

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 24, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP2428

Cir. Ct. No. 2009CV208

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**ERIK AFFOLTER AND ARDEN ALEXANDER, AS SPECIAL
ADMINISTRATOR FOR THE ESTATE OF ZACKARY COLE LYREK,**

PLAINTIFFS-APPELLANTS,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dunn County:
WILLIAM C. STEWART, JR., Judge. *Reversed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Erik Affolter appeals a summary judgment dismissing his wrongful death claim against American Family Mutual Insurance Company. Affolter sought to recover damages for loss of society and companionship stemming from the death of his son, Zackary Cole Lyrek. The

circuit court concluded Affolter was not entitled to assert a wrongful death claim because he was estranged from and had abandoned Zackary. The court also determined that, based on the undisputed facts, Affolter could not prove a loss of Zackary's society and companionship. We disagree on both points. Affolter, as Zackary's biological father, is entitled to assert a wrongful death claim pursuant to WIS. STAT. § 895.04,¹ regardless of the quality of his relationship with Zackary. Furthermore, disputed issues of material fact preclude summary judgment on the merits of Affolter's claim. We therefore reverse.

BACKGROUND

¶2 Affolter was employed as a hired hand on a farm owned by Rita Lyrek's brothers. Affolter and Rita had a sexual relationship, and Rita became pregnant. Zackary was born in June 2003. Affolter, who had stopped working for the Lyreks, did not know about the pregnancy or the birth until he was served with paternity and child support papers. After a paternity test established a 99.9% likelihood that Affolter was Zackary's father, Affolter admitted paternity. A family court commissioner found Affolter to be Zackary's father, awarded Rita primary physical placement, and ordered Affolter to pay child support. A follow-up hearing was scheduled to discuss custody and alternative physical placement, but Affolter failed to appear. Consequently, Affolter was not granted custody or physical placement.

¶3 In May 2006, Zackary was killed when his head became caught in a car window. Affolter commenced a wrongful death lawsuit against

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

American Family, Rita's automobile insurer. Affolter alleged Rita's negligent supervision and care caused Zackary's death. He sought damages for the loss of Zackary's society and companionship.

¶4 American Family moved for summary judgment, arguing Affolter could not assert a wrongful death claim because he was estranged from and had abandoned Zackary. American Family also contended Affolter could not prove a loss of society and companionship because Affolter did not have any relationship with Zackary before his death. American Family relied on Affolter's deposition testimony, where he conceded that he never personally spent time with Zackary; never spoke to Zackary; never sent Zackary a birthday or Christmas gift; never paid any of Zackary's medical expenses; did not pay Zackary's funeral expenses; and did not attend Zackary's funeral.

¶5 In response, Affolter contended that he did not voluntarily abandon Zackary, but had been prevented from seeing Zackary by Rita and her family. At his deposition, Affolter testified he repeatedly drove by the Lyreks' house to see Zackary, but the Lyreks threatened that he would be met with a gun if he attempted to stop. Affolter alleged that he, his wife, and his sister called Rita to try to set up visitation with Zackary, but their calls were not returned. Furthermore, Affolter testified he had "an attic plump full of [Christmas and birthday gifts]" for Zackary but was not allowed to deliver them. Affolter also testified that he was the first person at Zackary's wake, but he did not attend the funeral because the Lyreks threatened to start trouble if he did. Affolter further contended that he offered to pay for Zackary's funeral but was never provided with the bill. Affolter noted that he had paid child support. Finally, Affolter testified that he wanted to file a formal motion for physical placement before Zackary died, but he did not understand how to do so and could not afford to hire

an attorney. He contacted the public defender's office and was informed they could not help him. However, at the time of Zackary's death, Affolter "had money coming from an accident that [he] was in" and planned to use that money to "get a lawyer so [he] could get [Zackary] back."

¶6 The circuit court granted American Family's motion for summary judgment. The court determined Affolter had abandoned and was estranged from Zackary at the time of his death, and therefore was not entitled to assert a wrongful death claim. The court also concluded, "Based on the undisputed facts of the case, [Affolter] has no claim for loss of society and companionship[.]" Affolter appeals.

DISCUSSION

¶7 Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2). We independently review a grant of summary judgment, using the same methodology as the circuit court. *Hardy v. Hoeflerle*, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. We view the record in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party's favor. *Novell v. Migliaccio*, 2010 WI App 67, ¶9, 325 Wis. 2d 230, 783 N.W.2d 897.

I. Entitlement to assert a wrongful death claim

¶8 The circuit court found that Affolter was precluded from bringing a wrongful death claim because he was estranged from and had abandoned Zackary. The court determined this was an issue of first impression because Wisconsin "has no statutory law, administrative law or common law regarding the ability of a biological parent to either maintain or recover proceeds from a wrongful death

claim ... when the parent is estranged or has abandoned the child [whose] death gave rise to the claim.” The court therefore relied on cases from other jurisdictions to support its conclusion that Affolter could not bring a wrongful death claim.

¶9 However, it is unnecessary to look to foreign authority because WIS. STAT. § 895.04 establishes the classes of persons who are entitled to assert wrongful death claims. Accordingly, this case requires us to interpret § 895.04, which presents a question of law that we review independently. *See Estate of Lamers v. American Hardware Mut. Ins. Co.*, 2008 WI App 165, ¶7, 314 Wis. 2d 731, 761 N.W.2d 38. “The aim of statutory construction is to ascertain the intent of the legislature, and our first resort is to the language of the statute itself.” *Id.*, ¶8. If the meaning of the words in the statute is unambiguous, we do not look beyond the statute’s plain language; instead, we simply apply that language to the facts before us. *Id.*

¶10 The plain language of WIS. STAT. § 895.04 unequivocally establishes that the parent of a deceased child has a right to assert a wrongful death claim. Subsection 895.04(1) provides that an action for wrongful death may be brought by “the personal representative of the deceased person or by *the person to whom the amount recovered belongs.*” (Emphasis added.) Subsection 895.04(2) clarifies that, if the deceased is not survived by any minor children, a spouse, or a domestic partner, “the amount recovered shall belong ... to the deceased’s lineal heirs as determined by [WIS. STAT.] s. 852.01.” Pursuant to § 852.01(1)(c), parents qualify as the deceased’s lineal heirs. Thus, in conjunction, §§ 895.04 and 852.01 provide that the parent of a deceased child may assert a wrongful death claim, as long as the deceased child is not survived by a spouse, domestic partner, or minor children. Nothing in these statutes limits a parent’s right to assert a claim

based on the quality of his or her relationship with the child. Instead, under the statutes' plain language, any parent of a deceased child is entitled to bring a wrongful death claim.

¶11 Here, it is undisputed that Affolter was Zackary's biological father. Zackary is not survived by a spouse, domestic partner, or minor children. Accordingly, WIS. STAT. § 895.04 unambiguously permits Affolter to bring a claim for Zackary's wrongful death. The circuit court therefore erred when it determined, based on case law from other jurisdictions, that Affolter was precluded from asserting a wrongful death claim because he had abandoned and was estranged from Zackary. Pursuant to § 895.04, Affolter is entitled to bring a claim based on the mere fact that he was Zackary's father, regardless of the quality of the parent-child relationship.

II. Loss of society and companionship

¶12 American Family argues that, even if Affolter is entitled to bring a wrongful death claim, summary judgment is proper because the undisputed facts establish that Affolter had no relationship with Zackary during his life. As a result, American Family contends Affolter cannot prove any loss of society and companionship caused by Zackary's death. American Family correctly points out that "[r]ecovery under the wrongful death statute is keyed to actual loss." *See Chang v. State Farm Mut. Auto. Ins. Co.*, 182 Wis. 2d 549, 560, 514 N.W.2d 399 (1994). The statute's purpose is "to compensate for the loss of the relational interest existing between the beneficiaries and the deceased." *Wurtzinger v. Jacobs*, 33 Wis. 2d 703, 709-10, 148 N.W.2d 86 (1967). Damages are not automatically recoverable; beneficiaries must prove their losses. *Chang*, 182 Wis. 2d at 561 (citing *Peot v. Ferraro*, 83 Wis. 2d 727, 746, 266 N.W.2d 586

(1978)). Thus, while recovery under the wrongful death statute is vested in certain classes of beneficiaries,

the existence of damages and ownership of the recovery depend upon proof of loss. Whether any of the individual beneficiaries in a given class has suffered any actual damages, what the amount of any such damages might be, and what the allocation of damages among the beneficiaries should be, are questions which require specific and individualized proof.

Id. at 561-62.

¶13 We conclude Affolter has raised disputed issues of material fact regarding his loss of Zackary's society and companionship. Although American Family alleges that Affolter had no relationship with Zackary, abandoned Zackary, and was estranged from Zackary, Affolter presented evidence disputing those assertions. On summary judgment, we must view the record in the light most favorable to Affolter and draw all reasonable inferences in Affolter's favor. *See Novell*, 325 Wis. 2d 230, ¶9.

¶14 At his deposition, Affolter testified that he attempted to involve himself in Zackary's life but was prevented from doing so by Rita and her family. He drove by Zackary's home and watched Zackary play in the yard, but he could not stop because the Lyreks had threatened him. He repeatedly attempted to call Rita to discuss visitation, but she would not speak to him. He bought gifts for Zackary but could not deliver them because of the Lyreks' hostility. He wanted to go to court to get physical placement of Zackary, but he could not afford an attorney. However, at the time of Zackary's death, Affolter anticipated receiving money that he planned to use to hire an attorney. Furthermore, Affolter paid child support during Zackary's life and offered to pay Zackary's funeral expenses. Accepting Affolter's testimony, a reasonable jury could conclude that Affolter

wanted to be involved in Zackary's life and suffered a loss of society and companionship due to Zackary's death. Consequently, Affolter has raised a genuine issue of material fact regarding his loss of society and companionship claim.

¶15 American Family argues that any damages for loss of society and companionship would be purely speculative because Affolter "solely relies on the argument that [he] wanted to have a relationship with Zackary and intended to establish that relationship sometime in the future[,] but there is "no evidence in the record establishing that [Affolter] took any affirmative action to develop a relationship with Zackary." American Family ignores Affolter's testimony that he tried to establish a relationship with Zackary but was prevented from doing so by the Lyreks. Furthermore, we do not agree that Affolter's loss of society and companionship claim necessarily rises or falls based on the quality of his past relationship with Zackary. Although that past relationship is one factor for the jury to consider in awarding damages for loss of society and companionship, it is not the only factor. *See* WIS JI—CIVIL 1895 (2006).

¶16 Moreover, in *Straub v. Schadeberg*, 243 Wis. 257, 260, 265-66, 10 N.W.2d 146 (1943), our supreme court affirmed pecuniary loss and loss of society and companionship damages awarded to a divorced father following the death of his eleven-year-old son, even though the father and son were living in different states at the time of the son's death. The court noted:

[I]n any event, who can say that if [the son] had lived the father would not have received pecuniary benefits both before and after the son had attained his majority. It would be a harsh conclusion to say that the father sustained no loss of society and companionship in the death of his son.

Id. at 266. Applying the same logical underpinning to this case, who can say that if Zackary had lived Affolter would not have enjoyed Zackary's society and companionship? Because the facts are in dispute, it is up to the jury to answer this question. The circuit court therefore erred by granting summary judgment in favor of American Family.

By the Court.—Judgment reversed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

