SC 97599

IN THE MISSOURI SUPREME COURT

LOREN MACKE,

Plaintiff/Respondent,

and

PAMELA EDEN,

Intervenor/Appellant

v.

AUSTIN PATTON,

Defendant.

RESPONDENT'S SUBSTITUTE BRIEF

Appeal from the Circuit Court of the City of St. Louis
Twenty-Second Judicial Circuit
The Honorable Jason M. Sengheiser, Circuit Judge

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STATEMENT OF FACTS

This appeal arises out of the death of Nicklaus Macke ("Nick Macke") on April 21, 2017 in the City of St. Louis, as a result of injuries he suffered in a motor vehicle collision with Defendant Austin Patton. L.F. Doc. 2 at p.1; T.9. Nick Macke was 25 years old at the time of his death. T.9. He was an only child, unmarried, had no children and was survived by his long-divorced parents, Loren Macke and Pamela Eden. T9-10.

On October 25, 2017, Respondent Loren Macke ("Mr. Macke"), his father, petitioned the Circuit Court for the City of St. Louis for approval and apportionment of a wrongful death settlement in the amount of $500,000. L.F. Doc. 2. The matter was set for evidentiary hearing on November 21, 2017. L.F. Doc. 3; Resp. Appx. A8.

Appellant Pamela Eden ("Ms. Eden"), who resides in Alabama, has not contested that she received proper and timely notice of the proceedings and scheduled hearing. But just as the November 21 hearing was about to commence, Ms. Eden contacted the court clerk by phone. L.F. Doc. 4; Resp. Appx. A7. Mr. Macke already was present in court, having traveled the two and one-half hours from his home in Marshall, Illinois. *Id.*; T.7. Ms. Eden requested a continuance, so she could hire a lawyer. L.F. Doc. 4; Resp. Appx. A7. The Court granted the request, without objection, and the hearing was postponed for a week until November 28, 2017 at 2 p.m. *Id*.

Ms. Eden personally appeared on November 28, with counsel. At the start of the hearing, Ms. Eden's counsel made an oral request for a second continuance, once again after Mr. Macke had travelled two and one-half hours to court. T.5. The Court overruled

the request, remarking: "Ms. Eden had notice and we were kind enough to put it off for a week last week, and I think eventually we just need to go forward with this and I think that needs to happen today, partially due to the issue of the other parties having to travel into town." T. 6.

* * *

The evidence at the apportionment hearing – through testimony of Mr. Macke, his sister Loretta Neal, his wife Cathy Macke and from Ms. Eden herself – largely was undisputed:

Nicklaus Macke had been raised by his father, Mr. Macke, with the assistance of Mr. Macke's mother, his two sisters and, when he remarried, his wife, Cathy Macke. T. 14-25, 29-30 [Mr. Macke]; 34-36, 40 [Loretta Neal]; 42, 46-52, 53-54 & Trial Exhibits 3 & 4 [Cathy Macke]. Nicklaus Macke and his father had a strong, loving father-son relationship in which both were active in family life and in the lives of one another. *Id*. & T. 64 [Ms. Eden]. This relationship persisted without interruption throughout Nick Macke's lifetime, from the time he was born, through infancy, childhood, adolescence, and young adulthood and until the time of Nicklaus Macke's death. *Id*.

Ms. Eden, on the other hand, had little contact with her son over many years. T. 15-25, 32-33 [Mr. Macke]; 36-40, 41-42, 99 [Loretta Neal]; 55 [Cathy Macke]. Face-to-face meetings were rare, limited to a small number of occasions, many separated by years, each of brief duration. T. 13-25, 32-33 [Mr. Macke]; 57-60, 65, 78-79 [Ms. Eden]. See T. 55 [Cathy Macke]](From 2004 until Nick Macke's death in 2017, he was in Ms. Eden's physical presence four times). Ms. Eden lived in the same town as her son for

most of his life, but she rarely saw him. T. 13-25 [Mr. Macke]; 36-40, 41 [Loretta Neal]; 55 [Cathy Macke]; 62-64 [Ms. Eden]. Ms. Eden did not participate in her son's care and development as a child or as a young man, and otherwise had little involvement in his life. T. 13-25 [Mr. Macke]; 36-40, 41 [Loretta Neal]; 57-60, 62-63, 65-66, 78-79 [Ms. Eden].

Some matters at the hearing were sharply contested, leaving it to the Court to determine facts based on assessments of witness credibility. Ms. Eden, for example, asserted that she had been kept from her son by Mr. Macke and his family when her son was growing up. *Compare* T. 62-64, 84 [Ms. Eden] *with* T. 13-25 [Mr. Macke]; 36-40, 41 [Loretta Neal]; 55 [Cathy Macke]. Mr. Macke, and his sister, Loretta Neal, disputed this assertion. T. 11, 13, 32-33 [Mr. Macke]; 37-38 [Loretta Neal]. They testified that Mr. Macke had tried to foster and encourage a relationship between Nick Macke and his mother, but Ms. Eden consistently showed no interest in her son, and routinely failed to keep or follow through with commitments she had made to visit or care for him. *Id*.

Similarly, Ms. Eden asserted that, not long before Nick Macke's death she and her son had reconciled and developed a long-distance relationship, through text messaging, social media, one face-to-face visit with a possibility of future visits. See Resp. Sub. Br. at pp. 6-8. These claims, too, where contested. Both Mr. Macke and his sister testified to a long history of Ms. Eden's chronic unreliability in promises she had made to her son, dating back to when he was a small child. T. 14-15, 32-33, 37-42. Mr. Macke testified unequivocally about Ms. Eden's connection to their son: "Through 25 years of life she rarely saw him." T. 13.

The Trial Court approved the settlement but took under advisement the issue of apportionment and requested that the parties "file briefs in support of their positions." (L.F. Doc. 8; Resp. Appx. A6.) In her post-hearing submission, Ms. Eden requested that the Court apportion to her 50 percent of the settlement proceeds, L.F. Doc. 10 at p. 5.

Ms. Eden did not renew her request for a continuance after the completion of testimony or post-hearing. *Id.* Nor did she suggest that she had been unable to adequately participate or defend her interests at the hearing. *Id*. *See also* T. 107-108.

* * *

On December 12, 2017, the Trial Court entered its Judgment Approving Settlement of Wrongful Death Claim & Distribution of Net Proceeds. (L.F. Doc. 13; Resp. Appx. A1). The Trial Court recited in the judgment that "all persons who are entitled to bring an action for the wrongful death arising out of the death of Nicklaus Macke received proper, timely and adequate notice of the wrongful death claim and of the November 28 hearing, the hearing date having been continued by the Court once, without objection, at the request of Pamela Eden." *Id*. at p. 2.

The Judgment confirmed that Mr. Macke and Ms. Eden had appeared in person and through their attorneys at the November 28 hearing, and that they had agreed upon the settlement of the underlying case and proposed total settlement amount. *Id.* at p. 1.

The Judgment recited the process the Trial Court employed and the factors it considered in apportioning the settlement proceeds:

> The court has considered the testimony of the witnesses, the documentary evidence each submitted to the court, as well as the oral and written statements of counsel. The court observed first-hand and evaluated the credibility of the

> witnesses and determined the weight to be accorded to the testimony and documentary evidence of each. This court has apportioned the settlement proceeds as set forth in Exhibit A hereto, in proportion to the losses suffered by each party, as determined by the court based on the evidence and in keeping with the factors set forth in the Missouri Wrongful Death statute. R.S. Mo. §§537.080, 537.090, 537.095. (*Id*. at p. 3).

The Court apportioned the settlement proceeds (*Id*. at p. 5 [Exh. A]) as follows:

> The court finds that settlement proceeds should be and are hereby apportioned among the eligible heirs, in proportion to the losses suffered by each party, based on the evidence and as determined by the court as follows:
>
> *Loren Macke:* **$490,000** *Pamela Eden:* **$10,000**
>
> * * *

Ms. Eden filed her Notice of Appeal on January 8, 2018, (D14-16) and on November 6, 2018, the Missouri Court of Appeals reversed the Trial Court's apportionment of settlement proceeds. The Trial Court implicitly had placed little weight on Ms. Eden's contested testimony regarding her claim of a renewed relationship with her son prior to her son's death. The Court of Appeals disregarded the Trial Court's determination and substituted its own view of the evidence on that issue.[1]

[1] The Court of Appeals acknowledged the uncontroverted proof that Mr. Macke had been a model parent and that Ms. Eden had been absent for most of Nick Macke's life: "When Decedent was one and a half years old, Mother and Father divorced. Decedent went to live with Father and his mother back in Marshall [Illinois] and Mother was allowed supervised visitation. Following the divorce, Mother spent less and less time with Decedent, and by the time he was four or five, their relationship had largely dissipated. Mother remarried which was followed within a few years by another divorce, and she lost contact with Decedent. Father, for his part, assumed responsibility – together with substantial assistance from his mother and other family members – for raising Decedent. He remarried and provided Decedent with consistent support, a healthy and stable home-life including trips and hobbies and maintained with Decedent a deep and meaningful relationship." Slip op. at 3. Resp. Appx. at A17.

The Appellate Court fully credited Ms. Eden's testimony and went so far as to predict that, had Nick Macke "not untimely passed away, he and Mother may have continued building their relationship and Mother may have been able to enjoy a renewed connection with her son for many years. Also, like Father, Mother may have been able to rely on Decedent's care and support in her waning days. Therefore, we conclude that Mother's losses must account for more than 2 percent of the total compensable loss from Decedent's death, and that the distribution to her of only 2 percent of the wrongful death settlement proceeds shocks the conscience and is grossly disproportionate." Slip op. at pp. 10-11; Resp. Appx. at A.24-A25.

The Court of Appeals also interpreted Missouri's Wrongful Death statute to confer "inherent value" of loss on surviving birth parents, "irrespective of a past relationship" with a decedent child, and held that the Trial Court erred when this "inherent value" was "ignored" and not made part of the apportionment determination. Slip op at 11-12; Resp. Appx. at A24-A25. The Court of Appeals appears to have premised this ruling on the statutory language that places both parents "on a par with respect to their status as claimants of the first class" in R.S. Mo. §537.080, with the court finding that this status alone "carries inherent value" which should have been credited to Ms. Eden for purposes of the apportionment "as Decedent's birth mother." *Id.*

The Court of Appeals' logic seems to be as follows: If Ms. Eden had been the *sole* surviving parent of an only child, she would be entitled to *all* wrongful death settlement proceeds, even if she lacked a substantial, compensable relationship with her son. On this basis, the court reasoned, a surviving parent automatically should receive a more

substantial apportionment of a wrongful death settlement than the Trial Court ordered in this case, notwithstanding the absence of a prior relationship from which loss expressly compensable under the statute, *i.e.* loss of "companionship," could be discerned. *See* R.S.Mo. §537.090. The Court of Appeals apparently considered this to be the evidence of "inherent value" arising solely from her status as a surviving "birth" parent.

Finally, the Appellate Court suggested to the Trial Court a minimum appropriate percentage for apportionment, on remand, noting that "wrongful death apportionments in other similar cases are instructive here," and pointing to one case in which a trial court apportioned 22 percent of a wrongful death settlement to an absent father. Slip op at p. 9. Resp. Appx. at A23.

* * *

Mr. Macke filed his Application for Transfer to the Supreme Court in the Court of Appeals on November 10, 2018. The Court of Appeals denied the application by Order dated December 10, 2018.

Mr. Macke then filed his Application for Transfer to the Missouri Supreme Court in the Missouri Supreme Court on December 18, 2018, which was sustained by the Supreme Court, with the case transferred by Order dated March 5, 2019.

ARGUMENT

I. THE TRIAL COURT ACTED WITHIN ITS SOUND DISCRETION IN DENYING MS. EDEN'S REQUEST FOR A SECOND CONTINUANCE (IN RESPONSE TO APPLELLANT'S POINT I)

In Point I of her appeal, Ms. Eden argues that 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." App. Sub. Br. at 10 [point relied on], 13-16 [argument].

Ms. Eden's argument is without merit.

An Appellate Court "will review the denial of a motion for a continuance for an abuse of discretion by the trial court" and "will find an abuse of discretion only 'in extreme cases where it clearly appears that the moving party is free from dereliction,' and the trial court's ruling was clearly against the logic of the circumstances and so unreasonable and arbitrary as to shock the sense of justice and indicate a lack of careful consideration." *In the Interest V.C.N.C. & T.D.C.C.,* 458 S.W.3d 443, 450 (Mo. App. 2015), citing and quoting *G.G.B. v. M.W.*, 394 S.W.3d 457, 464 (Mo. App. 2013).

The party requesting the continuance "'must make a strong showing of abuse as well as prejudice resulting from the denial of the request.'" *K.R. v. A.L.S. (In re A.L.R.)*, 511 S.W.3d 408, 414-415 (Mo. 2017), quoting *State v. Chambers*, 481 S.W.3d 1, 8 (Mo. 2016). Here, the Trial Court acted within its discretion in denying Ms. Eden's request for a second continuance, and Ms. Eden has demonstrated no prejudice from the denial. Ms. Eden had received notice of the November 21 hearing date weeks earlier but did not

contact the Court until the hearing was about to commence. [2] She telephoned the clerk and was granted, without objection, a one-week postponement. L.F. Doc. 4; Resp. Appx A7.

When the hearing reconvened on November 28, Ms. Eden was present, appeared with counsel, and counsel made an oral request for a *second* continuance – again at the very last minute, just before the rescheduled hearing was about to commence, and after Mr. Macke once again had traveled two and one-half hours to court. L.F. Docs. 4 & 8; Resp. Appx. A6-A7; T.5-6. This time the Trial Court overruled her request. (T.6)

Ms. Eden does not explain how denial of her request for a second continuance prejudiced her ability to participate in the hearing. She did not claim at the hearing that she was unable to elicit evidence at the hearing or present evidence of her loss. She makes a vague assertion had she been granted a second continuance, she could have more effectively cross-examined Mr. Macke and his wife, Cathy Macke about family photographs introduced into evidence and considered by the Trial Court. App. Sub. Br. at p. 15. But she does not explain how.

[2] Ms. Eden implies without even a pretense of proof that there had been mischief in how the hearing's purpose and importance had been communicated to her, with Ms. Eden asserting in this Court that "[b]ased 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." App. Sub. Br. at p. 14 (emphasis added). This is an escalation of what she asserted in the Court of Appeals: "Based on her pro se conversations with Respondent, Appellant *was under the impression* the hearing was for recovery of moneys that were used to pay for funeral and medical expenses only." App. Br. at p. 14 (emphasis added). Neither assertion is accompanied by citation to the record.

By not making a written motion for a continuance pursuant to Missouri Supreme Court Rule 65.03, Ms. Eden has not, in any case, preserved this issue for appellate review. *See In the Interest V.C.N.C. & T.D.C.C.*, 458 S.W.3d at 450 (quoting *G.G.B. v. M.W.*, 394 S.W.3d 457, 466 (Mo. App. 2013)). Rule 65.03 provides that a motion of a continuance be made by written motion. Ms. Eden did not seek or obtain consent from Mr. Macke to an oral motion for continuance, and "[a]bsent compliance with Rule 65.03, there can be no abuse of discretion in the denial of a continuance." *Id*. *See also*, *In the Interest of P.D.*, 144 S.W.3d 907, 911 (Mo. App. 2004). Even if the issue were preserved, which it is not, Ms. Eden has failed to present substantial evidence of abuse of discretion or prejudice arising from her being denied a second continuance.

II. THE TRIAL COURT ACTED WITHIN ITS SOUND DISCRETION AND CORRECTLY DECLARED AND APPLIED THE LAW WHEN APPORTIONING THE WRONGFUL DEATH SETTLEMENT PROCEEDS (IN RESPONSE TO APPLELLANT'S POINT II)

Ms. Eden argues in Point II of her appeal that the Trial Court erred in apportioning to her $10,000 of the settlement proceeds (2 percent) "insofar as the evidence established that Appellant should have been apportioned a greater share." App. Sub. Br. at 11 [point relied on], 17-33 [argument].

The kernel of Ms. Eden's argument is that the Trial Court *erred by not adequately considering* Ms. Eden's testimony in which she asserted that, after her long absence as a parent, she and her son had started a new relationship. Specifically, she argued that "[t]he 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's life as well as uncontroverted evidence of a blossoming and strong relationship with Nicklaus at the time of his death." App. Sub. Br. at 19-20.

Ms. Eden asserts as a corollary to this argument that the Trial Court *erred by considering* her undisputed, near-complete absence from Nick Macke and failure to maintain a parent-child relationship from the time he was a young child through adulthood, characterizing such evidence as "an improper attempt to punish Appellate for perceived prior parenting failures." App. Sub. Br. at pp. 21-22.

Ms. Eden's arguments are without merit. They are inconsistent with the plain language of, and apportionment process prescribed by, Missouri's wrongful death statute. They ignore or misstate settled principles of Missouri decisional law. They also needlessly inject uncertainty and unpredictability in a sensitive but stable area of family law, creating incentives for delay and litigation by long-absent family members who emerge in the aftermath of family tragedy seeking a larger share of wrongful death proceeds. *See* Paula A. Monopoli, "*Deadbeat Dads": Should Support and Inheritance be Linked*, 49 U. Miami L. Rev. 257, 265-273 (1994).

A. Trial Courts Have Broad Discretion in Apportioning Settlement Proceeds in a Wrongful Death case.

Missouri's Wrongful Death statute vests trial courts with broad responsibility and authority to apportion settlement proceeds "among those persons entitled thereto in proportion to the losses suffered by each as determined by the court." R.S. Mo.

§537.095.3. In addition to "pecuniary losses suffered by reason of the death" and "funeral expenses," losses that are compensable and subject to apportionment are limited to the "reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death." R.S. Mo. §537.090. "[D]amages for grief and bereavement by reason of the death," on the other hand, "shall not be recoverable." *Id*.

Mr. Macke and Ms. Eden are the only survivors of Nick Macke eligible to receive distribution of the wrongful death settlement proceeds. But statutory *eligibility* to recover, does not, in the absence of proof of actual loss, entitle a party to an apportioned share of wrongful death proceeds:

> There is no minimum amount that must be awarded to any party designated as a taker under section 537.095.4. The trial court is not bound by a set percentage or a minimum; rather, the trial court must exercise its discretion and, as instructed by the statute, distribute the proceeds "in proportion to the losses suffered by each as determined by the court."

Parr v. Parr, 16 S.W.3d 332, 337 (Mo. 2000), quoting *Wright v. Cameron Mut. Ins. Co*., 908 S.W.2d 867, 868-69 (Mo. App. 1995).

What's more, "[t]he legislature chose to place the duty and responsibility of apportionment of losses in a wrongful death case squarely within the determination of the trial court. [Appellate Courts] neither approve nor disapprove of the apportionment of a settlement. [They] only rule on whether the trial court was within the discretion granted by statute and whether the trial court's determination of losses is supported by substantial evidence." *Keene v. Wilson Refuse, Inc*., 788 S.W.2d 324, 326 (Mo. App. 1990) (citations

omitted). Thus, an appellate court "will reverse the trial court's judgment only if the ruling is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law, and will not disturb the trial court's apportionment unless it is grossly excessive or inadequate" *Parr*, 16 S.W.3d at 336 (citations omitted).

In *Parr*, for example, the decedent died when struck by a truck on the shoulder of a highway. A wrongful death settlement was reached in the amount of $965,000. The Trial Court approved the settlement and apportioned virtually all the proceeds to decedent's widow and for attorney's fees. The court found that the wife had "by far and away the major loss in this case." *Id.* at 337.

The sum of $10,000 (1.04%) was apportioned to each of the decedent's parents. The parents appealed, arguing that they were entitled to a minimum of 15% to 20% of the settlement. The Missouri Supreme Court affirmed the trial court's apportionment of the settlement proceeds to each parent, holding:

> There is no dispute that decedent's death had a serious effect on his mother and father. The trial court's award, however, is intended to compensate survivors for their loss. The trial court found that most of the mother and father's damages were in the nature of grief and bereavement, which are not compensable under Section 537.090. Decedent provided few services to his parents. They presented no evidence of economic loss …. The trial court's apportionment did not underestimate the seriousness of the loss suffered by mother and father; it simply recognized the magnitude of the loss suffered by decedent's wife of nearly thirty-four years." *Id*.

Similarly, in *Wood v. Smith*, 359 S.W.3d 526 (Mo. App. 2012), the decedent died in an automobile collision. He was survived by a widow, to whom he had been married

for 15 years, and by three adult children from a prior marriage. The parties agreed to settle the wrongful death case for $376,378.

But there had been little contact between the adult children and decedent during the 10 years preceding his death. The Trial Court apportioned 5 percent ($18,819) of the settlement proceeds to each adult child. The adult children appealed, arguing that the apportionment to them was "grossly inadequate." *Id*. at 528.

This Court rejected these arguments, and affirmed the Trial Court, holding:

> The Children specifically object to the trial court's finding that "[t]his Court can only characterize the relationship between Decedent and his children as transitory and one of limited contact or communication." After reviewing the testimony and evidence provided at the apportionment hearings, there is ample support for the trial court's finding regarding the status of the Children's relationship with Decedent….
>
> Viewing the testimony as a whole, it appears that there is conflicting evidence both about the nature of the relationship between Decedent and the children at the time of Decedent's death, as well as the causes of any strain.…The Children obviously disagree with the trial court's resolution of the evidence to find that the Children's relationship was transient and one of limited communication. But as the trial court was in a better position to make that determination, we should defer to this finding.

Id. at 528-29, citing *Essex Contr., Inc. v. Jefferson County*, 227 S.W.3d 647, 652 (Mo. 2009).

B. The Apportionment of the Wrongful Death Proceeds in this Case Was Within the Trial Court's Discretion and was Supported by Substantial Evidence.

When, as in this case, parents lose a child on whom they are not economically dependent, their principal wrongful death loss mainly concerns loss of companionship, and the "[c]rucial factors in the computation of … companionship damages to a parent

for the loss of a child … must include the physical, emotional, and psychological relationship between the parent and the child." *Letz v. Turbomeca Engine Corp*., 975 S.W.2d 155, 176 (Mo. App. 1997).

Thus, to *look forward* and reasonably assess and apportion loss of companionship claimed by surviving parents, the trial court must *look back* at the relationship between parent and child during the child's lifetime. Determining and apportioning what a surviving parent ***claims will be her losses*** as a result of the wrongful death of her child, in other words, requires an assessment of what the surviving parent ***actually had*** in terms of relationship during the child's lifetime.

Much (but not all) of the evidence in this case, on which compensable loss of companionship could be based, was undisputed:

Nicklaus Macke had been raised by his father, Mr. Macke, with the assistance of Mr. Macke's mother and sisters, and when Mr. Macke remarried, his wife, Cathy Macke. T. 16-25, 29-30 [Mr. Macke]; 34-36, 40 [Loretta Neal]; 42, 46-52, 53-54 & Trial Exhibits 3 & 4 [Cathy Macke]. Nicklaus Macke and his father had a loving father-son relationship in which both were active in family life and in the lives of one another. *Id*. & T. 64 [Ms. Eden]. This strong relationship persisted throughout Nick Macke's lifetime, without interruption, from the time he was born, through infancy, childhood, adolescence, and young adulthood and until the time of Nicklaus Macke's death. *Id*.

Ms. Eden, on the other hand, had little contact with her son. T. 15-25, 32-33 [Mr. Macke]; 36-40, 41-42, 99 [Loretta Neal]; 55 [Cathy Macke]. Face-to-face meetings were

rare, limited to a small number of contacts of brief duration, each typically separated by years. T. 13-25, 32-33 [Mr. Macke]; 57-60, 65, 78-79 [Ms. Eden]; 55 [Cathy Macke].

Ms. Eden lived in the same town as her son for most of his life, but she rarely visited him. T. 13-25 [Mr. Macke]; 36-40, 41 [Loretta Neal]; 55 [Cathy Macke]; 62-64 [Ms. Eden]. Ms. Eden did not participate in her son's care and development as a child or as a young man, and for most of his life, she did not have any involvement in his life. T. 15-25 [Mr. Macke]; 36-40, 41 [Loretta Neal]; 62-63 [Ms. Eden].

Some aspects of this testimony were sharply disputed, requiring the Court to make determinations of fact based on its assessment of witness credibility.

"When evidence is contested disputing a fact in any manner, [an appellate court] defers to the trial court's determination of credibility. A trial court is free to disbelieve any, all, or none of the evidence." *Wood*, 359 S.W.3d at 529 (citations omitted). *See Ivie v. Smith*, 439 S.W.3d 189, 206 (Mo. 2014) (stating that an appellate court defers to the trial court in "against-the-weight-of-the-evidence challenges" when the outcome depends on credibility determinations).

Indeed, "[w]hen reviewing a bench trial where no findings of fact or conclusions of law were requested, we view the evidence in the light most favorable to the prevailing party and disregard all contrary evidence." *Keene*, 788 S.W.2d at 325-26 (citations omitted). This is "'because [the trial court] is in a better position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record.'" *Wood*, 359

S.W.3d at 529 (quoting *Essex Contr., Inc. v. Jefferson County*, 277 S.W.3d 647, 652 (Mo. 2009)).

Ms. Eden, for example, sought to mitigate her long absences by claiming she had been kept from her son by Mr. Macke and his family when her son was growing up. T. 15-25 [Mr. Macke]; 36-40, 41 [Loretta Neal]; 55 [Cathy Macke]; 62-64, 84 [Ms. Eden]. Mr. Macke, and his sister, Loretta Neal, disputed this. T. 11, 13, 32-33 [Mr. Macke]; 37-38 [Loretta Neal]. They testified that, to the contrary, Mr. Macke had tried to foster and encourage a relationship between Nick Macke and his mother, but Ms. Eden consistently showed no interest in her son, and routinely failed to keep or follow through with commitments she had made to visit or care for him. *Id*.

Ms. Eden also asserted that she and her son had reconciled and developed a relationship prior to his death. *See* App. Sub. Br. at pp. 6-9. These claims, too, were contested. Both Mr. Macke and his sister testified to a long history of Ms. Eden's chronic unreliability in promises she had made to her son, dating back to when he was a small child. T. 14-15, 32-33, 37-42. Mr. Macke testified: "Through 25 years of life she rarely saw him." T. 13. *See also* T. 55.

In weighing the credibility of witnesses, the Trial Court reasonably could be deemed to have placed little weight on Ms. Eden's contested testimony, and concluded that Ms. Eden's relationship with Nick Macke remained transitory, and that her compensable loss represented a small fraction of the total compensable loss when measured against evidence of Mr. Macke's relationship with his son and his compensable loss of companionship arising for his son's death.

There is *dictum* in appellate court cases that suggests infrequent contact in a parent-child relationship should not be a dispositive of loss when a child survives the death of an absent parent. The trial court has discretion to weigh the child's loss of opportunity for companionship and support more broadly. *See Banner ex rel. Bolduc v. Owlsley*, 305 S.W.3d 498, 501-504 (Mo. App. 2010) (A child's loss for purposes of wrongful death apportionment is "not always susceptible of measurement simply by reference to the frequency of contact and the time of association.").

There's logic to such an argument when a surviving child is seeking to recover a share of a wrongful death settlement arising out of the death of a long-absent, now-predeceased *parent* who had failed to establish the parent-child relationship. The surviving child, by definition, cannot reasonably be charged with a lack of contact or development of a parent-child relationship from which loss of companionship may be implied upon the absent parent's death. But that is not this case here, and that logic does not apply when the long-absent parent is the survivor and is seeking a share of a settlement arising from the death of a child with whom the parent, herself, failed to establish or sustain a relationship.

Ms. Eden's testimony displays sadness and regret concerning the loss of her son. But this evidence reasonably could be seen by the Trial Court as constituting "grief and bereavement," which is not compensable under Missouri's wrongful death statute. *See* R.S. Mo. §537.090.

The evidence before the Trial Court supports its judgment that Mr. Macke's relationship with his son and compensable loss was greater to an overwhelming degree.

His loss was undisputed and was demonstrated in poignant detail through testimony of Mr. Macke and his sister, Loretta, and his wife, Cathy. It was supported by an extensive collection of family photo albums, admitted to evidence without objection, lovingly prepared year-by-year over a young man's lifetime, reflecting the kinds of celebration, joy, recreation, devotion, and rites-of-passage that any parent only could hope to provide to a child in family life – and that this father, Mr. Macke, did for his son Nick, and that demonstrate in concrete terms the immense loss of companionship Mr. Macke will suffer as a result of his son's death.

The Trial Court thus acted within its discretion, supported by substantial evidence, when it concluded in its apportionment that Mr. Macke's relationship with his son, and proof of compensable loss, was of the magnitude and kind that the Court in *Parr* called "by far and away the major loss." *Parr*, 16 S.W.3d at 337.

C. The Trial Court correctly declared and applied the law

Ms. Eden attempts to call into question the correctness of the Trial Court's declaration and application of the law in its apportionment of the wrongful death settlement proceeds. She asserts that language from a part of the judgment that is unrelated to apportionment represented proof that the court erroneously applied the law when apportioning the proceeds.

Specifically, Ms. Eden points to the part of the judgment that recites that the parties who are entitled to bring this action and who received notice of the hearing "insofar as they may have failed to appear, or to appear in advance of the hearing date"

have "waived any right to complain" about the settlement, award, or the conduct of the hearing. App. Sub. Br. at pp. 17-18. See L.F. Doc.13 at p. 2; Resp. Appx. at A1, A2.

Ms. Eden claims this "wording … depicts the trial court relying on Appellant's failure to be present at the November 21, 2017 apportionment hearing or during negotiations for such settlement as a basis for a low apportionment of settlement proceeds" and "[a]s such, the trial court erroneously applied the law and reversal of the trial court's judgment is warranted." *Id*.

This argument is unfounded and directly contradicted by the language of the judgment itself.

First, the judgment correctly and expressly acknowledges and confirms that Ms. Eden did in fact appear, personally and through her attorney at the November 28 hearing, and, far from suggesting any waiver on Ms. Eden's part, the record (L.F. Doc. 4; Resp. Appx. A7) and judgment (L.F. Doc. 13; Resp. Appx. A1) expressly confirm that Ms. Eden's absence in court on November 21 had been without objection, and the hearing was postponed by order of the Court and at her request. *Id*.

Second, the judgment makes no suggestion that Ms. Eden had in any manner failed to participate in the settlement of the underlying claim. To the contrary, the record (L.F. Doc. 8; Resp. Appx. A6) and judgment (L.F. Doc 13; Resp. Appx. A1) reflect that the parties, including Ms. Eden, agreed to the underlying settlement at the November 28 hearing, which in turn was approved by the court as "fair and reasonable and in the best interests of the parties." (L.F. Doc. 13, p.1; Resp. Appx. A1).

The language in the judgment to which Ms. Eden points is boilerplate which by its own terms only would apply if one or more parties entitled to share in the settlement and who had received notice of the apportionment hearing failed to appear. The judgment confirms that was not the case here. The judgment acknowledges and finds that both parties, including Ms. Eden, appeared and participated in the hearing (L.F. Doc. 13, p.1; Resp. Appx. A1), and the judgment recites the process the Trial Court employed, the standard it applied, and the factors it considered when rendering the apportionment:

> The court has considered the testimony of the witnesses, the documentary evidence each submitted to the court, as well as the oral and written statements of counsel. The court observed first-hand and evaluated the credibility of the witnesses and determined the weight to be accorded to the testimony and documentary evidence of each. This court has apportioned the settlement proceeds as set forth in Exhibit A hereto, in proportion to the losses suffered by each party, as determined by the court based on the evidence and in keeping with the factors set forth in the Missouri Wrongful Death statute. R.S. Mo. §§537.080, 537.090, 537.095. (D13 p. 3; Resp. Appx. A3).

Exhibit A, in turn, further confirms the correctness of the court's apportionment process as follows (D13, p5; Resp. Appx. A5):

> The court finds that settlement proceeds should be and are hereby apportioned among the eligible heirs, in proportion to the losses suffered by each party, based on the evidence and as determined by the court as follows:
>
> Loren Macke: **$490,000** Pamela Eden: **$10,000**

If Ms. Eden had been concerned about the clarity of language of part of the judgment, and believed the language represented error, she was obliged to raise her concerns with the Trial Court by timely motion after entry of the judgment. "In all cases, allegations of error relating to the form or language of the judgment … must be raised in

a motion to amend the judgment in order to be preserved for appellate review." Missouri Supreme Court Rule 78.07(c). *See* Missouri Supreme Court Rule 73.01(d)

Ms. Eden likely didn't raise this issue before the Trial Court in a post-judgment motion because, in fact, the judgment reflects – clearly, expressly, and explicitly – that the Trial Court correctly declared and applied the law in apportioning the wrongful death settlement. L.F. Doc. 13; Resp. Appx. A1.

D. Ms. Eden Misstates the Law on Adequacy of the Amount of Apportionment.

Ms. Eden cites Appellate Court decisions in which, she suggests, Missouri courts have established guidelines and minimum percentages for apportionment of wrongful death settlements below which an apportioned amount may be deemed inadequate. App. Sub. Br. at 25-33. Ms. Eden misreads the cases. None purports to set guidelines or minimum percentages. In none was a Trial Court's apportionment reversed as excessive or inadequate. To the contrary, all the cases Ms. Eden cites support the Trial Court's determination in this case as a proper exercise of its broad discretion to apportion a wrongful death settlement according to loss.

In *Haynes v. Bohon*, 878 S.W.2d 902 (Mo. App. 1994), for example, the trial court approved a $51,000 settlement of the wrongful death of a child and apportioned $5,000 to a father who did not live in the family home for extended periods and failed to regularly support the children financially. The father appealed the apportionment as inadequate. The appellate court affirmed but did not refer to the percentage of the recovery apportioned to the father. Rather, the court rested its decision on the proposition that

"[g]reat deference is given to the trial court's resolution of conflicts in the evidence and we may not substitute our judgment on those matters" *Id*. at 904.

Similarly, in *Glasco v. Fire and Cas. Ins. Co*., 709 S.W.2d 550 (Mo. App. 1986), a case involving the wrongful death of a child, $2,500 of a $22,500 settlement was apportioned by the Trial Court to a father who had had only minimal contacts with the child over 12 years. The appellate court didn't suggest that the absent parent was entitled to some minimum apportionment; rather, it upheld the Trial Court determination of the losses as "amply supported by the evidence." *Id*. at 554-556.

The Court in *Martin v. Survivor Respirators, Inc*., 298 S.W.3d 23 (Mo. App. 2009), explained the limited but important purpose for which wrongful death apportionments in prior cases may serve as precedent. In that case, the widow and surviving children of a firefighter killed in the line of duty appealed as grossly excessive a 12.5 percent allocation of a wrongful death award to the firefighter's mother. The Court of Appeals, rejected the argument and affirmed the Trial Court's discretion as follows:

> The family makes essentially one point: that the award here is unprecedented. The family lays out several examples of courts affirming awards to surviving parents of zero to two percent of the judgment. The family uses this to argue that an award of 12.5% is grossly disproportionate and inappropriate. We disagree.
>
> The family has shown us no case reversing an award of this size; rather the cases simply affirm awards of lesser value. This is consistent with our standard of review, which grants wide discretion to trial courts to apportion damages. The fact that the family cannot find a case affirming an award of this size does not consequently mean that the trial court abused its discretion in making the award. *Id*. at 37.

The common thread running through the cases Ms. Eden cites[3] is the deference paid to trial court apportionments of wrongful death proceeds, whether challenged as excessive or inadequate. The Trial Court here reasonably found Mr. Macke's relationship with his son and, hence, the proof of his compensable loss was such that the loss fairly could be deemed what the court in *Parr* characterized as "by far and away the major loss" – with the evidence fully supporting as adequate the apportionment of $10,000 to Ms. Eden for her loss.

CONCLUSION

For the foregoing reasons, the Judgment of the Circuit Court should be affirmed in all respects.

Respectfully submitted,

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[3] This includes the cases Ms. Eden cites from appellate courts in other states. *Compare Williams*, 74 Or. App. 711, 704 P.2d 548 *with Oak v. Pattle*, 86 Or. App. 299, 739 P.2d 61 (1987), and *Lovely v. Fortune* (In re Estate of Lovely), 848 P.2d 51 (1993) *with Briggs v. Oklahoma ex rel. Okla. Dep't of Human Servs.*, No. CIV-06-677-D, 2010 U.S. Dist. LEXIS 11299, 2010 WL 545863 (W.D. Okla. Feb. 9, 2010).

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned attorney for Respondent Loren Macke hereby certifies that:

A copy of this document and Respondent's Appendix were served on counsel of record through the Court's electronic notice system on April 22, 2019.

This brief includes the information required by Rule 55.03, the original has been signed and is being maintained by the undersigned and that it complies with Rule 84.06, including the limitations of Rule 84.06(b). Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 7,336 words, excluding the cover, signature block and this certificate.

The electronic copies of this brief were scanned for viruses and found virus free through Windows Defender anti-virus program.

/s/ Edward M. Roth