent for which the estate is liable. The proceeds shall not be applied to the payment of any other charges against the estate of the decedent. The court shall then enter an order distributing the proceeds to those persons designated in subsection (3) who suffered damages and to the estate of the deceased for compensation for conscious pain and suffering, if any, 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. If there is a special verdict by a jury in the wrongful death action, damages shall be distributed as provided in the special verdict.

Klinske argues that it was improper for the trial court to decline to award him a share of the settlement proceeds on the basis of his fault in causing Kyle's death because MCL 600.2922(6)(d) does not identify a claimant's fault in causing a decedent's death as a factor for the court to consider when apportioning proceeds in a wrongful death action. To the extent this issue presents a question of statutory construction, our review is de novo. *Reed, supra* at 242.

"It is well recognized that legislative intent is determined by first looking at the language of a statute to ascertain and give effect to the intent of the Legislature." *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 648; 761 NW2d 414 (2008).

Unless defined in the statute, every word or phrase of the statute should be read in accordance with its plain and ordinary meaning. MCL 8.3a. Language of a statute must be applied as it is written and nothing should be read into the meaning of the statutory language that is not within the intent of the Legislature as determined from the statute itself. In other words, "a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *DLF Trucking Inc v Bach*, 268 Mich App 306, 310-311; 707 NW2d 606 (2005) (quotation marks and citation omitted). [*Id.* at 649-650.]

"Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *Jenkins v Patel*, 471 Mich 158, 167; 684 NW2d 346 (2004), quoting *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

Klinske correctly observes that a claimant's fault in causing a decedent's death is not expressly mentioned in MCL 600.2922(6)(d) as a factor for a court to consider when distributing proceeds in a wrongful death action. However, nothing in the statute expressly prohibits a trial court's consideration of fault either. Rather, MCL 600.2922(6)(d) directs the court to distribute proceeds to designated persons who suffer 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." It is apparent from the use of the phrase "fair and equitable" that the Legislature intended to vest courts with broad discretion with respect to the distribution of wrongful death proceeds: when the terms "fair" and "equitable" are given their plain and ordinary meanings, a court has broad discretion to consider a variety of factors in making its determination. Among the definitions of "fair" is "free from bias, dishonesty, or injustice."

Random House Webster's College Dictionary (2001). *Black's Law Dictionary* (8th ed) defines "equitable" as "[j]ust; consistent with principles of justice and right."

In this case, the trial court properly recognized that Klinske was not barred from recovering a share of the settlement proceeds as a matter of law because of his fault. Instead, the trial court, in a proper exercise of its discretion, *Hoogewerf, supra*, determined that Klinske was not entitled to a share because after examining all the facts and evidence, it concluded that it would be unfair and inequitable for Klinske to benefit from his negligent actions. It was not inappropriate for the trial court to consider Klinske's role in causing Kyle's death in the performance of its statutory function of determining what was fair and equitable under the circumstances of the case. Further, the trial court did not base its decision not to award Klinske a portion of the proceeds solely on Klinske's admitted role in Kyle's death. The trial court also noted that Sullivan's role as Kyle's primary caregiver, evidence of Klinske's sporadic child support payments, and the fact that before his death Kyle had lived with Sullivan and his half-brothers, not Klinske, indicated that Sullivan, Ryan, and Graham suffered a far greater loss from Kyle's death than did Klinske.

Klinske also argues that, to the extent it was proper for the trial court to consider the issue of fault, the court should have limited its consideration of this factor to the \$50,000 settlement amount that he contributed. Klinske proposes that the trial court should have deducted \$50,000 from the amount available to be distributed, and then distributed the remaining balance without any consideration of fault. We disagree. Again, the trial court is obligated to consider what is "fair and equitable." This determination is not governed by any mathematical formulas but rather by what is fair and just under the circumstances of the case. Again, in this case, the trial court's determination that it would be unfair and inequitable for Klinske to receive a share of the settlement proceeds was not based solely on its consideration of Klinske's fault in causing Kyle's death. The court also considered that Kyle had spent the great majority of his time with Sullivan and his half-brothers, and that Klinske failed to provide child support for Kyle on a regular basis.³ The court's findings are not clearly erroneous and, under the circumstances, its decision not to award a share of the proceeds to Klinske was not an abuse of discretion.

Finally, Klinske argues that the trial court erred in allowing both the estate's personal representative and the attorney for the estate in the wrongful death action to testify at the evidentiary hearing to determine the distribution of the wrongful death settlement proceeds. However, Klinske failed to challenge either witness being permitted to testify and, in fact, intended to call his attorney in the wrongful death action as a witness.⁴ Because Klinske at least implicitly, if not explicitly, consented to allowing the estate's attorney and personal

³ Kyle was born in September 1993. Sullivan and Klinske separated in June 1994, and were later divorced. Sullivan was awarded custody of Kyle.

⁴ Klinske's attorney was unavailable to testify. The record indicates that the parties instead agreed to submit the parties' case evaluation summaries in order to give the "view points of each side" in the wrongful death action.

representative to testify, we consider this claim of error waived. See *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 696; 630 NW2d 356 (2001).

We also disagree with Klinske's argument that these witnesses' testimony regarding their knowledge of the circumstances that led to Kyle's death was inadmissible hearsay. "Hearsay is defined as an out-of-court statement offered in evidence to prove the truth of the matter asserted." *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997); MRE 801(c). Hearsay is generally not admissible as substantive evidence unless it is offered under an exception to the hearsay rule. *Tanner, supra*; MRE 802. In this case, the witnesses' testimony was not offered for the truth of the matters asserted, but rather to show what information the estate acquired and to explain the estate's position in the wrongful death action. Thus, it was not hearsay. Furthermore, there was no dispute that Klinske agreed to contribute \$50,000 toward the settlement for his role in this matter. Klinske also later testified regarding the facts surrounding Kyle's death, admitting that he had allowed Kyle to ride the motorbike without having attended a training course and while not wearing a helmet. For the most part, the witnesses' testimony regarding the circumstances of Kyle's death was cumulative of Klinske's testimony, which by itself established his culpability in the matter. Under the circumstances, the trial court did not abuse its discretion in allowing the challenged testimony from the estate's attorney and personal representative. *Becker-Witt v Board of Examiners of Social Workers*, 256 Mich App 359, 365; 663 NW2d 514 (2003) ("[A] trial court's decision to admit evidence is reviewed for an abuse of discretion.").

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Michael J. Talbot