

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kenneth A. Klotzsche,
Appellant-Plaintiff,

v.

Susan Klotzsche,
Appellee-Defendant.

October 25, 2021

Court of Appeals Case No.
21A-CT-1143

Appeal from the Johnson Superior
Court

The Honorable Marla Clark

Trial Court Cause No.
41D04-2008-CT-120

Bailey, Judge.

Case Summary

- [1] Kenneth A. Klotzsche (“Klotzsche”), the personal representative of the estate of Kenneth B. Klotzsche (“Kenneth”), appeals a grant of summary judgment in favor of Kenneth’s widow, Susan Klotzsche (“Susan”), upon a wrongful death claim. Klotzsche presents a single issue for appeal: whether the trial court erred in determining that Susan is entitled to summary judgment. We affirm.

Facts and Procedural History

- [2] On August 15, 2018, seventy-four-year-old Kenneth fell down a flight of stairs in his home. He died, intestate, the next evening. On August 5, 2019, Klotzsche, Kenneth’s eldest son, was appointed the personal representative of Kenneth’s supervised estate. On August 14, 2020, Klotzsche filed a wrongful death action against Susan, alleging that she had failed to render reasonable assistance to Kenneth after the fall.
- [3] On December 9, 2020, Susan filed a motion for summary judgment. A hearing was conducted on April 20, 2021, at which argument of counsel was heard. On May 19, 2021, the trial court entered summary judgment for Susan, concluding that she is entitled to summary judgment because Klotzsche failed to file a timely claim with leave of the probate court:

The Decedent died on August 16, 2018. Accordingly, the statute of limitations on a wrongful death claim expired on August 16, 2020. The Personal Representative of the supervised estate filed this action on August 14, 2020 without obtaining court approval.

On August 18, 2020, the probate court granted the Personal Representative the authority to retain counsel to pursue the wrongful death claim. It did not authorize the filing of a complaint. Thus, the probate court did not even authorize the retention of counsel until after the expiration of the statute of limitations.

Appealed Order at 3. Klotzsche now appeals.

Discussion and Decision

[4] We review summary judgment de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). Summary judgment is appropriate “if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Ind. Trial Rule 56(C). We construe the evidence in favor of the nonmovant and resolve all doubts against the moving party. *Pfenning v. Lineman*, 947 N.E.2d 392, 397 (Ind. 2011). The party moving for summary judgment bears the initial burden to establish its entitlement to summary judgment. *Id.* at 396-97. Only then does the burden fall upon the nonmoving party to set forth specific facts demonstrating a genuine issue for trial. *Id.* at 397.

[5] A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue. *Huntington v. Riggs*, 862 N.E.2d 1263, 1266 (Ind. Ct. App. 2007), *trans. denied*.

The summary judgment process is not a summary trial. *Hughley*, 15 N.E.3d at 1003-04. Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims. *Id.* at 1004. Nevertheless, a grant of summary judgment is clothed with a presumption of validity, and the appellant bears the burden of demonstrating that the trial court erred. *Kramer v. Catholic Charities of Diocese of Fort Wayne-South Bend, Inc.*, 32 N.E.3d 227, 231 (Ind. 2015). We may affirm a grant of summary judgment on any grounds supported by the record of designated summary judgment materials. *Catt v. Bd. of Comm'rs of Knox County*, 779 N.E.2d 1, 3 (Ind. 2002).

[6] Klotzsche contends that he was not required to obtain the probate court's permission to file a wrongful death action. Alternatively, he argues that he was implicitly granted authority for the filing of the action when the probate court authorized the retention of legal counsel. He also expands upon a cursory argument made to the trial court that Indiana Code Section 34-23-1-2 violates the Privileges or Immunities clause of the Indiana Constitution.¹

[7] In *McCabe v. Comm'r, Ind. Dep't of Ins.*, 949 N.E.2d 816, 818 (Ind. 2011), the Court described the potential statutory bases for a wrongful death action:

¹ Klotzsche argued to the trial court: "The class that is treated unequally, here, in the Adult Wrongful Death Statute, are non-dependent children who would be treated unequally from other non-dependent children solely based on the identity of the bad actor." (Tr. Vol. II, pg. 13.)

Located within Title 34 (Civil Law and Procedure) of the Indiana Code, Article 23 is titled “Causes of Action: Wrongful Death.” Within Article 23, there are two chapters, Chapter 1, entitled “Wrongful Death Generally,” and Chapter 2, entitled “Wrongful Death or Injury of a Child.” Chapter 1 contains two sections, with Section 1 (the GWDS) generally permitting wrongful death actions and expressly permitting recovery of specified types of pecuniary damages including attorney fees and costs and expenses of administration and prosecution of the action. Ind. Code § 34-23-1-1 (originally enacted in 1881 and subsequently amended several times ...). Section 2 (the AWDS) authorizes a wrongful death action specifically for the death of an adult person who is unmarried and without any dependents[.] . . . Chapter 2 of Article 23 permits an action for the wrongful death of an unmarried child without dependents and allows for recovery of specified types of damages[.]

[8] A wrongful death action is entirely a creature of statute. *Durham v. U-Haul Int’l*, 745 N.E.2d 755, 758 (Ind. 2001). Because wrongful death statutes are in derogation of the common law, they must be construed strictly against the expansion of liability. *Id.* at 759. “An action for wrongful death must be brought within two years of the date of death.... In Indiana this two year time period is not a statute of limitations but a condition precedent to the existence of the claim.” *Southerland v. Hammond*, 693 N.E.2d 74, 76-77 (Ind. Ct. App. 1998) (citing *General Motors Corp. v. Arnett*, 418 N.E.2d 546, 548 (Ind. Ct. App. 1981)).

[9] Here, the complaint did not identify the particular statute under which Klotzsche sought damages. However, Klotzsche clarified at the summary judgment hearing and on appeal that he filed the action pursuant to Indiana

Code Section 34-23-1-2, the Adult Wrongful Death Statute, which provides in pertinent part:

As used in this section, “adult person” means an unmarried individual:

(1) who does not have any dependents; and

(2) who is not a child (as defined in IC 34-23-2-1).

[10] It is undisputed that Kenneth was married at the time of his death. Thus, Kenneth was not an “adult person” as defined in the foregoing statute. Regardless of whether Klotzsche filed the complaint in his personal capacity or was implicitly authorized by the probate court to file a wrongful death suit as the personal representative of the supervised estate, Indiana Code Section 34-23-1-2 does not provide a means to recover the damages sought.

[11] Klotzsche concedes that Indiana Code Section 34-23-1-2 does not facially apply to the claim against Susan.² And, with reference to both Indiana Code Section 34-23-1-1 and Indiana Code Section 34-23-1-2, Klotzsche admits: “[t]he effect under the wrongful death statutes in the current circumstance is that no claim may be made against Susan.” Reply Brief at 12. But Klotzsche argues that he

² He argues that “equity requires this case to be analyzed under the Adult Wrongful Death Statute” as opposed to Indiana Code Section 34-23-1-1, which he has referred to as the General Wrongful Death Statute. Reply Brief at 11. He additionally observes: “if the decedent had been unmarried, the express language of the Adult Wrongful Death Statute would allow [he and his brother] to recover against Susan.” *Id.*

is left without recourse because of statutory disparate treatment prohibited by Article 1, § 23 of the Indiana Constitution.

[12] Article 1, Section 23 of the Indiana Constitution, the Privileges and Immunities Clause, provides:

The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

In *Collins v. Day*, 644 N.E.2d 72, 80 (Ind.1994), the Indiana Supreme Court adopted a two-part standard for determining a statute’s validity under this provision: first, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes and, second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. “Whether a statute or ordinance is constitutional on its face is a question of law and we review the matter de novo,” though it “stands before this Court clothed with the presumption of constitutionality until clearly overcome by a contrary showing.” *Paul Stieler Enters., Inc. v. City of Evansville*, 2 N.E.3d 1269, 1272-73 (Ind. 2014) (internal quotations and citations omitted).

[13] In his constitutional attack upon the statute under which he sought wrongful death damages, Klotzsche describes the classes of persons who are treated differently as “victims” who are “non-dependent children that lost their married parent due to the wrongful act of the parent’s spouse v. non-dependent children that lost their unmarried parent due to the wrongful act of anyone else in the

world.” Appellant’s Brief at 13. And in his reply brief, Klotzsche explains that “the disparate treatment is based upon the identity of the bad-actor and not upon characteristics inherent to the class of children, thus violating the Privileges and Immunities Clause of Article I, § of the Indiana Constitution.” Reply Brief at 12.

[14] But Indiana Code Section 34-23-1-2 does not “distinguish unequally treated classes” in this manner. *See Collins*, 644 N.E.2d at 80. The statutory definition of “adult” includes an unmarried person and not a married person, but the statute does not draw a distinction based upon the identity of an alleged tortfeasor. At bottom, Klotzsche’s contention is that he was forced to file his claim under the Adult Wrongful Death Statute but it is inadequate because it does not include a married individual within its provisions. To the extent that he suggests the statutory definition should be expanded to include married decedents, the argument is best directed to our Indiana Legislature. To the extent that Klotzsche claims the statute affords disparate treatment by drawing a distinction based upon the identity of a tortfeasor, it does not. Klotzsche has not overcome the presumption of constitutionality of Indiana Code Section 34-23-1-2.

Conclusion

[15] Klotzsche did not satisfy the burden of persuading this Court that summary judgment was erroneously granted.

[16] **Affirmed.**

Crone, J., and Pyle, J., concur.