

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHNITA M. BURGER, Individually
and as Personal Representative of the
Estate of Mary J. Moore, Deceased,
and AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

01-C-0210-C

This is a civil case for money damages brought pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80. Plaintiffs Johnita M. Burger and American Family Mutual Insurance Company alleged that Mary J. Moore was killed by an employee of the United States while that employee was acting in the scope and course of his employment. The parties stipulated to the pecuniary damages suffered by Mary J. Moore's estate; their only disagreement was the amount of damages for loss of society and companionship to which her daughter, Johnita M. Burger, was entitled. Trial on damages was held on October 15, 2001.

From the evidence adduced at trial, I make the following findings of fact.

FACTS

Plaintiff Johnita M. Burger was the only child of the decedent Mary J. Moore. Her parents' marriage was a difficult one because of her father's alcoholism and Johnita looked to her mother for protection, attention and security. When Johnita was 17, she left home because of difficulties with her father. She has been on her own ever since. Her mother never contributed financially to her upkeep. Indeed, at several times in her life after Mary left her husband, she looked to Johnita for housing and financial support when she was having difficulties with her boyfriend. Mary lived with Johnita on three occasions when Johnita had housing and Mary did not. Sometime during this period, Johnita had a child. She did not marry the father of the child but raised him herself. Her mother gave her considerable emotional support and approval for the job she was doing as a single parent.

In about 1993, Johnita married her husband, Thomas Burger. Mary Moore was very much in favor of the marriage. She liked Tom and she was happy that Johnita had a formal wedding. She was delighted when Johnita became pregnant with her second child. Tom and Johnita moved to Watertown, about 100 miles from Mary's home.

Up until the time that Johnita was married, she lived in the Adams-Friendship area near her mother and saw her almost every day. They often went out together after work or

went shopping together. For three years, they worked for the same employer.

Mary Moore was never in a position to make a financial contribution of any size to Johnita or to her family, although she gave her grandchildren small gifts of money once in a while. Mary worked a full-time job, which limited her ability to visit Johnita. Johnita and her husband lived on a dairy farm, where Tom worked for the owner. Tom had only 12 days off each year and Johnita did not like to travel without him. Their truck was not reliable and often needed repairs. They did not have a telephone and could make calls only by going to a nearby service station.

Johnita and her mother wrote to each other about once a month. Johnita told her mother about the children and what the family was doing. Her mother was always interested in knowing about the children and proud of their accomplishments. Mary wrote about the people in Johnita's home town that Johnita might remember.

Johnita gets upset easily. Her mother was one person who could calm her in those situations. She gains control of herself by thinking of what her mother would have said to her. She considered her mother her closest friend and confidant and a person who loved her unconditionally. Both she and her husband enjoyed the visits her mother made to their house because of her upbeat personality and her enjoyment of whatever entertainment the Burgers provided, whether it was sitting and watching television or doing something more active. Mary Moore was an imaginative gift giver, who could find gifts at Goodwill or St.

Vincent de Paul's that delighted Johnita's children. She gave Johnita confidence in herself and emotional support, even from a distance.

Since her mother's death, Johnita has had trouble sleeping. She misses her mother and thinks of her every day.

Mary Moore was 51 years old when she was killed.

OPINION

Under the Federal Tort Claims Act, the law of the jurisdiction in which the tort occurred supplies the applicable law. § 2674. In Wisconsin, damages for loss of society and companionship in wrongful death cases are capped at \$350,000, when the plaintiff is an adult child of the decedent. See Wis. Stat. § 895.04.

The parties approach the cap from two different positions. Plaintiffs argue that the court should assess the damages it finds appropriate and then reduce them if necessary to the capped amount. Defendant contends that the court should view the \$350,000 as the maximum to be awarded to any claimant and adjust the amount to reflect the varying kinds of relationships between particular parents and their children. There is no case law on the subject that provides guidance in choosing between the two approaches. In arriving at the amount to award plaintiff Johnita Burger, I used a hybrid. I determined that the loss Johnita had suffered with her mother's death was substantial; that they were unusually close

emotionally for a mother and daughter; that Johnita's connection with her mother was acute despite Johnita's happy and strong marriage and her two children; and that the loss of her mother has had a profound effect on Johnita's life and on her emotions. She has been deprived of a person whom she would have expected to be part of her life for another 30 years. Such a loss is worth more than the \$350,000 the Wisconsin legislature has decided is the maximum that may be awarded for an adult child's loss of a parent. However, rather than award Johnita the full amount of damages available under the statute, I discounted the loss downward from the maximum slightly to account for the fact that there would be other situations in which an adult child would suffer an even greater loss than someone in Johnita Burger's situation, such as an adult child who continued to live with her parent or an adult child who was handicapped and needed her parent for physical care and supervision.

ORDER

IT IS ORDERED that plaintiff Johnita M. Burger, individually, is awarded \$300,000 for the loss of her mother's society and companionship. As personal representative of the estate of Mary J. Moore, deceased, Johnita M. Burger is awarded \$11,567.95 in special

damages, as stipulated by the parties.

Entered this 17th day of October, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge