STATE OF MICHIGAN

COURT OF APPEALS

ANGLETTE KIMBROUGH, Personal Representative of the Estate of DWIGHT E. BRADLEY, Deceased,

Plaintiff-Appellant,

v

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN and UNIVERSITY OF MICHIGAN HOSPITALS,

Defendants-Appellees.

UNPUBLISHED
July 16, 1996

No. 167279
LC No. 91-13379-CM

Before: White, P.J., and Holbrook and P.D. Schaefer,* JJ.

PER CURIAM.

Plaintiff appeals the Court of Claims' judgment awarding him $15,381.32, following a bench trial limited to the issue of damages in this medical malpractice suit brought under the wrongful death act, MCL 600.2922; MSA 27A.2922. Plaintiff challenges the trial court's award of $10,000 for plaintiff's decedent's pain and suffering as clearly inadequate, its failure to award him damages for loss of society and companionship, and the admission of testimony of the decedent's co-workers. We affirm in part, and reverse in part and remand.

I

Plaintiff Anglette "Tony" Kimbrough is the half-brother and only surviving immediate family member of plaintiff's decedent, Dwight Bradley. Bradley was born with a congenital facial anomaly, Crouzon syndrome,[1] which manifests itself in the severe protrusion of the eyes and severe retrusion of the midface. The condition was not life-threatening. Bradley was aproximately thirty-four years old[2] when he underwent elective reconstructive craniofacial surgery at defendant hospital in March 1991, and was described as otherwise healthy and physically active, often playing basketball with friends. Following the twelve-hour surgery on March 4, 1991, Bradley was taken to the surgical intensive care

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* Circuit judge, sitting on the Court of Appeals by assignment.

unit where, several hours later, his nasotracheal tube became dislodged, leading to his suffering irreversible brain damage and resulting in his death on March 6, 1991. Bradley was a supervisor at the Center for Forensic Psychiatry in Milan at the time of his death, where he had been employed apparently since the late 1970s.

Plaintiff filed a pre-trial motion in limine seeking to preclude "defense counsel from offering any testimony from plaintiff's decedent's co-employees regarding the relationship" between Bradley and plaintiff, on the grounds that it was based solely on hearsay conversations with Bradley to which no hearsay exception applied, the co-employees lacked personal knowledge (MRE 602), and lacked the requisite foundational perception required for admission as lay person opinion testimony (MRE 701).

The hearing was held before a different judge than presided at trial. Plaintiff's counsel argued at the hearing that defense counsel at depositions elicited testimony from the co-workers which was clearly hearsay, and that none of the deposed witnesses had testified they had any foundational experience, i.e., they had no personal knowledge from observing the two brothers together and how they got along. Plaintiff's counsel argued that the only time these witnesses saw plaintiff was at Bradley's funeral, and that all the statements were allegedly made by Bradley and were hearsay which did not qualify under any exception. Lastly, plaintiff's counsel argued the statements were more prejudicial than probative because there were other witnesses who knew both brothers, had an opportunity to observe them together, and did not testify that these things occurred. Plaintiff also argued parts of the co-workers' testimony regarding his alleged drug use were more prejudicial than probative.

Defense counsel argued each of the witnesses worked at least four years with Bradley, and each testified that during discussions of personal matters Bradley discussed plaintiff, and further argued the statements were not being offered to prove the truth of the matter asserted:

> I will stand before Judge Brown and say I am not. I don't care whether Mr. Kimbrough cheated his brother out of money. I don't care whether Mr. Kimbrough abuses drugs and Mr. Bradley despises people that abuse drugs. And I don't care if Mr. Kimbrough did not want Mr. Bradley to get any money should he die. What I do care about it, and I hope that Judge Brown draws the same conclusion, when they heard his statements, is that someone—whose [sic] warm close relationship between two brothers does not go about town making those kinds of comments about the other participant to this relationship.
>
> Everything he says in opposition, I think, doesn't go to the admissibility so much as it goes to the weight and I would ask you to deny the motion.

Plaintiff's counsel responded by arguing that

> . . . you cannot separate what is said by the witnesses from what it is meant to mean. And I don't think that any trier of fact, whether it be a juror or a judge can listen to these statements and not give credence to what, in fact, was allegedly said.

More importantly is the fact that the individuals who did have an opportunity to observe the two brothers together did not testify to these types of things and, in fact, said that there was a warm and friendly relationship and also there are members of the Forensic Center staff who do not, in total, follow the line in terms of these statements. So there are some statements that go to this and others that do not.

The court ruled as follows:

Thank you. Well, the first argument that MRE 602 excludes the use of this testimony because it is not based on personal knowledge is simply not supported by the arguments given to me. The witnesses do have personal knowledge as to whether or not Mr. Bradley said these things, they do have personal knowledge of how often he said things, and what he looked like when he said them and what the emotional tenor of his voice was. So MRE 602 does not preclude the use of this testimony.

MRE 701 deals with opinion testimony by lay witnesses. Certainly this—I think any lay witness can give opinions as to the relationship of any two people if that person had an opportunity to make—to come to that conclusion. It does not mean that the person has to physically observe the two people in some interaction together. And the opinion would certainly be helpful to a trier of fact as to a clear understanding of the testimony or the determination of a fact in issue. So 701 does not preclude the use of testimony.

MRE 801 and 803 addresses [sic] the definition of hearsay as well as the exceptions to hearsay. Plaintiff is quite correct, I'm not aware of any hearsay exception that would cover these statements, however, for the statements to be hearsay, in addition to the fact that they have been made outside the presence of the trial or hearing, they have to be offered for the truth of the matter asserted. It is very clear that the testimony—that the truth of what the statements are is not relevant. What they are being offered for is a reflection of the way that Mr. Bradley felt about his brother and as tending to prove or disprove the quality of the relationship that he had with his brother.

The Court finds that under MRE 801(C), these statements are not hearsay and therefore not precluded. Therefore, it really comes down to whether or not they are more prejudicial than probative . . .

* * *

That rule allows for evidence that is relevant to be excluded if its probative value is substantially outweighed of [sic] the fear of unfair prejudice. The reason the rule has substantial in it is because almost any time the opposing party wishes to offer evidence, it is because it is prejudicial to the other side's case, otherwise it wouldn't be relevant and there would not be any point in offering it. The balancing that the Court must

perform is whether or not that probative value is small or great and whether or not that probative value is substantially outweighed by the danger of unfair prejudice.

> Here the probative value is very great, we can't ask Mr. Bradley what his relationship was with his brother. Both sides are having to depend upon the observations of other people as to the quality of that relationship. The suggestion that a trial judge is going to be prejudiced by the language or by allegations of cheating or allegations of drug use I think is simply not merited. The probative value is so great that the minimal prejudicial value does not substantially outweigh it.

At the bench trial, plaintiff called Reginald Harbin, who testified he was a close friend of plaintiff's, saw plaintiff nearly every day, lived five houses down from plaintiff, and met decedent through plaintiff around 1986. Harbin testified Bradley came to plaintiff's house quite often, every weekend or more. Harbin testified he last saw Bradley about six or eight months to a year before his death, at plaintiff's house. Harbin testified he learned Bradley was in the hospital the day after the surgery and that he went to the hospital with plaintiff. Harbin testified plaintif was shaken upon seeing his brother's condition at the hospital and "just couldn't take it," that plaintiff had not been the same since, and that plaintiff made all the funeral arrangements. On cross-examination, Harbin testified that it was fair to characterize him as plaintiff's best friend. He further testified plaintiff's wife and his wife are friends.

Plaintiff next called Jesse Gardner, who testified he was a lifelong friend and best friend of Bradley's, having gone to elementary, junior high and high school with him, having lived in the same neighborhood and played sports together. Gardner testified he saw Bradley daily after high school. Gardner testified that he had the opportunity to see Bradley with family members, and that most of the time he saw Bradley with plaintiff and Naomi (a cousin of Bradley's), and that Bradley also visited some family in Flint. He testified he had been to plaintiff's house with Bradley many times. When asked "How did he get along with Tony?" Gardner testified:

> Him and Tony, they had a good relationship together. They had their differences, but they had a good relationship together. It wasn't where one was at each other's throat. You know, they were true brothers, you know.

Gardner testified that less than a year before Bradley died, plaintiff, Bradley, Gardner and others participated in a cabaret party. Gardner testified that there had been some problem between plaintiff and Bradley regarding the cabaret but it "really didn't concern the issue that they would break up as brothers. You have differences." Gardner testified that he saw Bradley and plaintiff together at Bradley's house after the cabaret and that he never saw anything go on after that led him to believe there was a rift or problem between the two.

Gardner further testified that he and Bradley spent a lot of time going out together and playing basketball after Bradley began work at the forensic center. When asked if he knew whether Bradley spent time after work with the people he worked with, Gardner testified "No, lot of times he had a

controversy with the people that he had at work." Gardner testified he knew Bradley was going into the hospital, and that he told Bradley he objected to it. He further testified that he was with Bradley the day before he went to the hospital, and that defendant's co-workers were not, and that he and Bradley got into an argument because he begged Bradley not to have the surgery. Gardner testified that plaintiff had seen Bradley about four days before. Gardner testified that plaintiff and plaintiff's wife made most of Bradley's funeral arrangements, and that plaintiff was hurt by Bradley's death because he and Bradley were close and Bradley "didn't visit many people . . . . Between me and Tony was really the only ones he visits and every once in a while he went to Flint."

On cross examination, Gardner testified that when Bradley spent the holidays with him, plaintiff never came to Gardner's house. Gardner testified that Bradley told him he thought plaintiff had cheated him regarding the cabaret, but that Bradley found out the money really got lost and plaintiff did not cheat him.

Plaintiff then testified that he was one of five brothers and that Bradley was the youngest. He testified all were deceased. When asked how he and Bradley got along, plaintiff responded

> Me and my brother, we got along as brothers, you know, we had our ups and downs, downs and ups, but we got along as brothers. As far as loving each other, yes, we did. But Dwight didn't want me telling him that and I didn't want him telling me nothing. But we was brothers and we got along as best we could.

Plaintiff testified he lived in the same house with Bradley until plaintiff was about sixteen years old, when he lived with an aunt, but was always back and forth. Plaintiff testified Bradley worked at the forensic center as a supervisor and that he had been there once or twice. He further testified that Bradley had been married for several years and at the time of his death had been divorced about six months or a year, and that the divorce had "messed his mind up." Plaintiff testified that his brother talked about how his wife did him wrong all the time and was depressed, and that if Bradley was not with him or Gardner he was "sitting in the house with all the shades pulled down grieving" about the way he looked and how his wife had done him wrong.

Plaintiff testified that around the fourth of July of 1990 he and Bradley gave a cabaret. He testified he did not see Bradley for a while after that because they were mad at each other. He later testified it was a misunderstanding, that he had been drunk, and Bradley had been high. When asked if he had ever been mad at Bradley before, plaintiff responded:

> Me and my brother, my brother was the type of guy, he didn't believe nothing unless he said it was right. But, man, I could get mad with him and walk away and next five minutes, we would be right back together because it was just
>
> Q. That was my next question.

> A. There wasn't anybody else but me and Dwight; it was just me and Dwight left. How can you stay mad when there is nobody left but you and him?

When plaintiff was asked whether he knew his brother was going into the hospital for surgery, he responded:

> No, and I'm going to tell you why I didn't know that. Because the simple fact I got a daughter named Nicki. She had to go for the same surgery to save her life and that was the doctor told me then a human being—a grown person couldn't stand the surgery. My daughter at the time when she took the surgery, she was from three to four years old. It had been done to save her life. But if she'd have been grown, she couldn't have took the surgery. My daughter was cut here (indicating) all the way across here (indicating).

Plaintiff testified he went to the hospital every day after being notified Bradley was in the hospital and spent the whole day there. Plaintiff testified he made the funeral arrangements and paid for it, and that he missed his brother and could not sleep. Plaintiff produced four photographs of plaintiff with his brother.

On cross-examination, plaintiff testified that those photographs were the only ones he could find of him and Bradley. He further testified that he was not the named beneficiary on Bradley's insurance policy through work. Plaintiff was also questioned regarding his deposition testimony where his answers indicated a lack of familiarity with Bradley's education and job.

Defendant called no live witnesses, but introduced the depositions of five of decedent's co-workers: Moore, Smythe, Rogers, Walker and Clark.[3] Defendant rested and the court stated it would conduct its review of the depositions that afternoon and reconvene the following morning for final argument and the court's judgment.

We summarize pertinent portions of the depositions here. Daryl Moore testified that he had been employed at the forensic center since 1980 and worked with Bradley in 1980, and again in 1989, and that they were union officers together from 1987 to 1989. Moore and Bradley worked on different shifts from either the fall of 1989 or 1990. Moore testified that in 1988 and 1989, in addition to discussing union matters with Bradley three to four days a week, Bradley talked to him about his marriage and divorce and about a brother whom Moore thought was named Tony. Over plaintiff's counsel's objection on the basis of foundation, Moore testified he formed the impression the brothers "weren't close at all" based on "what Dwight told me he stole from him and he thought he used drugs." Moore estimated that Bradley talked about Tony to him about six to twelve times. Moore testified that Bradley felt he was shortchanged by plaintiff and a nephew after the three threw a cabaret, and that as far as he knew, Bradley was not spending any time with Tony "especially after the cabaret." Moore testified that Bradley asked to borrow $500 from him in order to get a lawyer for his divorce, and that when Moore asked him why he did not borrow the money from a family member, Bradley replied "I

wouldn't ask my brother to lick the sweat off my balls." Moore testified he considered that he and Bradley were "pretty good friends." Moore testified he had discussions with Bradley regarding his surgery, and Bradley wanted to have the surgery because his ex-wife had said to him she did not want to have children by him because she was afraid they would look like him. Moore testified that Bradley told him that if he should die, he wanted everything he owned to go to his stepdaughter and that he did not want his ex-wife or brother to have "a red cent." Moore testified that he first met plaintiff at Bradley's funeral, that he had never met any of his family members prior to the funeral. Moore testified that when Bradley spoke about plaintiff his demeanor and facial expressions would change, and that he interpreted his expression to mean "it was something he didn't want to talk about with what I gathered. He didn't—it was a lot of hatred there. It was like you could just see it in his face." Moore testified that Bradley was "real depressed" after his divorce.

On cross-examination, Moore testified he considered himself a good friend of Bradley's, had never been to his home, and that in the eleven years he knew Bradley, Bradley had been at his house once. Moore testified he was aware that Bradley had thrown cabaret parties but could not give any dates. He testified that he had been invited to two of them but did not attend, one of them having been held a little longer than one year before Bradley's death. Moore testified that he knew that at least on one occasion Bradley threw a party with his brother and that he knew that at some point they got along well enough to join forces and throw a party. Moore testified that plaintiff appeared sad and upset at Bradley's funeral.

Melvin Walker testified he had been employed at the center for forensic psychiatry thirteen years (since 1979) as a security aide, and knew Bradley from that date until his death. Walker testified Bradley was the assistant supervisor on his unit and they worked on the same shift for a number of months before Bradley's death. Walker testified he was Bradley's friend, that they socialized outside of work, and that Bradley had visited him at home. He further testified Bradley had given his name as an emergency contact at defendant hospital, and that he got in touch with Bradley's ex-wife when the hospital contacted him regarding Bradley's condition. Walker testified Bradley did not have a best friend, that the staff at the forensic center was Bradley's family, and that the only person Bradley ever talked about was a nephew who lived with him for a time. Walker testified he met plaintiff for the first time at the funeral. When asked if he formed an impression as to whether Bradley and plaintiff were close, Walker responded "Only on what we talked about. Him and his brother wasn't close." When asked what kind of comments Bradley made, Walker responded "they had a falling out about a cabaret," that they had thrown a cabaret together and that "When it was over with, they was supposed to split the money up, there was no money and that was probably the last straw with it. Dwight had bad feelings for him ever since." Walker added that he talked to Bradley the Friday before his surgery and Bradley said he did not want his wife and brother to have anything if anything happened to him; Walker further added that he asked Bradley whether he had a will and Bradley said no. When asked if any other discussions he had with Bradley concerning plaintiff stood out in his mind, Walker testified "No, that was about the last one. He said he had a few more spats with him. He said he would try to help him out but then he would just turn around and do something else that wasn't right, so."

On cross-examination, Walker testified he had not gone to the cabaret, had been to Bradley's house less than five times, and had never met any of his family.

Dohn Smythe testified at deposition that he had been employed at the forensic center since 1979, had met Bradley around 1980, and worked on the same unit and shift three days a week for about a year and a half prior to Bradley's death. Smythe testified:

> Q. Did Dwight ever discuss his half brother, Tony, with you?
>
> A. Yes, he did. Oftentimes, the subject of drugs came up—wait a minute. The subject of drugs comes up quite often at the facility, where we work, both between staff, between staff and patients, and Dwight had a pretty extensive knowledge of street drugs and things because of—basically, because of the way he grew up. I was kind of surprised. I wasn't ever under the impression that Dwight had ever taken any kind of hard drugs or any anything, but he had quite a good knowledge of it. And I do remember him having talked about heroine.[sic]
>
> MR. KONKEL [*plaintiff's counsel*]: Objection, hearsay. You can still answer this.
>
> A. Okay. Dwight talked to me about heroine [sic] and a family member that heroine [sic] had basically destroyed. He had a lot of anger about this individual. And he—I was under the impression that it was a half brother, but no name came up.
>
> Q. Did you form an impression as to whether or not Dwight and his half brother Tony were close?
>
> A. Yes. I formed an opinion that they were not close.
>
> Q. And what do you base that upon?
>
> A. I formed my opinion about his feelings about his brother in that there was a lot of anger that no one could help with the nephew who he felt responsible to. And he did mention there were other family in the area, but that none of them would take him and none of them could take him. That was when the subject of heroine [sic] came up and hard drugs. That was the only thing that—we all talked about family at work, to a certain extent, but that was the only thing that he ever talked about.

Smythe testified he had never met any of Bradley's family members until the funeral, that he had never visited Bradley. Smythe testified that Bradley only told his close friends at work about his upcoming surgery, that Bradley was adamant about not wanting plaintiff to know about it, and he had the impression that Bradley was not telling plaintiff or his family about the surgery out of anger.

On cross-examination, Smythe testified he had never met any of Bradley's family and, regarding Bradley discussing plaintiff, that "I remember him having referred to him once as Tony. Mostly, he didn't talk about him, to tell you the truth. I mean, we didn't have a lot of conversations about him."

Kevin Rogers testified at deposition that he had worked at the forensic center since 1976 and had met Bradley shortly after. Rogers testified he worked with Bradley beginning in the winter of 1989, played basketball with him at work, and considered him a close friend. Regarding Bradley's relationship with plaintiff, defense counsel asked:

> Q. During the conversations that you had with Dwight concerning his half brother, did you have an occasion to form an impression as to the closeness of the relationship between Dwight and his half brother?
>
> A. Yes.
>
> Q. And can you tell me what your impression was?
>
> A. Totally negative.
>
> MR. KONKEL: Based on hearsay objection.
>
> Q. You can answer.
>
> A. Totally negative.
>
> Q. What do you mean by that?
>
> A. To be blunt, Dwight didn't have a kind word to say about him. It was—it was always—excuse my language—his fucking brother or his stupid fucking brother, stuff like that.
>
> Q. Was that fairly uncommon for Dwight to use that kind of language?
>
> A. Uh-huh. Yes, it was.
>
> Q. That kind of left an impression with you?
>
> A. Yes.
>
> Q. Did Dwight ever tell you what it was that led him to have these feelings toward his half brother?
>
> MR. KONKEL: Objection. Hearsay.
>
> Q. You can answer.

A. His brother supposedly had gypped him out of some money for a cabaret they had thrown, and the money didn't come out right. In other words, he just stole some money from Dwight.

Q. Did you have an understanding as to when this cabaret was thrown?

A. No.

Q. Did you have an understanding as to whether or not Dwight kept in any contact with his half brother after this incident?

A. As far as I know he had no contact with him.

Q. Any other reason that you are aware of why Dwight may have had these feelings regarding Tony other than this cabaret?

A. Just didn't get along.

* * *

Q. Do you recall Dwight ever indicating to you that Tony was involved in drugs?

A. Yes.

MR. KONKEL: Objection. Hearsay.

Q. How did Dwight feel about drug use, if you know?

A. Totally against it . . .

Rogers testified he spoke with Bradley the day before the surgery and Bradley said "just his luck to fucking die, and if he did die, he told Melvin (Walker) he didn't want his brother to have fucking shit, word for word." Rogers testified he had not met any of Bradley's family before the funeral.

On cross-examination, Rogers was asked how often Bradley would talk about plaintiff, and he responded:

Whenever he got mad or I guess when something would set him off about it. Let's see. I can give you a for instance. We were talking about brothers and sisters, about my sisters, and he just came right out and blew and he said he couldn't stand his brother. The discussion went on and he told me why he couldn't stand him and why he doesn't get along.

Rogers further testified that he lived in Detroit while Bradley worked at the forensic center, but had never been to Bradley's house in Detroit or met his wife. Rogers also testified that it seemed to him that Bradley and plaintiff were getting along at one time. Rogers testified that he thought Bradley had spoken about plaintiff to him "about five times." He never saw Bradley and plaintiff together.

The last co-worker deposition admitted at trial was that of William Clark. Clark testified he had worked at the forensic center for ten years (i.e., since 1982) and knew Bradley for about eight years. Clark testified he worked the same shift as Bradley the last seven or eight months of his life, that they drove to work together during that time, and that he considered their relationship "pretty close" the last two to three years. Clark testified Bradley would visit him at home and they would go to dances after work. Clark estimated that Bradley spoke about plaintiff approximately once a month, and he formed the impression that Bradley disliked plaintiff. Clark testified he remembered Bradley telling him "that his brother stole money, profits that they made from this function that they had together," that he "sort of remember[ed] him saying that he wouldn't let him come in his house because he didn't trust him," and he "guess[ed it was] because of some of the things that he had did [sic] to Dwight, you know, in the past." Clark testified he did not attend that function. Clark testified that to his knowledge Bradley did not tell anyone outside of work he was having surgery, and that Bradley did not discuss with him about what should happen if he died. Clark testified that two or three days before the surgery he and Bradley discussed the surgery, Bradley told him he was scared but wanted to do it anyway, and that plaintiff did not come up at all.

On cross-examination, Clark testified that he did not know that plaintiff was Bradley's half-brother, because when Bradley spoke about him he called him his brother. Clark testified he never observed Bradley with any family member.

The trial court ruled:

> As to the society and companionship, it's interesting to note all those persons called on behalf of the defendant, friends and fellow workers of Mr. Bradley, described the relationship between Mr. Bradley and his brother, the plaintiff here, Anglette Kimbrough, better known as Tony, as not a friendly one. As Mr. Hebert points out, there was some rather colorful language contained in these depositions regarding the characterization of that relationship, which the Court's not going to repeat. It's in the depositions. And if someone wishes to read it, they can. But the witnesses characterized that. They had their characterization of it.
>
> It's interesting to note that Melvin Walker, a fellow employee, friend of Mr. Bradley's, was rather commissioned by Mr. Bradley to oversee the operation; he knew when he went to the hospital. Mr. Tony Kimbrough did not know, did not even know that his brother was in the hospital having this operation.

Mr. Tyrone—Reginald Tyrone Harbin testified of some relationship that existed between Mr. Bradley and Tony Kimbrough, which the Court believes is somewhat—what's a good word—let's say, at best, oh, described by Mr. Harbin as, in the opinion of other persons, not entirely correct. He hadn't seen Mr. Dwight Bradley, for example, for six to eight months prior to his death, which was approximately sometime after this so-called cabaret when the relationship became somewhat strained between the brothers.

Mr. Jesse Gardner testified to the same thing on behalf of the plaintiff, that there was some problems arising out of this cabaret, which was apparently some kind of a party that was put on around the 4th of July, apparently in 1990, sometime prior to this operation in March of '91, where apparently someone went out and got apparently the liquor or whatever and charged admission and they were supposed to make some money, I guess. And even Mr. Anglette Kimbrough, Tony Kimbrough, indicates that Dwight was unhappy with him after this so-called cabaret and that this was a misunderstanding, that they were going to get back together and they would work things out, which is probably true in time would have worked out. But at the time of the event, at the time of Mr. Dwight Bradleys' death, there was still a strain between these brothers.

For example, Mr. Kimbrough did not know when Tony—excuse me, when Dwight was going into the hospital. He found out about the hospitalization the day after the operation. He returned over to the hospital because he was advised by, I believe, the former wife of Mr. Kimbrough—excuse me, Mr. Bradley, that Mr. Bradley had passed away.

Mr. Kimbrough described his feelings regarding his brother's death, but it's interesting to note that he may have those feelings about his brother but apparently the society and companionship that he feels toward Dwight was not reciprocated toward him by Dwight. Mr. Bradley never made him the beneficiary of any of his insurance policies, did not make him the beneficiary of these death and wage benefits, which were part of the evidence.

It's interesting to note that Mr. Kimbrough was asked to gather all the pictures he could together of he and Dwight or any pictures that he had of Dwight Bradley. We have only four, which are in rather, to put it charitably, beat-up condition; almost hesitate to touch these pictures, they're that messed up. But in any event, there are only four pictures of a gentleman that's what, 34 at the time, that Mr. Kimbrough could only find four instances of any pictures he had of his brother. Seems rather strange if he's advancing all this close relationship existing between the two of them.

> The Court is not convinced there was any great amount of love and affection that existed between these brothers, for whatever reason. Whether Mr. Kimbrough felt it toward Mr. Bradley or not, that's one thing, apparently Mr. Bradley didn't feel it back towards Mr. Kimbrough, was not reciprocated in the opposite direction, was not a two-way street. So the Court does not feel that there is any damages here nor any loss of society and companionship on the part of these parties as a result of Mr. Bradley's demise.

II

Plaintiff first argues the trial court reversibly erred in allowing the testimony of Bradley's co-workers regarding their perceptions of the relationship between plaintiff and Bradley. We review the court's determination to admit evidence for abuse of discretion. *People v Davis*, 199 Mich App 502, 516-517; 503 NW2d 457 (1993). We cannot agree that the admission of this testimony for the non-hearsay purpose of showing that the statements were made was error. We agree with the pretrial judge that the fact that the comments were made was relevant separate and apart from the truth of their contents.

Plaintiff cites two cases which he argues warrant reversal here, *Williamson v Williamson*, 122 Mich App 667; 333 NW2d 6 (1982)(reversing an order changing custody from defendant mother based on its finding under factor (f) of the Child Custody Act, that she was morally unfit because she was living with a man while unmarried, whom she subsequently married, and finding that the change of custody was not supported by clear and convincing evidence), and *Truit v Truit*, 172 Mich App 38; 431 NW2d 454 (1988)(reversing the circuit court's order changing physical custody of the parties' three daughters from the plaintiff to defendant and remanding for a new hearing based on the court's failure to consider and evaluate each of the Child Custody Act factors, and on its admission of hearsay testimony). The only reference made to hearsay testimony in *Williamson* is the following:

> Finally, in determining the morality of defendant, Judge Kelley should not have admitted into evidence the testimony of an employee of the Friend of the Court regarding his conversation with the three-year-old child. This testimony was clearly inadmissible hearsay. MRE 801(C). [*Id*. at 674.]

There is no indication that the testimony at issue, which is not summarized in the opinion, was admitted for a non-hearsay purpose, as was the testimony in the instant case.

In *Truitt*, the parties' three daughters were aged seventeen, thirteen, and eleven at the time of the evidentiary hearing. The pertinent testimony was from the defendant mother, who was questioned whether "the children ever told you there is no food in [plaintiff father's] home?" and "[d]id the children ever complain to you that they did not maintain a visitation schedule with you because they were forced into babysitting Mr. Truitt's girlfriend's children? Defendant responded "yes" to both questions. Unlike

the instant case, in *Truitt*, the testimony was offered to prove the truth of the matter asserted. Neither of these cases commands reversal here.

Lastly, plaintiff cites *Santure v Detroit Trust Co*, 275 Mich 661, 666; 267 NW2d 583 (1936), noting that, defendant's argument that the challenged testimony was not offered to prove the truth of the matter asserted was specious because "with the type of testimony offered, such a fine legal line cannot be drawn. The testimony was offered and used as substantive evidence and the court's reference to that testimony in its opinion demonstrates that fact." *Santure* was a suit brought in behalf of the plaintiff's decedent, who sustained fatal personal injuries after a collision with defendant's truck. The case was tried to a jury, which ruled for the defendant. On appeal, the Supreme Court reversed and remanded for a new trial. Id. at 667. The testimony at issue was from a State Police officer, regarding a conversation he had had with one of the survivors of the collision, not a party to the suit, about ten hours after the accident. The officer testified as to the survivor's statements regarding the intoxication of the driver and plaintiff's decedent, which defendant argued was the proximate cause of the accident. The Supreme Court ruled the statements inadmissible because they were hearsay statements not made in the presence of any party in interest nor given in impeachment of a witness, concluding the error was highly prejudicial and commanded reversal. *Id.* at 665-666. This case is also distinguishable, as the jury was allowed to hear hearsay testimony offered, apparently, for the truth of the matter asserted.

We conclude that admission of the testimony at this bench trial was not error.

III

We next consider plaintiff's claim that the trial court abused its discretion in failing to award any damages for loss of society and companionship. We review determinations of damages in a bench trial for clear error. *Hoffman v Auto Club Ins Assn*, 211 Mich App 55 , 98-99; 535 NW2d 529 (1995), citing *Pricopio v Detroit*, 415 Mich 457, 467; 330 NW2d 802 (1982). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. In applying this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witness who appeared before it. *Hoffman*, *supra* at 99. A claim for loss of society and companionship under the wrongful death act addresses compensation for the destruction of family relationships that results when one family member dies. *McTaggart v Lindsey*, 202 Mich App 612, 616; 509 NW2d 881 (1993). The only reasonable means of measuring the actual destruction caused is to assess the type of relationship the decedent had with the claimant in terms of objective behavior as indicated by the time and activity shared and the overall characteristics of the relationship. *Id.* at 616.

We conclude that the trial court clearly erred in failing to award any damages to plaintiff for loss of society and companionship. We agree that the evidence showed that the cabaret incident, which occurred less than a year before Bradley's death, led to considerable friction between plaintiff and Bradley and, based on the co-worker's testimony, to an estrangement. However, there was no

testimony controverting that before the incident plaintiff and Bradley had a relationship. The testimony of Bradley's co-workers recounting Bradley's commenting on plaintiff focused primarily on the cabaret incident and to a limited extent on alleged drug use. Rogers testified that Bradley brought up plaintiff to his co-workers when he was angry at plaintiff. Smythe testified on cross-examination that "mostly" Bradley did not talk about plaintiff, and Moore and Rogers testified that at one time plaintiff and Bradley got along. None of defendant's witnesses was able to assess the time and activity shared between Bradley and plaintiff, as none had had opportunity to observe plaintiff and Bradley together, and only Walker had visited Bradley at his house. Even discounting plaintiff's witnesses, the evidence clearly shows that while Bradley was at times displeased with plaintiff, the brothers had a relationship until the cabaret incident, and that that incident, which occurred less than a year before Bradley's death, was the cause of their estrangement. The evidence also showed that plaintiff came to the hospital when he learned of the surgery, and that he arranged and paid for the funeral.

Accepting that there was an estrangement between the brothers due to the cabaret incident, and further accepting that at least from Bradley's point of view, the estrangement continued until the time of his death, we conclude it was nevertheless erroneous to conclude that there was absolutely no loss of society and companionship where there was previously a relationship, and where the court acknowledged that although not reciprocated, plaintiff may have had feelings for Bradley. Bradley and plaintiff were the only immediate family each had; their parents and siblings had all died before Bradley's surgery. While the court properly took into consideration the factors discussed in its opinion -- that Bradley did not tell plaintiff about the operation; that he spoke ill of plaintiff to others; that they had a falling out due to the cabaret; that when Bradley had the operation the relationship was still strained; that plaintiff could produce only four pictures of the two together; and that Bradley did not want plaintiff to receive money, the court nevertheless clearly erred when, in assessing damages, it disregarded its own acknowledgment that the brothers probably would have worked things out had Bradley not died due to defendant's negligence, and that plaintiff apparently had feelings for Bradley. The question was not whether "there was any great amount of love and affection" between the brothers, but the value of plaintiff's loss of Bradley's society and companionship, taking into account all the facts. While the court properly discounted that loss due to the estrangement, under all the circumstances the failure to award any damages at all was clearly erroneous.

III

Plaintiff lastly argues that the trial court's award of $10,000 for Bradley's pain and suffering was clearly inadequate. Plaintiff argues Bradley was an otherwise healthy, thirty-six year old who was gainfully employed and who died as a result of the undisputed negligence of defendant. Awards of damages for pain and suffering rest within the sound judgment of the trier of fact. *Alley v Klotz*, 320 Mich 521, 541; 31 NW2d 816 (1948).

Defendant argues that in light of trial testimony that Bradley's pain and suffering was reduced by the effect of his medications, specifically morphine and Versed, a sedative, the court did not err in finding that $10,000 adequately compensated for Bradley's pain and suffering. We agree.

The trial court's ruling indicates it carefully considered and weighed the testimony in this regard. Under these circumstances, we conclude that the trial court's award of $10,000 was not an abuse of discretion.[4]

We affirm the court's award of $10,000 for pain and suffering and the rulings regarding the co-worker's testimony, and remand for a redetermination of damages for loss of society and companionship.

/s/ Helene N. White
/s/ Donald E. Holbrook, Jr.
/s/ Philip D. Schaefer

[1] Crouzon syndrome is defined as a congenital condition of faulty body development marked by shallow eye sockets, bulging eyeballs, hypertelorism (eyes far apart), hearing loss, underdeveloped maxilla, premature closing of sutures (seams) of cranial (skull) bones, etc. Schmidt, 1 Attorney's Dictionary of Medicine.

[2] The lower court record contains various references to Bradley as having been thirty-four years old, however, plaintiff's appellate brief refers to him as having been thirty-six years old.

[3] Under MRE 804(b)(5), in order for deposition testimony to be admissible at trial under the hearsay rules, there must be a showing that the deponent is unavailable. Defendant made no such showing at trial, but plaintiff did not object on this ground.

[4] Plaintiff's reliance on *Byrne v Schneider's Iron, Inc*, 190 Mich App 176; 475 NW2d 854 (1991), in which this Court upheld a $100,000 jury award for pain and suffering is misplaced. The plaintiff's decedent in *Byrne* was an eight year old boy who was suffocated when his airways were obstructed by sand after he tried to dig under a large boulder while playing in a sandpit, and the boulder rolled on top of him. There was no evidence that the boy was sedated.