

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA A. LEWIS-CLARK, Individually and
as Personal Representative of the Estate of
HENRY O. CLARK, JR.,

Plaintiff-Appellant,

v

JAMES GLAZIER, M.D. and JOHN BARNWELL,
M.D.,

Defendants,

and

HARPER HOSPITAL, d/b/a HARPER HUTZEL
HOSPITAL, DETROIT MEDICAL CENTER, J.
PIPER, R.N., J. NEINO, R.N., and VIRGINIA
TEKEILI, R.PH.,

Defendants-Appellees,

and

NJERI RUTHERFORD,

Claimant,

and

KALLENE RUTHERFORD,

Claimant-Appellee.

Before: Talbot, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order approving and authorizing the distribution of settlement proceeds in this wrongful death medical malpractice action. Plaintiff

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No. 273716
Wayne Circuit Court
LC No. 03-340704-NH

also challenges the chief circuit court judge's order denying her motion to disqualify the trial judge. We affirm.

I. Background

Plaintiff filed this wrongful death action after her husband, Henry Clark, died from complications following gall bladder surgery. The action was settled for \$500,000, which the trial court approved, but the family members could not agree on the distribution of the settlement proceeds.

The decedent and plaintiff each had a daughter from a prior relationship. The decedent's daughter, Kallene, and plaintiff's daughter, Chandra, are approximately the same age. Henry and plaintiff married in October 1985, when Kallene was in high school. Henry adopted Chandra approximately one year later. Chandra lived with Henry and plaintiff until 1987, when she married and moved to New York with her husband. Chandra lived in New York for ten years before returning to live with plaintiff. Kallene lived with her mother and stepfather during her formative years, except for two brief periods when she lived with Henry and plaintiff.

Henry and plaintiff divorced in 1995, and Henry moved in with his parents. In 1997, Henry suffered a stroke. When Henry was released from the hospital in September 1997, Chandra became his guardian and he moved in with plaintiff and Chandra. Henry remarried plaintiff in December 1997. Henry eventually made a full recovery. During his stroke recovery, Kallene had very little contact with Henry. However, in June 2000, Kallene and Henry re-established their relationship. On June 27, 2001, Henry was admitted to the hospital to have his gall bladder removed. He died on July 3, 2001, from internal bleeding following the surgery.

After conducting an evidentiary hearing, the trial court ordered that the settlement proceeds be awarded in the following proportions: (1) 42 percent to plaintiff; (2) 27 percent to Kallene; (3) 17 percent to Chandra; and (4) 14 percent to Kallene's daughter Njeri. Plaintiff subsequently filed a motion requesting the trial court to reconsider its earlier decision not to award damages for conscious pain and suffering, which the trial court treated as a motion for relief from judgment. The trial court denied the motion, finding that there was no evidence to support an award to the estate for conscious pain and suffering.

II. Distribution of Settlement Proceeds

Plaintiff challenges the trial court's distribution as it relates to Chandra's and Kallene's awards. She also challenges the trial court's finding that there was no evidence of conscious pain and suffering.

A. Standard of Review

A trial court's decision concerning the distribution of settlement proceeds in a wrongful death action is reviewed under the clearly erroneous standard. *McTaggart v Lindsey*, 202 Mich App 612, 615-616; 509 NW2d 881 (1993). "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. If the reviewing court determines that the trial court made a mistake, it will substitute its own appraisal of the record and reduce damages or conditionally affirm the

award.” *Id.* at 616. In reviewing the trial court’s findings, however, this Court gives due regard to the special opportunity of the court to judge witness credibility. *Hoogewerf v Kovach*, 185 Mich App 577, 579; 463 NW2d 160 (1990). Settlement proceeds are to be distributed in a fair and equitable manner. *In re Claim of Carr*, 189 Mich App 234, 237-238, 240; 471 NW2d 637 (1991).

This Court reviews a trial court’s decision regarding a motion for relief from judgment for an abuse of discretion. *Yee v Shiawassee Co Bd of Comm’rs*, 251 Mich App 379, 404; 651 NW2d 756 (2002). An abuse of discretion occurs when a trial court’s decision is outside the principled range of outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

B. Loss of Society

Plaintiff argues that the trial court clearly erred in distributing the settlement proceeds between Henry’s two daughters, Chandra and Kallene. Plaintiff asserts that Chandra should have received an equal, if not greater, share of the proceeds than Kallene.

“Michigan’s wrongful death act, MCL 600.2922, provides for the distribution of settlement proceeds to claimants who have suffered damages . . . in an amount the court deems fair and equitable after considering the relative damages sustained by each of the persons and the estate.” *McTaggart, supra* at 616. Damages for the loss of society and companionship awardable under the wrongful death act compensate “for the destruction of family relationships that result when one family member dies.” *Id.* at 616 (citation omitted). “The only reasonable means of measuring 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.” *McTaggart, supra* at 616; *Carr, supra* at 239.

The trial court found that Kallene and Henry had a mutual and loving relationship, despite periods of estrangement, for all of Kallene’s life. With regard to Chandra, the trial court found that she had enjoyed a fatherly relationship with Henry since her teenage years, when Henry adopted her. At the time of Henry’s death, Chandra and Kallene were 31 and 30 years old, respectively. Kallene’s award was just over one-third greater than Chandra’s award. It appears that the trial court found that Chandra had a slightly “closer” relationship with Henry, but that Kallene had a longer relationship with him.

Plaintiff argues that the evidence clearly showed that Chandra had a closer relationship to Henry than did Kallene and, therefore, Chandra should have received a greater, or at least an equal, percentage of the proceeds relative to Kallene. Plaintiff particularly focuses on Chandra’s role in Henry’s stroke recovery. It is undisputed that Kallene did not play a role in Henry’s recovery, while Chandra greatly assisted Henry, even becoming his guardian. The evidence also showed that Chandra had a close relationship with Henry. During her teenage years, Chandra was able to spend more time with Henry because she lived with him. When she moved to New York, she continued her relationship with Henry, visiting every six months during the ten-year period that she lived out of state. These are all facts that the trial court recognized, but we do not believe that they render the trial court’s award to Chandra clearly erroneous.

Plaintiff asserts that Kallene's relationship with Henry was inconsistent at best and did not warrant a larger portion of the proceeds. The trial court found that most of the strain in Kallene and Henry's relationship was due to normal teenage behavior or the circumstances regarding the adults in Kallene's life. There was evidence that Kallene, at times, disrespected her father, but these incidents were limited to her teenage years. The evidence also showed that issues between Kallene's mother and Henry affected the frequency of Kallene's contact with Henry during this time. Kallene testified that her relationship with Henry was more strained when he was married to plaintiff and that the quantity and quality of her time with her father decreased during these periods. The evidence also indicated that neither plaintiff nor Chandra had sufficient observations of Kallene and Henry together to offer direct testimony regarding Kallene and Henry's interactions. The trial court did not clearly err in finding that Kallene's actions and reactions to Henry during her teenage years were the product of normal teenage behavior and the difficulty of adjusting to a blended family as a result of her father's remarriage when she was approximately 14 years old. We further conclude that the trial court did not clearly err in finding that Kallene and Henry's relationship was strained at times because of the involvement of plaintiff and Kallene's mother.

Plaintiff takes issue with the trial court's finding that she was a source of interference in Kallene and Henry's relationship. Plaintiff testified that she always tried to include Kallene in the family, indicating that it was Kallene who was cold and chose not to be a part of Henry's life. The trial court discounted this aspect of plaintiff's testimony, finding it not credible. We determine that the trial court's finding, in this regard, is not clearly erroneous. Plaintiff testified that she was happy to have Kallene as another daughter and was open to her, but she also testified that when Kallene was out of sight she was also out of mind. Plaintiff testified that Kallene did not come to the hospital after Henry had gall bladder surgery, but later stated that she did. Furthermore, plaintiff reported that she had a decent relationship with Henry's family and that, at the time of Henry's stroke, she and Henry had already made plans to remarry. Yet plaintiff learned of Henry's stroke from one of his co-workers and Henry's family did not include her on the hospital's visitor list. Moreover, plaintiff believed Kallene was the cause of her divorce from Henry, which provided an additional reason for the trial court to view plaintiff's testimony regarding Kallene with a critical eye.

Kallene admitted that she had very little contact with Henry after his stroke for a period of 2-1/2 years. She explained that this was because she had to go through plaintiff to arrange to see Henry, who was not mentally or physically self-sufficient during this time, which she found difficult to do. Although Kallene admitted that it was her own immaturity that prevented her from dealing with plaintiff in a different manner and insisting on more frequent contact with her father during his stroke recovery, we do not believe that this supports plaintiff's contention that the trial court's award to Kallene is clearly erroneous.

Plaintiff further argues that the trial court ignored Henry's will, which provided that she and Chandra were the primary beneficiaries of his assets. Plaintiff asserts that Henry's will shows that he had a closer relationship to Chandra. Although provisions of a will may be relevant to distributing damages attributable to loss of support and consortium, the trial court is not bound by it. *In re Thornton*, 192 Mich App 709, 715; 481 NW2d 828 (1992). Considering that the will was executed in 1999, at a time when Henry was admittedly estranged from Kallene

during his stroke recovery, we cannot say that the trial court clearly erred in failing to give weight to the will's provisions.

Plaintiff also asserts that the only explanation for the trial court's greater award to Kallene is that she was Henry's biological daughter, whereas Chandra was his adopted daughter. The trial court's written findings of fact provide no indication that this was a factor in its decision. In sum, we conclude that the trial court's decision is not clearly erroneous.

C. Conscious Pain and Suffering

The wrongful death act provides for "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." MCL 600.2922(6). Plaintiff argues that the trial court clearly erred in finding that there was no evidence of Henry's conscious pain and suffering. She first argues that conscious pain and suffering could be inferred from the fact that Henry bled internally for three days before slipping into a coma. However, plaintiff did not present evidence at the evidentiary hearings to substantiate her claim that Henry experienced internal bleeding for three days. Further, there was no competent evidence that Henry experienced disconcerting symptoms related to the alleged bleeding.

This Court has recognized that pain and suffering may be inferred from circumstantial evidence. See *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 461; 633 NW2d 418 (2001) and *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 180; 475 NW2d 854 (1991). In this case, plaintiff relies on Dr. Robert Stark's affidavit of merit to affirmatively establish that Henry suffered persistent dizziness and light-headedness as a result of his internal bleeding. However, an affidavit is simply an offer of proof; it is not evidence. No medical professional testified at the evidentiary hearings regarding Henry's symptoms after surgery and his medical records were not admitted.

As direct evidence of Henry's pain and suffering, plaintiff also cites several statements allegedly made by Henry that she overheard. However, plaintiff did not testify regarding these statements at the evidentiary hearings. She only referred to them in her brief in which she requested the trial court to reconsider an award for conscious pain and suffering. Plaintiff's unsupported assertions in her brief are not evidence and do not support an award for conscious pain and suffering. Accordingly, the trial court did not clearly err in finding that there was no competent evidence of Henry's conscious pain and suffering, and accordingly, did not abuse its discretion in denying plaintiff's motion for relief from judgment.

III. Motion for Judicial Disqualification

A trial court's factual findings on a motion for disqualification are reviewed for an abuse of discretion, while the application of the facts to the law is reviewed de novo. *Van Buren Twp v Garter Belt, Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003). "A judge is disqualified when he cannot hear a case impartially. But a party challenging the impartiality of a judge must overcome a heavy presumption of judicial impartiality." *Id.* (citations and quotation marks omitted). Generally, "the challenger must prove that a judge harbors actual bias or prejudice for or against a party or attorney that is both personal and extrajudicial." *Id.*

When circumstances present a probability of actual bias too high to be constitutionally tolerable, due process requires judicial disqualification without showing actual prejudice, but only in the most extreme cases. Such circumstances include: “(1) when the judge has a pecuniary interest in the outcome; (2) when the judge has been the subject of personal abuse or criticism from the party before him; (3) when the judge is enmeshed in other matters involving the complaining party; or (4) when the judge might have prejudged the case because of having previously acted as an accuser, fact-finder, or initial decisionmaker.” *Van Buren Twp, supra* at 599-600. None of these circumstances exist in this case and there was no allegation of any circumstance of similar caliber. Therefore, plaintiff cannot avoid the requirement of showing actual personal bias.

The evidence on which plaintiff relied to show bias was Judge Baxter’s remarks at the August 31, 2005, settlement conference. Plaintiff contends that the remarks coerced her into settling the case.¹ We agree with the chief judge that even if Judge Baxter made the remarks alleged by plaintiff, none suggest extrajudicial bias. Plaintiff failed to overcome the heavy presumption of judicial impartiality. Accordingly, the chief judge did not abuse his discretion in denying plaintiff’s motion to disqualify Judge Baxter.

Affirmed.

/s/ Michael J. Talbot
/s/ Brian K. Zahra
/s/ Patrick M. Meter

¹ On appeal, plaintiff refers to additional circumstances at subsequent proceedings. However, that evidence was not before the chief judge at the time he made his decision. Thus, it cannot form a basis for challenging the chief judge’s ruling.