SC 97599
IN THE MISSOURI SUPREME COURT

PAMELA EDEN,	)	
	)	
Plaintiff/Appellant,	)	
	)	
and	)	
	)	
LOREN MACKE,	)	
	)	**Case No.: SC 97599**
Co-Plaintiff/Respondent,	)	
	)	
vs.	)	
	)	
AUSTIN PATTON,	)	
	)	
Defendant.	)	

APPEAL FROM SAINT LOUIS CITY CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT, STATE OF MISSOURI
THE HONORABLE JASON M. SENGHEISER

ON TRANSFER FROM THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT
CASE NO.: ED 103133

SUBSTITUTE BRIEF OF APPELLANT

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Oral Argument Requested

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REFERENCE NOTE

All statutory references are to RSMo 2016. References to the Legal File are denoted "L.F." and to the Trial Transcript "Tr." References to the trial court's Judgment are denoted "J." References to the exhibits from the trial court are denoted as "Exh." References to the Missouri Court of Appeals, Eastern District, Opinion in this case are referred to as "CoA Op."

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

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JURISDICTIONAL STATEMENT

This appeal concerns distribution of proceeds between two plaintiffs in a wrongful death settlement. Plaintiffs are the natural and biological parents of decedent Nicklaus Macke who died in a motor vehicle crash involving Defendant Patton on April 25, 2017 in the City of St. Louis. On November 28, 2017, the trial court determined that Plaintiffs constitute the only persons entitled to recover damages in accordance with RSMo 537.080(1), approved the wrongful death settlement, and heard evidence pertaining to distribution of proceeds. On December 12, 2017, the trial court entered its Judgment apportioning 98 percent of the settlement funds to Respondent and 2 percent of the settlement funds to Appellant. (L.F. 42-46).

Appellant timely filed Notice of Appeal to the Missouri Court of Appeals, Eastern District, on January 8, 2018. (L.F. 47-50). On November 6, 2018, the Court of Appeals, in an opinion which all three of the participating judges concurred, reversed the trial court's judgment with respect to apportionment of settlement proceeds and remanded the case to the trial court. (CoA Op. 12). On December 10, 2018, the Court of Appeals denied Respondent's Application for Transfer to this Court. On March 5, 2019, however, this Court sustained Respondent's Application for Transfer. Jurisdiction is accordingly proper with this Court pursuant to Mo. R. Civ. P. 83.04 and Article V, Section 10, of the Constitution of the State of Missouri.

STATEMENT OF FACTS

Appellant Pamela Eden (hereinafter also "mother") and Respondent Loren Macke (hereinafter also "father") are the natural and biological parents of decedent Nicklaus Macke. The decedent was born on December 7, 1991 and died on April 25, 2017 at the age of twenty-five (25) as a result of a motor vehicle crash in the City of St. Louis. Decedent was unmarried and had no children at the time of his death. He was the only child born of the brief marriage between Appellant and Respondent. (Tr. 9-10). Appellant and Respondent accordingly constitute the only persons entitled to recover damages herein under Missouri's wrongful death statute. RSMo §537.080(1).

Both Appellant and Respondent attended the decedent's funeral services. (Tr. 68). Appellant travelled from her home in Alabama where she has lived and worked with her husband since 2014 in order to attend. (Tr. 68; 80). Without informing Appellant, Respondent then pursued a civil wrongful death claim against Defendant Austin Patton. Defendant later agreed to tender his policy limits of $500,000.00.

On October 26, 2017, counsel for Respondent sent Appellant, who at the time was pro se, a notice of hearing with respect to approval of the wrongful death settlement. The original approval hearing was scheduled for November 21, 2017. Hours before the hearing Appellant was informed for the first time - by defense counsel - as to the nature of the settlement. Appellant then telephoned the Court from her home in Alabama and requested a continuance. She advised the court that she just learned the that the subject of the hearing was the distribution of wrongful death proceeds, and that she had been led to believe by

Respondent that the hearing concerned only reimbursement of funeral and medical expenses. The trial court continued the hearing for 1 week to November 28, 2017. Appellant immediately began searching for counsel. However, this search was complicated by the immediacy of the hearing date coupled with the Thanksgiving holiday weekend. Not until the morning of the November 28, 2017 hearing was Appellant able to retain counsel to appear on her behalf. (Tr. 5).

On November 28, 2017, Appellant and her husband Anthony Eden travelled from Alabama and appeared in person, accompanied by counsel. Respondent, his sister Loretta Neal and wife Cathy Macke also appeared and were accompanied by counsel. Defendant was also represented by counsel. At the outset of the hearing, Appellant's counsel requested a continuance insofar as he had been only been retained that same morning, was unable to conduct any discovery in the matter and was prejudiced and handicapped in preparing for a contested apportionment hearing under the circumstances. (Tr. 5). The trial court denied Appellant 's motion stating that "Ms. Eden had notice and we were kind enough to put it off for a week . . . that [the hearing] needs to happen today, partially due to the issue of the other parties also having to travel into town." (Tr. 6).

Counsel for the two parties proceeded to elicit testimony from Respondent, his sister Loretta Neal, his wife Cathy Macke, Appellant and her husband Anthony Eden. After hearing evidence elicited by counsel for each party, the trial court approved the settlement in exchange for the release of Defendant Austin Patton from liability and took the issue of apportionment under advisement. The trial court further ordered Respondent and Appellant

to submit written briefs in support of their positions. (L.F. 23). Both parties duly filed their briefs, although Respondent also filed a proposed judgment. (L.F. 37-40).

On December 12, 2017, the trial court signed the judgment submitted by Respondent. The Order and Judgment included the following statement:

> [i]nsofar as they may have failed to appear, or to appear in advance of the hearing date, they have waived any right to complain about the settlement or the conduct of the hearing on the issue of apportionment or distribution, and, except as provided in this Judgment, have waived any right to make a claim for the wrongful death of Nicklaus Macke and their rights to any interest they may have had in any settlement or proceeds resulting from this proceeding.

(LF 43). The Order and Judgment apportioned 98 percent of the settlement funds to Respondent and 2 percent of the settlement funds to Appellant.

Evidence During Apportionment Proceeding

Nicklaus Wayne Macke was born on December 7, 1991 and died on April 25, 2017 which made him 25 years old at the time of his death. (Tr. 9:8-13). Respondent and Appellant were married in 1991 through 1992 while she was pregnant with Nicklaus. (Tr. 10:2-15). Appellant gave birth to Nicklaus when she was just 16 years old. (Tr. 57:22-58:1). Appellant and Respondent divorced when Nicklaus was 1 ½ years old at which time Nicklaus went to live with Respondent and his mother in Marshall, Illinois. (Tr. 59:1-9). Nicklaus lived with Respondent's mother throughout his entire life. Even when Respondent re-married he stayed at his grandmother's home. (Tr. 72:2-4). Respondent's mother performed tasks such as taking Nicklaus to the doctors and arranging for Nicklaus to play Little League. (Tr. 18:4-13). Immediately following the divorce, Appellant was working at the IGA grocery store from 8:00 a.m. to 11:00 a.m. while Respondent worked

at Allendale Country Club in Terre Haute, Indiana. Appellant would care for Nicklaus four or five times a week until Respondent got off of work around 10:00 p.m. and was able to pick up Nicklaus from Appellant 's mother's house. (Tr. 59:10-19; 73:7- 75:2).

Appellant was a large part of Nicklaus' early life. For example, as referenced above, she cared for him four or five times a week while Respondent was at work. (*Id.*). After the divorce, Appellant continuously tried to be a part of Nicklaus' life but was blocked from doing so by Respondent and his family. For example, Nicklaus was frequently not present when it was time for visitation. There were even occasions when Appellant would be on her way to pick up Nicklaus and Respondent's mother would physically leave the house with Nicklaus thereby depriving Appellant of her custodial rights. (Tr. 58:3-10; 73:7-75:2). Appellant went to the Marshall Police Department to report Respondent's non-compliance with the visitation requirements, but the department informed her that they could not have the manpower to sit and wait until Respondent showed up with Nicklaus. (Tr. 58:19-13; 74:10-12).

Appellant was never informed of Nicklaus' doctor visits, school meetings and little league games. (Tr. 62:22-63:2, 63:23-24). Appellant recalls being blocked from seeing Nicklaus after Christmas Eve of 1999. (Tr. 60:7-8). Appellant continued her attempts for a couple of years after Christmas Eve 1999 to see Nicklaus and give him gifts. (Tr. 63:5-15). She would take gifts to Respondent's mother's house and after no one would answer the door, she would then leave the presents on the front porch and drive by the next day to see that the presents were still there. (*Id.*).

Nicklaus was a talented artist who was also in a band. (Tr. 64:4-9; 76:10-77:6). Appellant kept the drawings that Nicklaus made her when he was younger. (Tr. 64:4-9). Appellant also kept pictures of Nicklaus when he was a toddler, his kindergarten picture, a picture of Nicklaus during Appellant's daughter's birthday party that he attended, pictures from his prom night, pictures of graduation and pictures of their reunion in February of 2016. (Tr. 69:8-71:4).

Appellant and Nicklaus reconnected in late 2000s. (Tr. 76:5-7). In 2008, despite Appellant being eight months pregnant and on bed rest Appellant and her family attended Nicklaus' concert. (Tr. 76:10-16). Appellant began to follow several different bands in which Nicklaus played. (Tr. 76:17-18). She explained how proud she was that one of his bands, Visions of Scion, actually had music for sale on iTunes and travelled all over the country. (Tr. 77:4-6). Again in 2010 Appellant attempted to reunite with Nicklaus when she attended his graduation party with her husband, two brothers and mother to congratulate Nicklaus and give him cards and tell him how proud they were of him. (Tr. 77:7-16). In 2011, Nicklaus moved to Indiana where he attempted his hand at school and several jobs. (Tr. 77:17-25). As a young adult Nicklaus thus spent the last 6 years of his living in a different state than both of his parents.

Importantly, in February 2016, Nicklaus and Appellant began to physically reconnect while spending time together in Marshall, Illinois. (Tr. 78:15-80:4). They ate and socialized together. (*Id.*). They discussed Nicklaus' grandmother's passing. Notably, Appellant comforted Nicklaus and apologized for not being present as much as she would

have liked to have been in his life. (Tr. 66-68). Nicklaus replied by stating that he forgave her. Appellant described the comfort she took from Nicklaus' forgiving heart. He told her she should not beat herself up about not being there as much as she wanted to during his younger years. (*Id.*). She also explained how Nicklaus' willingness to forgive her taught her in turn how be more forgiving herself. (*Id.)*

The relationship between mom and her son then began to rapidly gain momentum. Later that evening after their first day together in February, 2016, Nicklaus sent Appellant and Appellant's daughter Facebook friend requests. (Tr. 78:23-79:3). They began to communicate regularly via text and Snapchat. (Tr. 66:22-23). Nicklaus took Appellant back to the home where his grandmother lived before she passed. Appellant was familiar with the home from when she and Respondent were together as a couple. Nicklaus showed Appellant all of the remodeling work he had done inside his childhood room. Appellant complemented Nicklaus and counseled him that "it was very nice work," and that he could always consider carpentry and remodeling as a backup career in light of his talents. (Tr. 79:23-80:4).

With respect to his occupation, Nicklaus discussed with Appellant his new career as an independent insurance broker with The Carrillion Group in St. Louis. (Tr. 79:13-22). Appellant was aware that Niklaus' best friend helped him get the job. She expressed to Nicklaus that "it sounded like a very nice job," and that she "was very proud of him for getting the schooling for it." However, she also counseled him that he was smart and that he should not allow himself to become content simply because he got the job. (Tr. 79:21-

22). At the hearing Appellant showed the Court a Snapchat photo she screenshotted. Nicklaus sent her the photo after his first week of work at The Carrillion Group. The photo was captioned "Good First Week of Work." (Tr. 79:7-12).

Appellant and Nicklaus also conversed about his recent purchase of a loft on Washington Ave. in St. Louis. (Tr. 78:15-80:4; 81:17-82:15; 82:21-83:10; 93:7-15). Appellant asked Nicklaus if he was happy with the purchase and if he felt the neighborhood was safe. Nicklaus told her he was quite happy with the purchase. He explained there were many young adults his age in the area and that the neighborhood offered several options in terms of activities. Nicklaus assured her he was 24 years old and he felt confident in his purchase. Nicklaus showed Appellant pictures of the loft. Appellant told Nicklaus she wanted to see the loft in person. Appellant therefore scheduled a trip from Alabama to St. Louis over Memorial Day weekend 2017 to see Nicklaus' loft. (*Id.*). These plans, however, were forever foreclosed by the events of April 25, 2017.

Appellant described her son as "smitten" with his girlfriend. They communicated on several occasions about his relationship with her. (Tr. 82:21-83:6). Appellant explained that "a mom can tell when her son is smitten, and he … lit up [about his girlfriend]." (*Id.*) In 2016, Appellant also invited Nicklaus and his girlfriend to join her and her family in South Haven, Michigan for a vacation. (Tr. 80:20-81:4). Nicklaus told her because he just started his insurance job he had limited vacation time, but thanked her and expressed his appreciation for the invitation. (*Id.*).

In light of the above, Appellant described the current state of her relationship with Nicklaus at the time of his death as "very strong," and that but for his untimely death they would have continued to enjoy a very strong relationship. (Tr. 83:7-10). Appellant looked forward to a continuing mutually flourishing relationship with Nicklaus into the future. (Tr. 81:7-24).

POINTS RELIED ON

Point I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR CONTINUANCE INSOFAR AS COUNSEL FOR APPELLANT HAD BEEN RETAINED THAT MORNING AND HAD NO OPPORTUNITY TO CONDUCT DISCOVERY, AND A CONTINUANCE WOULD NOT HAVE PREJUDICED RESPONDENT.

Graves v. Davidson, 68 S.W.2d 711, 712-13 (Mo. 1933)

In re D.C., 49 S.W.3d 694, 698–99 (Mo. Ct. App. 2001)

In re. D.L.W., 413 S.W.3d 2, 10 (Mo. Ct. App. 2012)

State ex rel. Woytus v. Ryan, 776 S.W.2d 389, 392 (Mo. banc 1989)

Missouri Supreme Court Rule 41.01

Missouri Supreme Court Rule 41.03

Missouri Supreme Court Rule 41.04

Missouri Supreme Court Rule 56.01

POINTS RELIED ON

Point II

THE TRIAL COURT ERRED IN APPORTIONING ONLY A 2 PERCENT SHARE OF SETTLEMENT FUNDS TO APPELLANT INSOFAR AS THE EVIDENCE ESTABLISHED THAT APPELLANT SHOULD HAVE BEEN APPORTIONED A GREATER SHARE OF SETTLEMENT FUNDS.

Banner ex rel. Bolduc v. Owsley, 305 S.W.3d 498, 503 (Mo. App. S.D. 2010)

Bishop v. Nico Terrace Apartments, LLC, No. 4:09CV1718MLM, 2010 WL 2556846, at *1-2 (E.D. Mo. 2010)

Glasco v. Fire and Cas. Ins. Co., 709 S.W.2d 550 (Mo. App. 1986)

Haynes v. Bohon, 878 S.W.2d 902

RSMo. §537.080(1)

RSMo. §537.090

RSMo. §537.095

Ala. Code §6-5410

Miss. Code Ann. § 11-7-13

42 Pa. C.S.A. §8301(b)

Introduction and Summary of Issues

Under Point 1 Appellant argues that the trial court erred in denying a continuance insofar as her counsel had just been retained the morning of the hearing and did not have an opportunity to conduct discovery. Additionally, Appellant argues that granting a continuance would have not prejudiced Respondent. Appellant argues that the trial court's failure to deny a continuance was not harmless error insofar as it affected Appellant's ability to build a more robust case regarding the full nature and extent of Appellant's relationship with her son.

Under Point 2 Appellant argues that the trial court erred in its apportioning only 2 percent of the settlement proceeds to her. It appears the trial court erroneously relied on Appellant's "failure to appear" for previous hearings in support of a reduction in apportionment proceeds. Appellant presented credible evidence that she had a relationship with her son throughout his life. In 2016, her and her son developed a stronger and renewed relationship that was continuing to flourish and grow stronger. Appellant also presented evidence that reconnecting with her son comforted her and that she was robbed of any opportunity to further grow her relationship with her son which would undoubtedly warrant greater than 2 percent of any settlement for the wrongful death of Nicklaus.

ARGUMENT

Point I

The trial court erred in denying Appellant's motion for continuance insofar as counsel for Appellant had been retained that morning and had no opportunity to conduct discovery, and a continuance would not have prejudiced Respondent.

Standard of Review

An appellate court reviews for an abuse of discretion a trial court's denial of a motion for continuance. "[T]he trial court enjoys neither an absolute nor an arbitrary discretion, and the trial court's action will be reversed if there has been an abuse of discretion." *In re. D.L.W.*, 413 S.W.3d 2, 10 (Mo. Ct. App. 2012) (*quoting In re D.C.,* 49 S.W.3d 694, 698–99 (Mo. Ct. App. 2001)).

Appellant's counsel requested a continuance at the beginning of the apportionment hearing in so far as Appellant was only able to secure counsel the morning of the hearing and had no opportunity to conduct discovery or otherwise adequately prepare for such hearing. (Tr. 5-6). The trial court denied Appellant's motion. (Id.)

Discussion

Counsel for Appellant requested a continuance at the beginning of the apportionment hearing on November 28, 2017. Appellant argued that she was just only able to secure counsel that morning and that there was no time for any discovery to be had. Appellant was made aware of an apportionment hearing on October 26, 2017 at which time Appellant was not represented by counsel. The matter was originally set for approval hearing on November 21, 2017. She learned, from Defense counsel just a few hours before

the November 21, 2017 hearing, that she was under a misunderstanding of the nature of the proceeding set for November 21, 2017.

Based on her pro se conversations with Respondent, Appellant was actively led to believe the hearing was for recovery of moneys that were used to pay for funeral and medical expenses only. Appellant offered to help pay for funeral and medical expenses but was denied by Respondent. Logically, therefore, Appellant did not believe herself to be a stakeholder in the hearing. Not until her conversation with Defense counsel did she learn that the true nature of the proceedings was to approve a settlement for the wrongful death of her son. Appellant then immediately phoned the trial court on November 21, 2017 and asked the trial court to continue the hearing. The trial court continued the hearing for just one week, until November 28, 2017. Appellant, living in Alabama, scrambled to find counsel in St. Louis over the Thanksgiving holiday and was successful in locating counsel the morning of the November 28, 2017. Despite these facts, the court subsequently denied the continuance and commenced the approval and apportionment hearing.

"Parties involved in litigation have the right to perform discovery. Parties may freely conduct [such] discovery." *State ex rel. Woytus v. Ryan*, 776 S.W.2d 389, 392 (Mo. banc 1989); *See also* Missouri Supreme Court Rules 56.01, 41.01, 41.04. A denial of an application for continuance after a showing that the attorney presenting the application was not sufficiently acquainted with facts to proceed may be held an abuse of discretion. *Graves v. Davidson*, 68 S.W.2d 711, 712-13 (Mo. 1933).

Appellant was deprived of her right to perform discovery into the relationship between Nicklaus and Respondent. Further, Appellant's counsel was unable to sufficiently gather evidence that would have strengthened Appellants case in so far as he had only a matter of hours between the time of being retained and the time of November 28, 2017 hearing. For example, had Appellant's counsel had more time, he would have ordered cell phone records to prove the extent of recent communications between mom and son. Appellant's counsel was deprived of the opportunity to take depositions of Respondent and his witnesses and to gather evidence such as photographs in Appellant's possession prior to the apportionment hearing. Appellant's counsel could also have secured witnesses to further establish the contours of the blossoming relationship between mother and son.

Under the circumstances presented, the trial court's actions described above constitute an abuse of discretion. There was no evidence of bad faith or unreasonable delay on Appellant's part. To the contrary, Appellant was first informed of the existence of wrongful death proceeds on November 21, 2017 and was given exactly one week (including the Thanksgiving holiday) to find counsel and prepare for the hearing. This constitutes a de facto depravation of Appellant's right to a fair hearing and right to conduct discovery. *Woytus* 776 S.W. 2d at 392; *Graves* 68 S.W. 2d at 712-713. Respondent would not have been prejudiced in any fashion since both Appellant and Respondent, as sole beneficiaries under the wrongful death act, had approved the policy limits settlement. To the contrary, Respondent misled Appellant about the nature of the settlement funds and yet at various points attacked Appellant's supposed lack of evidence brought to the hearing.

This violates Rule 41.03 which requires that the administration of the rules of civil procedure "shall be construed" to secure a "just" outcome.

The Court of Appeals acknowledged that "it is true, as Mother argues here, that the court's denial of Mother's continuance request deprived her counsel of the opportunity to depose Father and any of his witnesses and to otherwise conduct discovery and this may have undermined the effectiveness of his cross-examination and the presentation of Mother's position generally at the hearing." (CoA Op. 5). Ultimately, however, the Court of Appeals concluded that in light of the guiding principles that should apply to an apportionment hearing such discovery "should normally be unnecessary in an apportionment hearing on a wrongful death settlement." (*Id*). Thus, the Court of Appeals predicated denial of this point in large part upon the fact that §537.090 is necessarily a *forward looking* statute. In other words, the apportionment should not turn into a competition between parents about who can bring into the courtroom a larger stack of evidence proving they had more contact with the child than the other parent. Nor should the hearing turn into a 'race to the bottom' where one parent comes armed with as much dirty laundry on the other as can be obtained thru lengthy discovery.

Point II

The trial court erred in apportioning only a 2 percent share of settlement funds to Appellant insofar as the evidence established that Appellant should have been apportioned a greater share of settlement funds.

Standard of Review

Appellate courts may interfere with a decree or judgment of a trial court apportioning proceeds in a wrongful death action if the judgment is grossly excessive or inadequate, *Kavanaugh v. Mid-Centry Ins. Co.*, 937 S.W.2d 243, 246 (Mo. App. W.D. 1996)(*citing Kenne v. Wilson Refuse, Inc.*, 788 S.W.2d 324, 326 (Mo. App. E.D. 1990); or if the decree or judgment is not supported by substantial evidence, is against the weight of the evidence, erroneously declares the law or erroneously applies the law. *Parr v. Parr*, 16 S.W.3d 332, 336 (Mo. banc 2000) (*citing Kavanaugh*, 937 S.W.2d at 246).

The trial court's finding is against the weight of the evidence and erroneously applies the law. Appellant presented credible evidence of a strong and reunited relationship with Nicklaus and thus entitling her to greater than 2 percent of the wrongful death proceeds. Precedent suggests that a 2% award to a surviving parent would be appropriate only in situations where the decedent is also survived by a dependent child or spouse. In this case, since the decedent was not survived by either a dependent child or spouse, the 2% award to the surviving mother is grossly inadequate, is against the weight of the evidence and erroneously applies the law.

Discussion

Parties seeking to establish their losses have an equal burden of proof, that is, to show the amount to which they are entitled by a preponderance of the evidence. *Motley v. Colley*, 769 S.W.2d 477, 478-79 (Mo. App. W.D. 1989). The burden of proof in a wrongful death action is by a preponderance of the evidence. *Id.* A preponderance of the evidence is evidence which shows the fact to be proved more probable than not. *Id*. (*citing Fujita v. Jeffries,* 714 S.W.2d 202, 206 (Mo. App. E.D. 1986)). "The burden of the parties to establish their loss, and the resulting proportion of damages to which they are thereby entitled, is the same." *Motley*, 769 S.W.2d at 478-79. Whatever loss the parties claim to have suffered, they have the burden of proving that loss by a preponderance of the evidence. In Missouri, the legislature has placed the duty and responsibility of apportionment of losses in a wrongful death case squarely within the determination of the trial court. *Farr v. Schoeneman,* 702 S.W.2d 512, 515 (Mo. App. E.D. 1985). However, an apportionment cannot be based upon an incorrect statement or application of the law. *Motley*, 769 S.W.2d at 478-79; *Parr v. Parr*, 16 S.W.3d 332, 336 (Mo. banc 2000).

A) The trial court erroneously applied the law by suggesting that since Appellant did not participate in the settlement that their rights to their appropriate share of the apportionment proceeds were thereby restricted.

The trial court erroneously applied the law in its Judgment and Order, and its findings were not supported by the evidence presented during the hearing. The trial court erroneously applied the law by stating in the Judgment:

> [i]nsofar as they may have failed to appear, or to appear in advance of the hearing date, they have waived any right to complain about the settlement or the conduct of the hearing on the issue of apportionment or distribution, and, except as provided in this Judgment, have waived any right to make a claim for the wrongful death of Nicklaus Macke and their rights to any interest they may have had in any settlement or proceeds resulting from this proceeding.

(L.F. 43). The wording stated above appears to show the trial court relied on Appellant's failure to be present at the November 21, 2017 apportionment hearing and failure to assist in obtaining the settlement itself as a basis for a low apportionment of settlement proceeds. The trial court is not authorized to rely on these factors in the apportionment process. To the contrary, the apportionment is not to be decided on any such basis, but instead must be allocated to those entitled to recover damages based on the actual losses suffered by those individuals as well as losses they are likely to suffer in the future based on the factors set forth in RSMo §537.090. *Parr* 16 S.W. 3d at 336-37. Here, the court explicitly states it relied on factors other than only the losses suffered by Appellant and Respondent in making its apportionment findings. As such, the trial court erroneously applied the law and reversal of the trial court's judgment is warranted.

B) <u>The trial court's award of 2% of wrongful death proceeds to Appellant is grossly inadequate and not supported by the evidence.</u>

The evidence presented during the hearing fully supported a finding that Appellant had a relationship with her son befitting far more than 2% of settlement proceeds from his wrongful death. During the apportionment hearing Appellant offered credible evidence of a relationship in the early years of Nicklaus' life as well as uncontroverted evidence of a blossoming and strong relationship with Nicklaus at the time of his death. Appellant

testified that she was just 16 when she gave birth to Nicklaus and was subsequently divorced from Nicklaus' father soon thereafter. During Nicklaus' early years, she and Respondent participated almost equally in Nicklaus' upbringing. In the early – mid-2000's, Appellant became blocked by Respondent and his family from raising her own son and admittedly was not there as much as she would have preferred. However, Appellant and her husband offered uncontroverted credible testimony that Appellant enjoyed a very strong relationship with her son at the time of his death. Their current relationship began to take shape with both mother and son comforting each other about turbulent patches in earlier years. From there, they began to provide companionship, guidance and counsel to each other on fundamental life issues such as Nicklaus' career choice, his first real estate purchase and his girlfriend. The uncontradicted evidence plainly shows Appellant had every reason to look forward to a flourishing relationship with Nicklaus into the future. In addition, Appellant certainly may have been able to rely on her son's care and support in her waning days. The trial court's 98% - 2% division under the circumstances is grossly inadequate, is against the weight of the evidence and misapplies the law insofar as it is clearly based on an attempt to punish Appellant for perceived past failures when she was a young single mom 10-20 years ago.

"The benefits flowing to a child or parent from a relationship with the decedent, and the correlative loss sustained by reason of the decedent's death, are not always susceptible of measurement in a wrongful death action simply by reference to the frequency of contact and the time of association." *Evans v. FirstFleet, Inc.*, 345 S.W.2d 297, 306 (Mo. App. S.D. 2011). Thus, "the quality of time spent together is not determined by the clock but

rather upon the fulfillment of the needs which may vary from child to child and from age to age." *Keene v. Wilson Refuse, Inc.*, 788 S.W.2d 324, 326 (Mo. App. E.D. 1990). Notably, RSMo §537.090 "*requires* the Court to consider what the Plaintiff has been deprived of by reason of the death, not only what the decedent has failed to provide to date." *Banner ex rel. Bolduc v. Owsley*, 305 S.W.3d 498, 503 (Mo. App. S.D. 2010) (emphasis added).

The trial court's apportionment completely failed to follow the forward-looking principles used to measure survivors' losses in wrongful death cases. RSMo §537.090 establishes losses that are compensable and subject to apportionment which include the "reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, personal training and support [the survivors] have been deprived by reason of such death." *Id.* As the Court of Appeals correctly pointed out, the plain language of the statute mandates what is "necessarily a forward-looking inquiry." For this reason, the life expectancy of eligible survivors is relevant and admissible to assist the trier of fact in measuring the extent of the future loss caused by the death. *Dorsey v. Muilenburg*, 345 S.W.2d 134, 141 (Mo. banc 1961). (CoA Op. 7).

Instead of focusing on these future losses the trial court's ultimate apportionment of 98%-2% obviously represents an improper attempt to punish Appellant for perceived prior parenting failures. For example, over Appellant's relevance objection, the trial court heard evidence of Appellant's alleged marital infidelity when Nicklaus was 1 year old. (Tr. 12:21-13:5). Likewise, over Appellant's relevance objection, the trial court admitted evidence that following the parties divorce Appellant allegedly would return Nicklaus

home late while supposedly dirty and hungry. (Tr. 14:14-15:7). Similarly, again over Appellant's relevance objection, Respondent elicited testimony thru Loretta Neal about how Appellant would supposedly allow Nicklaus to remain in dirty diapers when he was 1 year old. (Tr. 36:25-37:12). Over Appellant's relevance objection, Respondent's counsel questioned Appellant about a drug possession charge (there is no evidence in the record about a guilty plea, and Appellant's counsel had no time before the hearing to research the same) in 2002 – 15 years before Nicklaus' death. Respondent's counsel asked about whether Nicholas' kindergarten vaccinations were kept up to date by Appellant – to which Respondent himself conceded "that was a long time ago." (Tr. 18:20-19:5).

Finding that "the testimony elicited by Father's counsel regarding Mother's decades-old misconduct was irrelevant and misdirected the purpose of the hearing," the Court of Appeals correctly concluded that the trial court erroneously applied §537.090 and §537.095.3. (CoA Op. 8). The Court explained:

> From our review of the record, it appears that the fundamental cast of the apportionment hearing was the punishment of Mother for her past failures to provide Decedent with proper parental support – not the statutorily mandated discernment of the extent and proportion of Mother's losses resulting from Decedent's death, and the apportionment of wrongful death proceeds in accordance therewith.

It is plainly apparent that old evidence of Appellant's alleged shortcomings as a parent (much of it from when she was a 17-year old single mother and the decedent a 1-year old child) has absolutely no bearing whatsoever on the value of the companionship, comfort, counsel and support she has been deprived of as a result of her 25-year old son's death. As the Court of Appeals thoughtfully explained "the purpose of an apportionment hearing is not to punish a survivor for past failures, particularly when the relevance of that conduct

to the actual forward-looking losses is, as here, dubious at best." (CoA Op. 7). The trial court's repeated admission of this evidence coupled with the lopsided 98% - 2% apportionment confirms the Court of Appeals conclusion that the trial court erroneously applied the law and committed reversible error.

In *Banner*, the trial court focused extensively upon the lack of a past relationship between father and son and apportioned the son only 5% of settlement proceeds. *Id.* at 503. In awarding only 5%, the trial court pointed out that son "had not seen decedent since age four (4) and did not remember his father." *Id.* In addition, the trial court noted that dad "provided no services, no companionship, no family bonding, no comfort, no instruction, no guidance, no counsel, no training and little support although ordered to do so to [son] since age four (4)." *Id.* Son agreed that his relationship with dad was "non-existent." *Id.* The Court of Appeals nonetheless criticized the 5% award because the trial court erroneously failed to consider the relationship that son had been deprived of going forward as a result of the death. For example, son testified that he "wanted to get to know [dad] better" and hoped to develop a relationship in the future. *Id.* at 504. The Court of Appeals pointed out on remand that "the benefits flowing to a child from the relationship with his or her father and the correlative loss sustained by reason of the father's death are not always susceptible of measurement simply by reference to the frequency of contact and the time of association." *Id.* (*see also Evans v. FirstFleet, Inc.*, 345 S.W.2d 297, 306 (Mo. App. S.D. 2011)).

Here, by contrast, mom and son enjoyed a relationship that was very much existent. And the uncontradicted evidence plainly shows Appellant had every reason to look forward

to a flourishing relationship with Nicklaus into the future. In 2016, Mother and son mutually comforted each other about their periodic lack of contact at certain points in the past. They began to communicate regularly. Nicklaus physically took Appellant to his childhood room to show her his remodeling work. Appellant advised and encouraged Nicklaus regarding his choice to pursue a career as an independent insurance broker in St. Louis. After his first week on the job he Snapchatted a photo to Appellant expressing his excitement about a good first week of work. They discussed his first real estate purchase. Appellant and her husband planned a trip to see Nicklaus' loft on Washington Ave. over Memorial Day 2017 – their meeting of course cut short by his premature death. The two of them discussed Nicklaus' relationship with his girlfriend. Appellant invited Nicklaus and his girlfriend to join them for a summer beach house vacation in Michigan. Appellant had every reason to expect going forward they would continue to provide companionship, guidance and counsel to each other on fundamental life issues and events. And, as the Court of Appeals pointed out, this evidence of Appellant's lost companionship, guidance and counsel into the future was "uncontradicted testimony." (CoA Op. 12).

Despite this undisputed evidence of a rapidly blossoming relationship between mother and son, Respondent argues that because he enjoyed a greater quantity of time with the decedent overall that his claim is superior to mom's claim. Respondent's position is unsupported by the law. In *Keene v. Wilson Refuse, Inc.*, 788 S.W.2d 324 (Mo. App. E.D. 1990), the decedent's two (2) sons were apportioned equal shares. The son from the decedent's current wife claimed that he "lost a close and continuing relationship upon his father's death" and that the son from the decedent's first marriage "had limited contact with

his father since his parents divorced in 1974." *Id.* at 325. The son from the decedent's current wife appealed the 50/50 apportionment claiming "his actual losses exceed those of [older son] in both quality and duration; yet the equal monetary awards fail to reflect this fact." *Id.* The Court of Appeals upheld the 50/50 division explaining that "while the losses suffered by each were concededly not the same the trial court still could reasonably determine that their losses merited equal awards." Thus, the Court of Appeals specifically held that "the quality of time spent together is not determined by the clock but rather upon the fulfillment of the needs which vary from child to child from age to age." *Id.*

Along similar lines, Respondent's assertion that his claim is superior insofar as Appellant was entitled to periods of limited visitation when the decedent was a minor child is unsupported by the law. This Court has specifically addressed this issue. In *Higgins v. Gosney*, 435 S.W.2d 653 (Mo. 1968), the Supreme Court held that a father's "cause of action as a surviving parent is neither destroyed nor affected" by the fact that "the decree vested custody in the mother subject to limited periods with the father." *Id.* at 658; see also *Sims v. Arvin Industries*, 770 S.W.2d 711, 712 (Mo. App. W.D. 1989) (juvenile court order regarding custody irrelevant to wrongful death claim).

Although each case is to be decided on its own facts, a comparison of the compensation apportioned in comparable cases can prove helpful in determining the adequacy of the trial court's award. *See*, i.e., *Kenton v. Hyatt Hotels Corp.,* 693 S.W.2d 83, 98 (Mo. banc 1985). The trial court's apportionment here represents an enormous departure from a line of Missouri precedent in wrongful death cases for separated parents of deceased children.

In *Bishop v. Nico Terrace Apartments, LLC* No. 4:09CV1718MLM, 2010 WL 2556846, at *1-2 (E.D. Mo. 2010), the court ordered a 77%-23% apportionment between mother and father. Testimony during the apportionment established that the father's presence in his deceased children's lives was sporadic. Further, the father's financial support was inconsistent and amounted only to $10 to $20 whenever he had it while the mother was forced to rely on government programs to meet the children's needs. It was the mother who "assumed the role of responsible parent who supervised, supported, protected and cared for the children." The father was unable at the apportionment to confirm the address where his children resided, and was unable to identify what high school his oldest child was attending. In fact, the Court found that father "had considerable difficulty recalling even the most pertinent events" in the lives of his children. There was thus essentially no evidence supporting the existence of any of the §537.090 losses on father's part. Father was nonetheless ultimately apportioned 23% of the settlement proceeds. *Id.* at 1-2.

In *Haynes v. Bohon*, 878 S.W.2d 902 (Mo. App. E.D. 1994) the decedent had lived continuously with mother from the time she was born. Father did not marry mother until daughter was 7 years old. Although daughter saw father occasionally, he was absent from the family home for varying amounts of time and for a variety reasons (including stints in prison) and was separated from mother for about 2 years prior to his daughter's death. Father's contact with his daughter at the time of her death was essentially nothing other than sporadic gifts. As in *Bishop* there was no evidence in the record to suggest the

prospect of a future relationship that would trigger substantial §537.090 losses into the future. The *Haynes* court found that father was nonetheless entitled to 10% of settlement proceeds. *Id.* at 904-905.

In *Glasco v. Fire and Cas. Ins. Co.*, 709 S.W.2d 550 (Mo. App. W.D. 1986), father failed to support child and maintained only a bare minimum of contacts with her for 12 years prior to her death. *Id.* at 554-55. As in *Bishop* and *Haynes*, there was no evidence in the record to suggest the prospect of a future relationship that would trigger §537.090 losses into the future. The *Glasco* court likewise found that father was still entitled to 10% of settlement proceeds.

The following chart synthesizes the above precedent:

Missouri Precedent	**Relevant Facts**	**%**
Bishop v. Nico Terrace Apartments, LLC	•Undisputed that father failed to shoulder his responsibilities. •Father had difficulty remembering any events in children's lives. • No evidence of future losses under §537.090.	23% to Father 77% to Mother
Haynes v. Bohon	•Daughter saw father occasionally; he was absent from the family home for varying amounts of time (including stints in prison). •Contact with daughter reduced to sporadic gifts. •No evidence of future losses under §537.090..	10% to Father 90% to Mother
Glasco v. Fire and Cas. Ins. Co.	•Father never legitimized decedent child as his daughter. •Bare minimum contacts with decedent child for 12 years prior to her death. •No evidence of future losses under §537.090.	10% to Father 90% to Mother

This visually confirms the trial court's 2% apportionment of the wrongful death settlement is against the great weight of the evidence, contrary to Missouri precedent, and therefore grossly inadequate. To hold otherwise would be to vest the trial court with an infallible level of discretion.

Appellant carried and gave birth to her son. Her involvement in Nicklaus' early life was more significant than any of the fathers described above. It is true Appellant was not substantially involved in the juvenile years of Nicklaus' life. However, by the time of his death, both mom and son had matured significantly. Both had reached stable places in life. This created fertile soil for their relationship to blossom and quickly make up for lost time – along with the help of modern technology like text messaging and Snapchat. As the Court of Appeals observed, "in the last several years of Decedent's life, Mother and Decedent reestablished contact and rebuilt their relationship – arguably to a level comparable to that of the father and his children in *Bishop* -even after Mother moved to Alabama in 2014. Increasingly, they provided one another with companionship, counsel, support and guidance. The renewal of their relationship also shows Mother to have been more invested in Decedent's life at the time of his passing than were the fathers in *Haynes* and *Glasco*." Thus, the Court of Appeals determined that "it appears if Decedent had not untimely passed away, he and Mother may have continued rebuilding their relationship and Mother may have been able to enjoy a renewed connection with her son for many years." (CoA Op. 10) (internal citations omitted). More importantly, Appellant distinctly stands apart from the fathers in *Bishop*, *Haynes* and *Glasco* who were apportioned minority shares

(23%, 10% and 10% respectively) insofar as her future loss of companionship, counsel, support and guidance under RSMo §537.090 was far more substantial based on the uncontroverted evidence in the record. In fact, in this particular case, the period of limited contact between mom and son in the past actually serves to make the future loss of companionship significantly more devastating in light of their blossoming relationship which was quickly making up for lost time.

Equal 50%-50% splits have been approved in other states with similar facts. In *Williams v. Cover*, 74 Or. App. 711 (1985), the trial court apportioned a 19-year old decedent's divorced parents equal 50% shares of a $110,000 wrongful death settlement. *Id. at 713.* In *Williams*, the parents divorced when the decedent was 6 years old. The decedent thereafter lived with mother. The father "clearly was not as involved in his daughter's activities as was the mother." In addition, father was in contempt of court for failure to pay more than $18,000 in back child support. *Id. at 713-14.* However, in the final years before decedent's death, she began to rebuild her relationship with her father. The Court of Appeals found that "when the decedent reached the age of 15, she began to take the initiative in visiting father. Her visits became more frequent when she got a car at age 16, and she began to see father approximately twice monthly. Their relationship was consistently described by witnesses as affectionate." *Id.* In affirming the trial court's equal 50% apportionment, the Court of Appeals pointed out that "the trial judge agreed that father was extremely deficient as a parent and that, if fulfillment of parental responsibilities were the basis upon which to apportion wrongful death proceeds, he would award all to mother

and none to father. He correctly recognized that [the Oregon wrongful death act] required him to determine each parties' [future] loss under ORS 30.020(2)(d) and to apportion proceeds on that basis. He acknowledged the difficulty of that task. He found that each parties' loss was equal and awarded each 50% of the proceeds." *Id. at 714.* The Court of Appeals approved, remarking that "the extent of a parent's loss on the death of a child is not necessarily measured by the quality of parenting." *Id. at 714-15*.

In the *Matter of the Estate of Lovely*, 848 P.2d 51 (1993), the Oklahoma Court of Appeals likewise approved an equal 50% division between surviving parents with comparable case facts. In *Lovely*, the trial court apportioned a 29-year old decedent's divorced parents equal 50% shares of a $25,000 wrongful death settlement. The parents were divorced 23 years before the decedent's death – nearly identical to the timeline in this case. The father in *Lovely* paid a total of $200 in child support. He sporadically exercised visitation and never sent his children cards or gifts. *Id. at 52.* However, after he reached the age of majority, the decedent began to visit his father more frequently. *Id.* In affirming the trial court's equal 50% apportionment, the Court of Appeals found that "the record evidence is equally clear that both parents suffered grief as a result of the Decedent's untimely death and experienced a loss of his companionship." *Id. at 53.* The Court likewise pointed out that "the extent of a parent's loss on the death of a child under [the Oklahoma wrongful death act] is not solely measured by the quality of one's parenting." *Id. at 54.* Notably, the Court also held that the trial court properly *excluded* evidence as to events occurring shortly after the parties' divorce in 1975 when the decedent died in 1989.

The trial court concluded that the events which occurred "at the time and shortly after the divorce almost 16 years ago are too remote in time to use as a measure of present grief and loss of companionship by compliance with the divorce decree granted in 1975." *Id. at 52.* The Court of Appeals agreed, finding that "nonpayment of child support and infrequent visits with Decedent during the latter's minority should be given less weight than the evidence of the quality of the father-son relationship during the years immediately preceding Decedent's death when assessing the extent of father's grief and loss of companionship." *Id. at 54.*

Missouri precedent logically suggests that only in situations where the primary takers under the wrongful death statute are dependent spouses or children is a small percentage of the wrongful death award to a surviving parent appropriate. In their appellate brief, Respondent cited *Parr*, *Keene* and *Wright v. Cameron Mut. Ins. Co.*, 908 S.W.2d 867 (Mo. App. S.D. 1995) in support of their argument that a 2% award has been found appropriate. These cases are not applicable to the current scenario. They all involve large apportionments to a surviving spouse and/or child. Appellant concedes that if her son had married his girlfriend prior to his death and/or if he had dependent children, that her 2% award would be viewed by this Court in much more favorable light. As the Court of Appeals explained, rather than demonstrating that "extraordinarily lopsided apportionments are proper," these cases reveal "a truism about apportionment of wrongful death proceeds: generally, a non-dependent parent does not suffer the same level of loss that a spouse or minor child of the deceased would." (CoA Op. 11).

Appellant and Respondent represent the only Class 1 beneficiaries under RSMo §537.080 in this case. As mother and father they thus enter the apportionment hearing with claims of equal statutory priority. They also of course enter the hearing with at least equal biological ties to the decedent. The Court of Appeals correctly held that, in addition to the trial court's erroneous failure to apportionment settlement proceeds in accordance with the forward-looking principles of RSMo §537.090, the trial court's 2% apportionment to the decedent's birthmother is also erroneous insofar as it completely fails to reflect the statutory and biological primacy of the mother-son relationship. (CoA Op. 12). The tiered approach to prioritizing takers under the wrongful death act necessarily reflects a legislative judgment that select types of familial relationships (i.e., Class 1) justify the presumptive exclusion of more distant family members in the apportionment process irrespective of the contours of the Class 1 family member's relationship with the decedent. It appears that 18 other states in this situation would automatically divide wrongful death settlement funds equally between mother and father. *See, e.g., Ala. Code §6-5410 (Alabama); Mississippi Code §11-7-13; 42 Pa. C.S.A. §8301(b)* (Pennsylvania)("The damages recovered shall be distributed to the beneficiaries in the proportion they would take the personal estate of the decedent in the case of intestacy.")

There is perhaps no more important, fundamental and organic relationship in the universe than that of mother and child. An ancient Irish proverb says "A man loves his sweetheart the most, his wife the best, but his mother the longest." The Court of Appeals was absolutely correct in "find[ing] that the 2% apportioned to Mother here not only fails

to recognize her actual losses from an interpersonal standpoint under §§537.090 and 537.095.3 but also ignores the inherent value of Mother's relationship to Decedent as recognized in §537.080." (CoA Op. 12). In this particular context with a pair of Class 1 takers who enter the apportionment on a statutory and biological par, it makes sense at a fundamental level that there be some amount of "inherent value" in a birthmother's relationship to her son that alone merits a greater apportionment under the wrongful death act. The trial court's judgment was properly reversed by the Court of Appeals on this basis as well.

CONCLUSION

WHEREFORE, for the foregoing reasons, Appellants pray this Court affirm the judgment of the Missouri Court of Appeals, Eastern District, in reversing the judgment of the trial court herein; and that this Court further instruct the trial court to allow Appellants to conduct discovery in this matter and instruct the trial court to conduct a rehearing on the apportionment of damages consistent with this Court's judgment, or, in the alternative, for this Court to exercise its authority pursuant to Rule 84.14 and award Appellant a percentage of the wrongful death settlement proceeds that is supported by the evidence.

Respectfully Submitted,

GOLDBLATT + SINGER

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CERTIFICATE OF COMPLIANCE

The undersigned certified under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. The Appellant's Brief includes the information required by Rule 55.03.

2. The Appellant's Brief, excluding cover pages, signature blocks, Certificate of Service, Certificate of Compliance and Appendix, contains 8,782 words, as determined by the word count tool contained in the Microsoft Word 2013 software with which this Appellant's Brief was prepared.

/s/Shaun M. Falvey

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 2019, I electronically filed the foregoing document through the Missouri Courts' electronic filing system, to be served by operation of the Court's electronic filing system to all counsel of record, as follows:

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CERTFICATION UNDER RULE 55.03(A)

Pursuant to Rule 55.03(a) of the Missouri Rules of Civil Procedure, the undersigned hereby certifies that he signed an original of this pleading and that an original of this pleading shall be maintained for a period not less than the maximum allowable time to complete the appellate process.

/s/Shaun M. Falvey