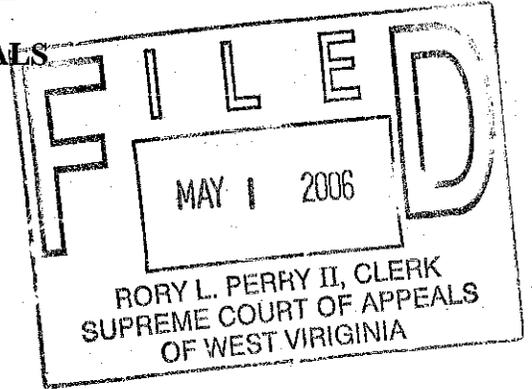


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**IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA
In Charleston**



**Dianna MAE SAVILLA, Administratrix
of the Estate of LINDA SUE GOOD KANNAIRD,
deceased,**

Petitioner,

vs.

No: 05-2519

**SPEEDWAY SUPERAMERICA, LLC, d/b/a
RICH OIL COMPANY, LLC, a Delaware corporation,
Respondent**

Petitioner's Memorandum in Support of Petition for Appeal

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Comes now the Petitioner, Dianna Mae Savilla, Administratrix of the Estate of Linda Sue Good Kannaird, and files this Memorandum in Support of Petition for Appeal seeking to have this Court reverse an order of the Kanawha County Circuit Court, Honorable Paul Zakaib presiding, wherein the Circuit Court granted the motion to dismiss of the Respondent, Speedway SuperAmerica dba Rich Oil Company (hereinafter called Speedway) in the above-styled case.

Statement of Facts

This civil action grew out of the tragic and untimely death of Linda Sue Good Kannaird on February 18, 2000, at the age of 54 years. On that date, despite the fact that flood waters were rising rapidly around Speedway's convenience store/gasoline station in Sissonville, Mrs. Kannaird was required by her employer, the defendant Speedway SuperAmerica, LLC, to report to duty on her day off. She was asked to come to work, bring her truck and enter into the flood

zone. The purpose of Mrs. Kannaird being called out to work was assist in saving the cigarettes, beer, and other merchandise owned by Speedway which was being threatened by the rising water. By that evening, Linda was dead, the victim of a horrifying death by drowning that occurred as a result of her employer's decision to place a higher priority on saving their merchandise than on preserving human life.

Mrs. Kannaird dutifully went to the store as her employer instructed and, with the help of her long-time companion, Danny Fout (another employee who was called out to work by Speedway to help save their merchandise), loaded their trucks full of cigarettes, beer, and other merchandise. Photographs taken the next day reflect that the trucks were filled to the brim with Speedway's precious cargo. Evidence elicited in discovery reflects that other employees present at the store were Betty Huffman, the manager of the store, and Karen Rhodes, another employee. Mrs. Rhodes was the only employee on duty at the store who survived this tragedy, and she did so by precariously hanging onto a tree limb for almost an hour as the flood waters swirled rapidly below. She testified in her oral deposition that she repeatedly requested of Mrs. Huffman, the store manager, that she close the store; but that Mrs. Huffman, based on instructions received by phone from Speedway management, failed and refused to do so. In fact, a Speedway regional manager later came to the store during the loading of the merchandise and, despite pleas that he close the store, he instructed personnel to continue to load the trucks. Mr. Fout, a strong and robust man, then drove the trucks to safety out of the flood waters. By the time he returned to the Speedway store on foot, he advised that the flood waters had become far too swift and dangerous for the employees (older females who were not as strong as he) to safely leave the store on foot.

The City of Charleston, Charleston Fire Department, eventually sent a "rescue" crew

consisting of the two individually named Defendants and their supervisor, to get the employees who were trapped in the store out. As Plaintiff below, the Petitioner alleged that the City conducted the rescue operation in a grossly negligent, wanton and reckless manner which ultimately contributed to Mrs. Kannaird's drowning death in the violent flood, and a Motion to Dismiss on the part of the City is still pending before the Circuit Court. However, because this appeal centers on the dismissal only of Defendant Speedway, an extensive factual recitation as to the failed rescue is unnecessary at this juncture.¹

Linda Sue Good Kannaird was a woman who, by all accounts, was hard-working industrious, and even entrepreneurial. She made her primary living as a cleaning lady, working several jobs a day, but over the years she had also owned small restaurants. She worked the Speedway job primarily in order to have health insurance. She was beloved by her family and her many friends. She loved life, had an ebullient personality, and was full of a positive spirit. There was, however, tragedy in Linda's life even before her untimely death, a tragedy of which she rarely spoke because of the pain it caused her.² The tragedy was that Linda Kannaird's only child, daughter Eugenia Moschgat, had refused to speak to her, see her, or otherwise communicate or have any relationship with her for seventeen to twenty years prior to Linda's death. Although Ms. Moschgat was a resident of North Carolina, she visited West Virginia frequently, but refused to visit or have any contact with her mother. As a result of her daughter's

¹The primary basis for the city's Motion to Dismiss are several types of immunity, including the *Zelenka v. Weirton*, 208 W. Va. 243, 539 S.E.2d 750 (2000), rule that no suit can be had against a municipality when there is workers compensation coverage, even when the city is not the employer.

²Linda's personal tragedy becomes important to a full understanding of this case.

refusal to have any relationship with her, Linda Kannaird had also never been permitted to meet or have any relationship whatsoever with her only grandson, who was thirteen years old at the time of her death. The record reflects that she thought she might have spotted him from a distance during one of his summer visits to his grandfather in West Virginia, Linda's former husband, Eugene Summers. But she wasn't sure, as she was never even allowed to have a picture of the child. Yet this same Eugenia Moschgat, who in life refused to have any relationship whatsoever with Linda Kannaird, rushed back to West Virginia to take total control of the litigation which ensued as a result of her death. She appeared promptly to sign up as administratrix of the estate, ejected Linda's siblings from Linda's residence, denied them photographs and other small keepsakes, failed to communicate with them, and throughout this period demonstrated not only a failure to live up to her fiduciary duty as administratrix, but also displayed pronounced hostility towards Linda's brothers and sisters. The importance of these facts to the history of this case is set forth more fully below in the procedural history.

Procedural History

The underlying civil action was filed in Kanawha County Circuit Court on April 11, 2000, by Eugenia Moschgat, the natural daughter of the decedent and a resident of North Carolina, who was at that time was the administratrix of Linda Kannaird's estate. The complaint sounded in both deliberate intent and wrongful death. With respect to the Respondent Speedway SuperAmerica, the Petitioner (Plaintiff below) contended that the company acted in a manner that fully met the requirements of law for a deliberate intent action pursuant to West Virginia Code 23-4-2 et seq. and West Virginia case law.

Subsequently, an issue arose with respect to whether Ms. Moschgat was a proper person³ to serve as the administratrix of the estate of Mrs. Kannaird⁴ and to conduct the litigation. After attempting to communicate and work with Moschgat and her lawyer without success and without being included in any way even with regard to receiving any information about the case, the brothers and sisters of the decedent sought independent legal counsel. Undersigned counsel on their behalf also sought cooperation and involvement in the litigation with Moschgat's counsel, but was refused. Therefore, the decedent's siblings on June 28, 2000, filed a Petition for Declaratory Relief seeking to have Ms. Moschgat removed as administrator of the estate, or in the alternative, to have one of the siblings named as co-administrator of the estate. The Circuit Court of Kanawha County, honorable Paul Zakaib presiding, held extensive evidentiary hearings on this petition and on January 8, 2001, entered an order containing extensive findings of fact and conclusions of law which granted the relief requested, removed Ms. Moschgat as administratrix of the estate and placed Dianna Mae Savilla, a sister of the decedent, into that position. In so doing, the Court found that Ms. Moschgat had demonstrated hostility towards the siblings and to the decedent during her lifetime; was unable to adhere to the strong fiduciary duty imposed upon her by law as administratrix of the estate; and was not a proper person to serve as administratrix of the estate. The lower court removed her as administratrix, and substituted

³Evidence developed that Ms. Moschgat had refused all contact with her mother, the decedent, that she did not regard the decedent as her mother, and that she had refused all contact with the decedent, even refusing to permit the decedent meet her grandson.

⁴The issue before the circuit court revolved around Eugenia Moschgat's complete estrangement from the decedent for approximately 17 to 20 years, and the hostility she had demonstrated both to the decedent during her lifetime and to the other beneficiaries of the estate; and whether she was therefore an inappropriate person to serve in the fiduciary capacity of administratrix of the estate.

Dianna Mae Savilla, one of the ten siblings, in that position. See Exhibit 1, copy of Circuit Court order of January 8, 2001, attached hereto and made a part hereof.

On May 7, 2001, Ms. Moschgat filed a Petition for Appeal of that ruling to the West Virginia Supreme Court of Appeals, and the Supreme Court refused to accept such appeal. As more fully set forth below, the Petitioner contends that this rendered this order final, that it became **the law of the case**, and that the standing of the Petitioner to bring the deliberate intent and wrongful death claims was foreclosed from further litigation.

More than a Year into Litigation, Speedway Seizes on "New" Issue

It is the Petitioner's contention that the proceedings which resulted in the January 8, 2001, order clearly placed the issue of who could properly pursue the underlying litigation and seek damages for Linda's death before the lower court. Both Speedway and Ms. Moschgat had an opportunity to raise the issue of standing in those proceedings, but they failed to do so. Instead, Speedway waited some fifteen months - - - subsequent to the court's extensive hearings and detailed rulings on the issue of who could properly conduct the litigation for the plaintiff, after the Supreme Court had declined to accept the appeal of the order addressing all these issues, after discovery in the underlying litigation was conducted, motions made, and the case was otherwise ready for trial⁵ - - to raise the issue of standing for the first time. The Defendant Speedway seized upon this so-called "new" issue,⁶ claiming for the first time that a sibling acting as administrator of the estate of the decedent did not have standing under West Virginia Code 23-

⁵Trial was set for December 2, 2002.

⁶Defendant Speedway presented this issue by way of a Motion for Judgment on the Pleadings, and later a Motion to Dismiss on the same grounds.

4-2(b),⁷ the deliberate intent statute, to pursue a deliberate intent claim on behalf of the decedent. That is the basis upon which the Circuit Court granted Speedway's Motion to Dismiss and it is the primary issue which is at the heart of this appeal.

Removal to Federal Court

Subsequently, the Plaintiff below moved to amend the complaint to add an additional claim against the City of Charleston, alleging that the City had violated the Plaintiff estate's State Constitutional rights of equal protection and due process.⁸ The complaint inadvertently⁹ contained a reference to the federal constitution as well as the state constitution. As a result of the federal reference, which was immediately sought to be withdrawn, the Defendants below succeeded in tying this matter up in federal court for approximately two years before it was remanded for the second time by the U. S. District Court, Honorable Robert Joseph Goodwin presiding. In his second order of remand entered August 25, 2004, the U. S. District Court,

⁷The portion of the statute at issue in the present case was previously designated as West Virginia Code § 23-4-2(c) and was amended and redesignated as West Virginia Code § 23-4-2(d). Other than minor stylistic alterations, the language was not changed.

⁸Under the West Virginia Constitution, the doctrine of equal protection of the law is implicated when similarly situated persons are treated in an unequal and disadvantageous manner. The Plaintiff contended that the defendant City of Charleston had arbitrarily negotiated, settled and paid personal injury and wrongful death claims to other, similarly situated claimants, even those who were plaintiffs in the instant consolidated civil action, while denying Plaintiff's claim based upon an assertion of governmental immunity. The Plaintiff also alleged that the use of such selective waiver of the shield of immunity by the City defeats such immunity, if any exists, and violated the Plaintiff estate's state constitutional rights to equal protection and due process under the West Virginia Constitution and West Virginia case law.

⁹The Plaintiff asserted on numerous occasions for the ensuing two years that inclusion of any reference to the federal constitution was not intended to enunciate any federal claim, as the West Virginia state constitution provides stronger rights than the U. S. Constitution in this regard. Hence, there was no need or intent whatsoever to make any allegation under federal law.

Honorable Joseph R. Goodwin presiding, spoke disapprovingly of the defendants' conduct in purposefully delaying the litigation:¹⁰

It has long been clear that the plaintiff's citation to the U. S. Constitution in the First Amended Complaint was an error and that the plaintiff does not intend to press a federal claim. There being no diversity and no federal question, the defendants do not have a legitimate need to adjudicate this matter in federal court. Nevertheless, the defendants have, to this point, successfully exploited the plaintiff's error, delaying the proceeding for two years in a jurisdictional quagmire and draining the resources of this court and of the parties.

Post-Remand Proceedings

Prior to the removal of this case to federal court, the Plaintiff had filed in the state Circuit Court a Petition for Certified Questions, articulating legal issues of first impression under state law,¹¹ and the Respondent had filed dispositive motions, and they were re-filed in the lower court.¹²

Additional Facts

Approximately four years into the litigation, Ms. Moschgat and Speedway did an end run around the lower court's January 2001 order by entering into their own confidential "settlement" of the deliberate intent claim, although the litigation remained pending and by virtue of the the lower court's January 2001 order, the Petitioner remained in charge of carrying it forth in her

¹⁰Speedway objected in its response to this Petition for Appeal that the federal proceedings are irrelevant. Petitioner, however, contends that the sojourn into federal court is an example of a long series of actions on the part of the Defendants to avoid corporate responsibility for their actions and to delay the progress of the litigation as long as possible.

¹¹Speedway did not oppose certification, and in fact initially agreed in open court before Judge Zakaib that certification would likely be appropriate.

¹²Because the second remand order provided that "(A)ll other pending motions in this case are denied as moot," the parties agreed that they would each file any additional motions by November 18, 2004. The Plaintiff below filed a Petition for Certified Questions and Speedway filed a Motion to Dismiss.

capacity as administratrix.¹³ The Petitioner contends in her Petition for Appeal that such a “settlement” was improperly entered into, because the Circuit Court had previously removed Ms. Moschgat as the administrator of the estate of the decedent. The fact that Ms. Moschgat did not like the courts’ decisions on those issues did not permit her to evade the court order by doing an end run around it by entering a secret settlement with Speedway which benefitted only herself and was in fact conditioned upon the actual administratrix and the other beneficiaries receiving nothing. Petitioner further contends that, under the circumstances here present, it was completely improper for Speedway to enter into a settlement with Ms. Moschgat, that such settlement was made to strengthen their position on the issues to be addressed in the pending appeal and to make it appear that they actually had paid fair damages for causing Ms. Kannaird’s death. However, the Petitioner has previously filed with this Court a Motion to Supplement the Record with details relating to this purported settlement, as they believe that the nature and amount of such settlement will reflect that Speedway at the time it entered into the “settlement” improperly ignored the lower court’s January 2001 ruling, and what had been established as the law of the case, in order to avoid paying fair damages in Linda’s death.

The Circuit Court Ruling

On April 8, 2005, the Circuit Court entered an order, a copy of which is attached hereto and made a part hereof as Exhibit 2, granting Speedway’s Motion to Dismiss. The Petitioner asks this Court to reverse that order; to hold that under the “law of the case doctrine,” the issues

¹³After entering such secret “settlement,” Ms. Moschgat filed a Motion to Intervene, but it was never ruled upon. Consequently, while she is even to this time not a party to the litigation, she and Speedway purport to have “settled” the deliberate intent litigation in her favor upon condition that the Petitioners fail in their effort to participate.

relating to standing have already been resolved and cannot be re-litigated, and to hold that under the circumstances here present, the Petitioner has a right to seek damages under the deliberate intent statute; and to remand this case to the Circuit Court for trial.

Standard of Review

Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.* 194 W. Va. 770, 461 S.E.2d 516 W.Va. (1995). Further, because the issues presented in this appeal are strictly ones of law and statutory construction, the power of interpretive scrutiny is plenary. See *Mildred L.M. v. John O.F.*, 192 W.Va. 345, 350, 452 S.E.2d 436, 441 (1994).

Assignments of Error

1. The lower court erred in determining that the Plaintiff, as administratrix of the decedent's estate, had no standing to bring a deliberate intent cause of action, and that the siblings of the decedent had no right to seek damages from Speedway in connection with the decedent's death. The lower court also erred in misstating W. Va. Code 23-4-2(b) (now 23-4-2(c)) as the basis for that ruling.
2. The lower court erred in making findings of fact on issues where there were factual disputes, and in basing his legal determinations on such findings of fact.
3. The lower court erred in dismissing the complaint because there were facts which the plaintiff could have proven in support of her claim which would have entitled her to relief. See *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).
4. The lower court erred in finding that the word "dependent" as used in the deliberate intent statute required total dependency.

5. The lower court erred in failing to consider the public interest in interpreting the deliberate intent statute.

6. The lower court's ruling which precluded the administratrix of the decedent's estate from asserting a deliberate intent claim and/or a sibling from seeking damages for the death of their sister as a result of employer deliberate intent conduct denied the Petitioner the constitutional right to a certain remedy.

7. The lower court erred in determining that the deliberate intent statute need not be read in pari materia with West Virginia's wrongful death statute.

Argument

1. Standing Issue

A. Law of the Case

It is the Petitioner's contention that the law of the case relating to the issue of standing was established when the lower court in January 2001 entered an extensive and detailed order, containing eleven pages of findings of fact and conclusions of law, on this precise issue and the Supreme Court refused to accept a Petition for Appeal of that order.

By way of background, on June 28, 2000, the siblings of the decedent had filed a Petition for Declaratory Relief seeking to have Eugenia Moschgat removed as administratrix of the estate, or in the alternative, to have one of the siblings named as co-administratrix of the estate. The petition, the extensive record in that case, and the lower court order make very clear that the issue of who had the right to conduct the underlying litigation, which sounded in both wrongful death and deliberate intent, was placed squarely before the lower court. After holding extensive evidentiary hearings and considering legal memoranda and argument, the court on January 8,

2001, entered an eleven-page order containing detailed findings of fact and conclusions of law, determining that the decedent's daughter, Eugenia Moschgat, was **not** a proper person to serve as the administratrix of her estate, replacing her with the Plaintiff, Dianna Mae Savilla (one of the decedent's ten siblings), effectively placing the Petitioner in charge of conducting the litigation¹⁴. The lower court also specifically found that the Petitioner siblings had a greater interest in a recovery, if any, from the wrongful death action because, unlike Moschgat, they had actually suffered the loss of society and relationship with the decedent.¹⁵ Thereafter, on May 7, 2001, Ms. Moschgat filed a Petition for Appeal with the W. Va. Supreme Court of Appeals and the Court refused to accept the appeal.

All parties, including the Respondent Speedway had a full and fair opportunity to litigate this issue. Speedway was present throughout the proceedings represented at all times by at least two lawyers and usually also present by corporate counsel; yet they completely failed to raise any issue or objection on the matter of who had standing to conduct the litigation. The record from those proceedings as well as the actions and inactions taken by the parties subsequent to the November 2001 order makes clear that was the central issue. For instance, if Moschgat or the Respondent Speedway considered that the November 2001 order did not encompass the

¹⁴The extensive proceedings held in the Declaratory Judgment proceedings made clear that the deliberate intent and the wrongful death were referred to generally as "the wrongful death claim," just as this Court in case law has frequently referred to a deliberate intent claim involving an employee death as a breed of wrongful death. See further discussion herein. Further, Moschgat's Petition for Appeal described the litigation which she filed (which encompassed claims under both deliberate intent and wrongful death law) as the "wrongful death" litigation. Moschgat or Speedway had the opportunity to plead a lack of standing and they simply failed to do so.

¹⁵See paragraph 13 of January 8, 2001, order.

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¹⁵See paragraph 13 of January 8, 2001, order.

deliberate intent claim, then certainly the litigation of that claim would have proceeded, but it did not. Although the term "wrongful death" was used, it is clear that both of the two types of claims were encompassed in the court's ruling. It is also interesting to observe how frequently this Court has discussed the two causes of action interchangeably. In the *Zelenka* case, 208 W.Va. 243, 539 S.E.2d 750 (2000), the Court characterized the nature of the civil litigation filed under the deliberate intent statute as follows:

Estate of city employee who was killed in work-related accident filed **wrongful death action** against city, alleging that city acted with "deliberate intention." Emphasis added.

And even more recently, in the case of *Luikart v. Valley Brook Concrete & Supply, Inc.*, 216 W.Va. 748, 613 S.E.2d 896 (2005), this Court characterized the action brought there as "a **wrongful death action** against (the employer) the Circuit Court of Putnam County, wherein (plaintiff) claimed a deliberate intent violation under the West Virginia Workers' Compensation Act. See W. Va.Code § 23-4-2(c)(2) (1913) (Repl.Vol. 1994)... This **wrongful death action** was eventually consolidated with a subsequently-filed declaratory judgment action." Emphasis added.

It is obvious that, when the death of an employee has resulted from deliberate intent-type conduct on the part of the employer, this Court has viewed the deliberate intent cause of action as a type of wrongful death case and has used the term "wrongful death" to describe it.

Furthermore, Syllabus point 2 of *Dent v. Pickens*, 59 W.Va. 274, 53 S.E. 154 (1906), held that in West Virginia, the law of the case doctrine (unlike in the federal system, where "the law of the case doctrine does not apply [to] an issue ... not raised before the prior panel and thus ... not decided by it." See *Yesudian ex rel. United States v. Howard Univ.*, 270 F.3d 969, 972 (D.C.Cir.2001)) extends "[n]ot only [to] all matters that were actually litigated, but also all others

that the parties were bound, by the state of the pleadings, to assert, by way of defense to, or in support of, the demand or demands set up in a cause, are res judicata by the decision rendered therein." Clearly, in the proceedings which resulted in the January 8, 2001, order by the Circuit Court, Speedway and Moschgat had the opportunity to raise all the issues upon which it now relies, but in fact Speedway failed to raise any such issue until fifteen months later. Moschgat (who is not even a party to the instant appeal) also completely failed to raise any such issue, until Speedway seized on it; and only at that time did Moschgat attempt to grab onto Speedway's coattails with a Motion to Intervene, which was never granted. In fact, Speedway's first time to raise the issue some fifteen months after entry of the January 2001 order was **after** the lower court's extensive hearing and detailed rulings on the issue of who could properly conduct the litigation for the plaintiff, **after** the Supreme Court had declined to accept the appeal of the administratrix issue, **after** discovery in the underlying litigation was conducted and motions made, **after** approximately \$40,000 had been expended on the case by the Petitioner, and **after** the case was ready for trial.¹⁶ The Defendant Speedway seized upon this so-called "new" issue,¹⁷ claiming for the first time that a sibling acting as administrator of the estate of the decedent did not have standing under West Virginia Code 23-4-2(b),¹⁸ the deliberate intent statute, to pursue a claim on behalf of the decedent. That is the issue which is at the heart of this appeal.

¹⁶Trial was set for December 2, 2002.

¹⁷Defendant Speedway filed a Motion for Judgment on the Pleadings. Later they filed a Motion to Dismiss on the same grounds.

¹⁸The portion of the statute at issue in the present case was previously designated as West Virginia Code § 23-4-2(c) and was amended and redesignated as West Virginia Code § 23-4-2(d). Other than minor stylistic alterations, the language was not changed.

This Court in the recent case of *State ex rel. TermNet Merchant Services, Inc. v. Jordan* 217 W.Va. 696, 619 S.E.2d 209 (2005) had the opportunity to discuss the doctrine of the law of the case and its binding effect on subsequent proceedings.

The *TermNet* case involved a petition for writ of prohibition and mandamus filed by a judgment debtor seeking to secure relief from existing judgments for contempt sanctions for failing to respond to interrogatories in aid of execution and to prevent issuance of further judgments or imposition of additional sanctions. The judgment had been secured by a default judgment entered by the Circuit Court of Tucker County on November 9, 2001. The debtor against whom judgment was rendered then filed a petition for appeal of that judgment, and the Supreme Court refused to hear the appeal, just as occurred in the instant case.

While the Court in *TermNet* agreed that the proceedings in aid of execution were not conducted properly, it upheld the validity of the underlying judgment and took this opportunity to discuss the doctrine of the law of the case. Citing *State ex rel. Frazier & Oxley v. Cummings*, 214 W.Va. 802, 591 S.E.2d 728 (2003), the Court held that "The law of the case doctrine provides that a prior decision in a case is binding upon subsequent stages of litigation between the parties in order to promote finality." Most importantly, this Court made clear that **this Court's refusal to accept a petition for appeal rendered the judgment to which appeal was sought a final one and that the findings of fact and conclusions of law therein governed the remainder of such proceedings or any subsequent proceedings related thereto.**

Not only does this doctrine promote finality of judgments, but in the instant case, it would also prohibit a grave injustice from being perpetrated upon the Petitioner. When the Petitioner fully and dutifully litigated the standing issue before the Circuit Court, Speedway participated in

the proceedings¹⁹ yet completely failed to take a position on the issue or to raise or address it in any way. Instead, they waited more than fifteen months later to raise the issue, long after the Supreme Court had refused to accept the appeal that was brought of the lower court's order. They waited until the Petitioner siblings had litigated this case extensively, conducting extensive discovery, retaining experts, and expending approximately \$40,000 to \$50,000 in expenses on the case (and until there was actually an imminent trial date) before raising this issue for the first time.

The Court in the *Frazier* case explained that the only exceptions to the law of the case doctrine is when there has been a dramatic change in controlling legal authority since the earlier proceeding, or in very narrow circumstances where significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light. Neither of those circumstances are present in the instant case.

Thus, in granting the Defendant's Motion to Dismiss more than four years later, the lower court exceeded its authority by failing to adhere to the law of the case as its previous court order had established. The Petitioner therefore contends that the doctrine of **the law of the case** and the holding of this court in *TermNet* are dispositive of the instant appeal,²⁰ and require that this Court reverse the lower court's legal determination that the Petitioner lacks standing and that siblings cannot seek damages under deliberate intent and remand the case with directions to

¹⁹Speedway at all points in these proceedings have had a minimum of two lawyers present.

²⁰Where a case is decided based on the law of the case doctrine, the law as enunciated in that fashion has no binding effect on other unrelated cases. It is simply **the law of that case**.

permit the siblings to present their claims.²¹

B. Statute and Case Law

The deliberate intent statute, West Virginia Code 23-4-2(b) (now 23-4-2(c)) provides as follows:

If injury or death result to any employee from the deliberate intention of his or her employer to produce the injury or death, the employee, the widow, widower, child or dependent of the employee **has the privilege to take** under this chapter and has a cause of action against the employer, as if this chapter had not been enacted, for any excess of damages over the amount received or receivable in a claim for benefits under this chapter, whether filed or not. Emphasis added.

At the outset, it must be noted that the lower court in paragraph 4 of its Conclusions of Law, found that “a deliberate intention action **may be brought** by ‘the employee, the widow, widower, child or dependent of the employee.’” In fact, the statute does not speak to who may **bring** the claim, but who only as to who may **take**. Thus, the entire ruling regarding standing was premised upon a misstatement of the statute. Further, as will be set forth more fully herein, this Court early on clarified that the administrator of an estate is the proper person to bring a deliberate intent cause of action. See *Collins v. Dravo Contracting Co.*, 114 W.Va. 229, 171 S.E. 757 (1933).²²

²¹If this Court agrees that the law of the case has been established and governs the remainder of these proceedings, it need go no further. Upon that basis, it should then reverse the April 8, 2005, order and remand for trial in conformance with the law of the case, with specific direction that the Petitioners have a right to present their claim for damages for the death of their sister to a jury. The law of **this case** would not be binding on subsequent proceedings in unrelated cases.

²²As stated, the lower court itself had ruled earlier that Moschgat was not a proper person to serve as administratrix, had removed her, and had ruled that the Petitioner had the right to pursue the underling litigation. Thus, in granting Speedway’s Motion to Dismiss more than four years later, the lower court ignored its earlier order (made final by a Supreme Court refusal to accept an appeal thereto) by holding that the Plaintiff could **not** maintain the action in her name

Out the outset, it is important to note that the Supreme Court has previously had before it deliberate intent cases wherein the administratrix of a decedent's estate has been the party bringing the deliberate intent action and where such person has not been a widow, widower, child or dependent of the decedent. This Court has never indicated disapproval of any such claim; and such situation has never been an impediment to the ability to pursue the deliberate intent claim. In fact, in *Zelenka v. Weirton*, 208 W. Va. 243, 539 S.E.2d 750 (2000), in addressing the lower court's certified question relating to an issue of municipal immunity to deliberate intent claims, Justice Davis in her concurring opinion²³ specifically pointed out that the decedent did not have any statutory dependents. Yet that fact obviously in no way precluded the Court's consideration of the issues as related to the deliberate intent action, and nothing in the opinion suggested that the cause of action lacked viability for this reason. In fact, in *Zelenka*, just as in the instant case, the administratrix who brought the deliberate intent claim was the sister of the decedent.

Even more directly on point, the older case of *Collins v. Dravo Contracting Co.*, 114 W.Va. 229, 171 S.E. 757 (1933),²⁴ held (in the context of a statute with the exact same language as the instant case relating to "the widow, widower, child or dependent of the employee") that **an administratrix was a proper person to pursue the deliberate intent claim.** The issue of who could receive the proceeds of such a claim may have been the subject of dicta, but there is no

as administratrix because she was a sibling of the decedent.

²³The *Zelenka* case was decided in the context of the issue of the adequacy of a workers compensation award juxtaposed against a deliberate intent claim.

²⁴In *Collins*, the plaintiff administratrix pled both a common law and a statutory deliberate intent claim. The focus of the case was whether under the old rules of pleading two alternative causes of action could be pled in one count. However, one of the primary issues issue focused on whether the administratrix of an estate could bring a deliberate intent claim.

question that one of the West headnotes of that case provides: "Administratrix could maintain action to recover for servant's death in consequence of master's deliberate intent to produce death." The *Collins* case is still good law.²⁵ The Petitioner thus contends that this case is dispositive of the issue before the Court as to the standing of the administratrix to pursue this claim.

Another case which must be considered is *Parsons v. Shoney's*, 580 F. Supp. 129 (1983), from the U. S. District Court, Southern District of W. Va.. This case, which interpreted West Virginia law relating to the deliberate intent statute, was authored by the Honorable Charles Haden. In that case, the plaintiff brought action against her former employer, Shoney's, Inc, seeking to recover damages for personal injuries she sustained as a result of Shoney's allegedly willful, wanton, and reckless disregard for her safety. Her husband joined in this action seeking to recover damages for the loss of consortium he suffered as a result of his wife's injuries. In their motion to dismiss, Shoney's pointed out that the word "spouse" was conspicuously absent from the list of persons who had a deliberate intent cause of action against the employer. Thus, Shoney's argued that because the word "spouse" did not appear in this section, the spouse of an injured worker was not authorized by the statute to bring an action for loss of consortium under Section 23-4-2.

Judge Haden's opinion held:

While Shoneys' observation concerning the statutory language is, obviously, correct, the Court believes the inference drawn therefrom misses the mark. For purposes of this discussion, the crux of the above quoted section is the phrase "shall also have cause of action against the employer, as

²⁵ Although the *Collins* case has some indirect negative history, it is unrelated to the point for which it is cited herein, it has never been overruled, and it was cited with approval as recently as 1983 in *Parsons v. Shoney's*, 580 F. Supp. 129.

if this chapter had not been enacted...." This "provision preserves for employees a common law action against employers" where injury results from an employer's deliberate intent to produce such injury.

The Respondent will argue that the case of *Bell v. Vecellio & Grogan, Inc.*, 197 W. Va. 138, 475 S. E. 2d 138 (1996) established the principle that the deliberate intent cause of action supersedes all other causes of action, common law or statutory, and the Petitioner does not disagree with that contention. However, in establishing that principle, nothing in the *Bell* case obliterated all jurisprudential reasoning developed in West Virginia case law to that point on all aspects of the deliberate intent concept. Nor does the *Bell* case limit consideration of the jurisprudential development of case law relating to deliberate intent actions by this Court since that time. And nothing in *Bell* limits this Court in its ongoing obligation to interpret applicable statutes. Because the answer to the question before this Court requires analysis and is not susceptible to a simplistic answer, it is important to further analyze Judge Haden's reasoning and all the other case law developed in this area. Judge Haden in *Parsons* explained that the plaintiff (husband's) claim was derivative of his wife's action under W. Va. Code 23-4-2, and that his action did not arise from the statute itself, but as a natural consequence of his wife's injuries. Thus, (the husband's) claim did not depend upon specific statutory authority.

Similarly, the Petitioner contends that, as administratrix of Linda Kannaird's estate, she is acting in a derivative capacity for the deceased "employee," who the statute permits to file a claim. When the employee who is permitted to file a claim is deceased, then her estate can be the proper entity to pursue the claim. Which persons ultimately may or may not actually "take" or receive proceeds from such claim may be an issue for another day. But it is clear from existing case law in *Collins* that under the same statutory language cited by the Respondent in support of

its motion to dismiss, this Court has held that an administratrix of a deceased employee's estate has the right to pursue the deliberate intent claim on behalf of the estate. For that reason, it was completely improper for Ms. Moschgat to file the underlying litigation, engage in extensive court proceedings on the issue of who was the proper person to pursue the litigation, and then after losing that court battle, file an appeal, have that appeal declined, and then go out and negotiate her own secret settlement with Speedway without the knowledge or acquiescence of the person who the court had placed in charge of the litigation. By so doing, Speedway and Ms. Moschgat essentially thumbed their noses at the lower court's order. Petitioner contends that it is a pattern of Speedway to ignore workplace safety and then at seeking to avoid any sense of corporate responsibility for its actions.

Petitioner further contends that the very wording chosen by the Legislature in the deliberate intent statute, W. Va. Code 23-4-2(db), specifically its use of the word "take" in the parameters of the provision at issue, bodes against Speedway's contentions. The word "take" carries with it a meaning that is unique in the law relating to estate administration, e.g. the longstanding implication of one who "takes" clearly signifying that such taking is in a representative capacity. When one "takes," there is the clear suggestion that the taker is taking on behalf of those entitled to receive.

This Court also had a much more recent opportunity to examine the relationship of the *Bell* principles to the common law in the case of *Erie Ins. Property and Cas. Co. v. Stage Show Pizza, JTS, Inc.*, 210 W.Va. 63, 553 S.E.2d 257 (2001). The *Erie* decision is very important in connection with the arguments made by the Petitioner in this appeal. In the *Erie* case, this Court (citing W.Va. Code 23-4-2(b)) held that in a deliberate intent action, if an employee is able to

establish that the employer acted with conscious, subjective deliberation and intentionally exposed employee to specific unsafe working condition, then the employer loses its workers' compensation immunity and may be subjected to suit for damages **as if workers' compensation law had not been enacted.** Erie (an insurer seeking to avoid liability for the employer's conduct) argued that under *Bell*, this Court conclusively ruled that a deliberate intent cause of action is a purely direct statutory cause of action expressed within the workers' compensation system, and that any liability imposed against an employer policyholder as a result of a deliberate intention lawsuit is liability arising entirely under a workers' compensation law. The appellant employee, however, argued that an employer subjected to a deliberate intent action under *Bell* does not become subject to a statutory sanction, but instead becomes liable for common law or other damages over and beyond any workers' compensation benefits received by an employee, "as if [the Workers' Compensation Act] had not been enacted[.]" In other words, while the deliberate intention statute specifies the evidence necessary to extinguish an employer's immunity under the Workers' Compensation Act, the statute only exposes an employer to an obligation for damages for any injuries proximately caused by the employer's conduct **as if workers' compensation law had not been enacted.** Since a deliberate intent cause of action results in damages which are not "workers' compensation benefits," the appellant in *Erie* argued that the Erie policy should be construed to find coverage for his deliberate intent cause of action. This Court agreed with that argument, and found that **the statute's imposition of liability "as if [the Workers' Compensation Act] had not been enacted[.]" required imposition of the damages**

which would have been imposed absent the enactment of the statute.²⁶ The Court reiterated that concept in *Marcus v. Holley*, 217 W. Va. 508, 618 S. E. 2nd 517 (2005). The Petitioner in the instant case now contends that case is also dispositive on the issue presented in Assignment of Error #1. If the Petitioner is successful at trial in presenting evidence sufficient to meet the criteria for proof of a deliberate intent claim, then the damages available will be those as if the **Workers Compensation Act had not been enacted**. Even the Respondent Speedway acknowledges that, prior to the enactment of this statute, the siblings could have sought and received damages for the death of their sister. In that instance, the administratrix of the estate would be able to conduct the litigation and each of those persons who she represents, the beneficiaries of the estate, would have the opportunity to present evidence to a jury, which would in turn determine, if any, to which each is entitled.

A closing reading of the *Bell* case holding makes it very clear the holding therein, that the statutory deliberate intent cause of action superseded all other causes of action, common law or statutory, dealt with the evidentiary requirements for making such a claim. It did not discuss who could bring the claim nor who had standing to seek damages. It did not modify whether damages

²⁶The case of *Handley v. Union Carbide Corp.*, 804 F.2d 265 C.A.4 (W.Va.) (1986) provided background which is useful in the instant discussion: "In 1978, the West Virginia Supreme Court of Appeals issued a far-reaching decision in *Mandolidis v. Elkins Industries*, 161 W.Va. 695, 246 S.E.2d 907 (1978). It ruled that deliberate intention "must be held to mean that an employer loses immunity from common law actions where such employer's conduct constitutes an intentional tort or willful, wanton, and reckless misconduct." This holding stimulated much public debate and, in 1983, the West Virginia Legislature amended the compensation statute with the express intent of **modifying the standard** adopted in *Mandolidis*. The statute now states that "in enacting the immunity provisions of this chapter, the legislature intended to create a legislative standard for loss of that immunity of more narrow application and containing more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct." Emphasis added. Thus, it has been recognized that the primary statutory change was in setting forth the elements of the claim.

were available pursuant to statute or common law. It did not even obliterate all the reasoning of the *Mandolidis* case; it simply clarified that the concept of what constitutes a deliberate intent claim had been altered by the legislature and that the criteria for a deliberate intent claim was now strictly defined by statute. *Mandolidis* provided that an employer would lose workers' compensation protection and be "subject to a common law tort action for damages or for wrongful death where such employer commits an intentional tort or engages in wilful, wanton, and reckless misconduct...." Those concepts have in fact now been reiterated by this Court in *Erie*, wherein this Court held that, once the evidentiary requirements for a deliberate intent have been fulfilled, the damages that are available are those **as if workers' compensation law had not been enacted**. That clearly includes the right for siblings to seek damages for the death of a decedent.

In summary, *Collins* makes crystal clear that the deliberate intent suit can be brought in the name of the administratrix of a decedent's estate. And *Erie* makes clear, that once the evidentiary requirements set forth in the statute extinguishes an employer's immunity under the Workers Compensation statutes, then the statute exposes the employer to an obligation for damages **as if workers' compensation law had not been enacted**. At common law, the beneficiaries of the decedent's estate would not be limited to those categories of persons enumerated in the deliberate intent statute. Further, under the wrongful death statute, the siblings clearly would have a cause of action.

C. Policy

Strictly from the perspective of justice, which after all must always be an overriding consideration in the decision of any case by this Court, it would be an incredible injustice for the

law to provide no means to compensate the loss of those who loved and were actually in relationship with Linda Kannaird. Speedway and their battalion of lawyers and corporate executives know full well that Ms. Moschgat, the daughter who rejected her mother for twenty years, would be very unlikely to be able to prove any damages as a result of Linda's death.²⁷ The evidence was clear that she had no relationship with Linda, wanted no relationship with Linda, and that her hostility²⁸ toward Linda was so great that she would not even permit her child to have a relationship with his grandmother. The record, however, was replete with evidence as to the close and loving relationship between Linda and her siblings. They grew up in a close-knit family of working people in Sissonville, West Virginia, and all but one still lives there. It is difficult to fathom that West Virginia law would allow a wealthy out-of-state corporate entity to come into West Virginia, act with complete disregard and disdain for the human life of an employee, cause her death, and then be permitted to act with complete disregard for their corporate responsibility.²⁹ For this Court to determine that there is no cause of action against them by those who suffered actual damages for such conduct is unthinkable.

²⁷Speedway attempts to create a straw man in persisting to make allegations of violation of fiduciary duty to Ms. Moschgat by the Petitioner. First of all, Speedway does not represent Ms. Moschgat although they display a community of interest that makes their "settlement" suspect; second, Speedway knows full well that Ms. Moschgat has chosen to have independent counsel in this matter.

²⁸The evidence demonstrated that Linda very much wanted a relationship with her daughter and grandson and made efforts to reach out to her. But as a child, Eugenia was alienated from her mother by a father with superior financial means to hire lawyers to fight any contact between mother and child.

²⁹Had Speedway demonstrated some minimal level of corporate responsibility for Linda Kannaird's death, they probably could have settled this claim by now for less than they have spent in trying to defeat it.

2. Certain Remedy Argument

Petitioner contends in Assignment of Error 6 that the lower court's ruling, which precluded the administratrix of the decedent's estate from asserting a deliberate intent claim and/or a sibling from seeking damages for the death of their sister as a result of employer conduct which constituted deliberate intent, denied the Petitioner the constitutional right to a certain remedy.

Article III, Section 17 of the W. Va. Constitution provides:

Courts Open to All--Justice Administered Speedily

The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.

The Certain Remedy Clause is a constitutional guarantee that all citizens have a right to seek redress for injuries in the courts of this state. See Syl. pt. 8, *Bennett v. Warner*, 179 W.Va. 742, 372 S.E.2d 920 (1988) ("It is beyond argument that the courts of this state are open to all and that parties in litigation should have access to their legal proceedings, W. Va. Const., art. III, § 17, and such access to court proceedings is also required as a part of due process, W. Va. Const., art. III, § 10.").

The Petitioner contends that, if the lower court's interpretation that there is no standing for the administratrix of a decedent's estate to file a deliberate intent claim, and there is no right on the part of the decedent's siblings to seek damages for their loss is upheld, then the Petitioner's constitutional right to a Certain Remedy has been vitiated.

In syllabus point six of *Gibson v. West Virginia Department of Highways*, 185 W.Va. 214, 406 S.E.2d 440 (1991), this Court observed as follows:

There is a presumption of constitutionality with regard to legislation. However, when a legislative enactment either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication of cases, then the certain remedy provision of Article III, Section 17 of the West Virginia Constitution is implicated.

Justice Davis' concurring opinion in the recent case of *Hinchman v. Gillette*, 217 W.Va. 378, 618 S.E.2d 387 (2005)³⁰ provides an excellent general discussion of the Certain Remedy clause:

This Court has made clear that "[a] severe limitation on a procedural remedy permitting court adjudication of cases implicates the certain remedy provision of Article III, Section 17 of the West Virginia Constitution." *State ex rel. West Virginia State Police v. Taylor*, 201 W.Va. 554, 565, 499 S.E.2d 283, 294 (1997). See also Syl. pt. 6, in part, *Gibson v. West Virginia Dep't of Highways*, 185 W.Va. 214, 406 S.E.2d 440 (1991) ("[W]hen a legislative enactment either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication of cases, then the certain remedy provision of Article III, Section 17 of the West Virginia Constitution is implicated.").

This concurring opinion also reiterated the analytical framework previously established by this Court on a Certain Remedy issue:

We have developed a two-part test for determining whether the Certain Remedy Clause is violated: When legislation either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication, thereby implicating the certain remedy provision of article III, section 17 of the Constitution of West Virginia, the legislation will be upheld under that provision if, first, **a reasonably effective alternative remedy is provided by the legislation** or, second, **if no such alternative remedy is provided, the purpose of the alteration or repeal of the existing cause of action or remedy is to eliminate or curtail a clear social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose.** Syl. pt. 5, *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 408 S.E.2d 634 (1991). This Court has cautioned that "[i]n our 'certain remedy' [analysis] ... we consider the total impact of the legislation. Where its impact is limited rather than absolute, there is less interference with the 'certain remedy' principle, and the legislation will be upheld." *O'Dell v. Town of Gauley Bridge*, 188 W.Va. 596, 606, 425 S.E.2d 551, 561 (1992). Emphasis added.

³⁰The context of the discussion in *Hinchman* was the validity of the certificate of merit requirement in medical malpractice lawsuits, but the Certain Remedy principles are equally applicable herein.

In applying these principles to the instant case, it is useful to examine the development of the law relating to wrongful death actions. Justice Starcher, writing on behalf of the Court in *McDavid v. U. S.* 213 W. Va. 592, 584 S.E. 2nd 226 (2003), provided an instructive history of wrongful death law. One of the points elucidated by the opinion is that wrongful death statutes were enacted as a response to the perceived failure of the common law to provide a remedy for wrongful death. This Court has held that these statutes must be construed to each have meaning in the context of a strong overlay of West Virginia law requiring that statutes be construed liberally to compensate those who are injured. If the deliberate intent statute is interpreted in a manner that removes from the sibling beneficiaries their right to sue as set forth in the wrongful death statute, without providing another avenue to obtain redress for such wrongful death, it is the position of the Petitioner that that constitutes a violation of the West Virginia Constitution, the Certain Remedy Clause.

The *McDavid* case pointed out that:

The great majority of our cases discussing the wrongful death act have recited, or been decided upon, the statement that “no right of action for death by a wrongful act existed at common law[.]”³¹ citing *Baldwin v. Butcher*, 155 W. Va. 431, 433, 184 S.E.2d 428, 429 (1971). See also,

³¹The *McDavid* case pointed out that “...the genesis of this oft-recited statement is generally agreed to be contained in dicta in the 1808 case of *Baker v. Bolton*, 1 *Campb.* 493, 170 *Eng.Reprint.* 1033 (1808), where the court indicated that “in a civil court, the death of a human being could not be complained of as an injury... The English judge’s off-hand remarks became the basis for the so-called American common law rule that there could be no recovery for wrongful death in the absence of statute. This became a magical intoned incantation recited by rote, without any critical examination, by hundreds of decisions in the various courts throughout the length and breadth of the United States.” *McDavid* pointed out, however, that “we do not now believe that this oft-repeated statement of the English common law is necessarily immutable. In Syllabus Point 1 of *Powell v. Sims*, 5 *W.Va.* 1 (1871), we stated that “[t]he common law of England is in force in this State only so far as it is in harmony with its institutions, and its principles applicable to the state of the country and the condition of society.” As Justice Holmes succinctly reflected, “[t]he common law is not a brooding omnipresence in

Farley v. Sartin, 195 W.Va. 671, 466 S.E.2d 522 (1995); *Adams v. Sparacio*, 156 W.Va. 678, 196 S.E.2d 647 (1973); *City of Wheeling ex rel. Carter v. American Cas. Co.*, 131 W.Va. 584, 48 S.E.2d 404 (1948); *Swope v. Keystone Coal & Coke Co.*, 78 W.Va. 517 89 S.E. 284 (1916).

We have since made clear that our courts retain the power to change the common law, holding in Syllabus Point 2 of *Morningstar v. Black and Decker Mfg. Co.*, 162 W.Va. 857, 253 S.E.2d 666 (1979) that “Article VIII, Section 13 of the West Virginia Constitution and W.Va. Code, 2-1-1, were not intended to operate as a bar to this Court’s evolution of common law principles, including its historic power to alter or amend the common law.”

McDavid explained that wrongful death statutes modeled after Lord Campbell’s Act were first enacted in the United States in 1847, and that the W. Va. Wrongful Death Act was first enacted in 1863 shortly after we separated from Virginia. Although a deliberate intent statute has also been on the books since early in the century in West Virginia, it is clear then that the right to seek damages under the a wrongful death statute³² in West Virginia pre-dated the enactment of a deliberate intent statute. This is a crucial fact.

Returning to the Certain Remedy analysis, numerous cases have made clear that workers compensation statutes were designed to give employers protection from being held liable in the civil justice system for negligence causing employee injury, while expediting the receipt of benefits by workers who were hurt on the job. See *Mandolidis*. Thus, it can be agreed that the workers compensation statutes generally, and the deliberate intent statute specifically, was

the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.” *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222, 37 S.Ct. 524, 61 L.Ed. 1086 (1917) (Holmes, J., dissenting).

³²Although there have been some permeations of the wrongful death statute over the years with regard to who was entitled to seek damages for the wrongful death of a decedent, under all versions, the Petitioners here would have had such right.

enacted for the purpose of eliminating or curtailing a clear social or economic problem. It is equally clear, however, that if the lower court was correct in its rulings in the instant case, then when the deliberate intent statute was enacted, no reasonably effective alternative remedy was provided to the siblings' then-existing right (under wrongful death law) to recover damages for their sister's death. Because the deliberate intent statute in the instant case, as interpreted by the lower court, provided no reasonable alternative to the right to seek a remedy in court on the loss of the decedent, which the Petitioner brothers and sisters had enjoyed under the wrongful death statute, then the Court must examine whether the means chosen to eliminate or curtail the social or economic problem was a reasonable method of achieving that purpose.

The Petitioner contends that, if the lower court was correct in its determination that the deliberate intent statute removed all rights of the siblings of a decedent to seek damages for her death, then that measure was not a reasonable method of achieving such purpose. In fact, it was an unnecessary and unreasonable means of achieving the purported goal of the workers compensation statute. Under wrongful death law, evidence of a beneficiary's relationship with the decedent may be admitted into evidence for purposes of determining damages pursuant to W.Va.Code, 55-7-6(c)(1) [1989] which provides for the recovery of damages for "[s]orrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent." The removal of this right from siblings, especially in circumstances such as here present, where the evidence already has demonstrated that the brothers and sisters are the only persons who actually have suffered damages as a result of the decedent's death, the complete obliteration of their right to seek damages is not a reasonable method of achieving the purpose for which the workers compensation were intended.

Speedway relies on the contention that no rights had vested in the Petitioner because their cause of action had not yet accrued. However, as Justices Starcher and McGraw pointed out in their dissenting opinion in *Zelenka v. City of Weirton*, 208 W.Va. 243, 539 S.E.2d 750 (2000), "...the constitutionality of taking away people's right to sue tortfeasors is contingent upon there being other avenues for those injured people to obtain redress of their injuries. *Randall and O'Dell*, supra." The Petitioner urges upon this Court that the deliberate intent statute, as interpreted by the lower court, removed from the Petitioners the right to bring action and seek damages for their injuries, a right which they would have enjoyed if the deliberate intent statute had not been enacted. The wrongful death statute, *W.Va. Code 55-7-6* (and its predecessor statutes) made clear that the siblings of a decedent were beneficiaries under a wrongful death claim and could bring a civil action for damages. If Speedway's contentions are accepted, then the deliberate intent statute, *W.Va. Code 23-4-2(c)*, took away that right from the sibling beneficiaries of Linda Kannaird and such removal cannot withstand constitutional scrutiny. Speedway's interpretation of the deliberate intent statute would result in that statute obliterating a right possessed by the beneficiaries of the estate as set forth in the wrongful death statute.

3. Factual Dispute Argument

The law is clear that when a Circuit Court considers a motion to dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, such motion must be examined in the light most favorable to the plaintiff, and it may be granted only if the court determines in that context that the plaintiff can prove **no set of facts** which would support the plaintiff's claim and entitle her to relief. *Owen v. Board of Educ.* 190 W. Va. 677, 441 S.E.2d 398 (1994); *Holbrook v. Holbrook*, 196 W. Va. 720, 474 S. E. 2d 900 (1996). Syl. Pt 3 of *Chapman v. Kane Transfer*

Co., Inc. 160 W.Va. 530, 236 S.E.2d 207 W.Va. (1977) provided:

The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

In the instant case, there are sets of facts which could have been proven by the Plaintiff below which could support her claim, there were factual disputes, and all inferences should have been drawn in favor of the non-moving party, the Petitioner.

A. Dependency.

For instance, the lower court found as a matter of fact that Linda Kannaird had no person wholly dependent on her for financial support. Plaintiff below, however, presented evidence that one of the siblings, Denise "Sissy" Harrison, was to some degree financially dependent upon the decedent. The evidence adduced during the discovery process reflects that one of the siblings, Denise "Sissy" Harrison, did claim at least partial financial dependency on her sister, the decedent. Sissy is alone in the world, is of very limited intellect, and is functionally illiterate. She was the "baby" of the family and throughout her life, relied on her sister Linda for assistance, support, and guidance. Sissy, who was more like a daughter to Linda, relied upon Linda for financial assistance and for permitting her to assist Linda in performing housecleaning jobs. Their relationship was more like mother and daughter than siblings. The lower court ignored this evidence and found that "(Mrs. Kannaird) had no person wholly dependent on her for financial support." The Petitioner had a right to present evidence and permit a jury to decide the degree of dependency. W. Va. Code 23-4-2(c) provides that a dependent may include an "invalid sister." The word "invalid" used as an adjective is defined on Dictionary.com as "Incapacitated by illness

or injury.” Petitioner contended below that, while Ms. Harrison can ambulate and is not injured, she has a very difficult time supporting herself and functioning without assistance, such as that which was provided by her sister Linda, due to other incapacity; and it is now contended that, at minimum, Ms. Harrison had the right to present evidence and argue to a jury whether she comported with the statutory definition of a dependent. Thus, even if the circuit court was correct in its determination that the administratrix has no standing to pursue a deliberate intent claim, and/or that the siblings have no right to seek damages as the result of their sister’s death, it is clear that “dependents” do have such right, no matter what their relational status to the decedent. The order granting the motion to Dismiss was in error because it deprived Ms. Harrison of this right.

Second, the court found as fact, *inter alia*, that at the time of her death, the decedent was working in the course of her employment with Speedway at its Rich Oil Store in Sissonville, West Virginia. While there is no dispute that the decedent was called out to work on her day off to save Speedway’s merchandise, and that she was required to report to enter a flood zone even as the waters were rapidly rising, the Petitioner throughout the litigation has contended that, in the event it is ultimately determined that the Petitioner did not have standing to bring a deliberate intent action, then a possible fallback position was that the decedent was not engaged in her employment at the time of her death, as she had departed her place of employment and was on her way home. The Petitioner was certainly entitled to prove her claims in the alternative,³³ and

³³Speedway asserts that if the decedent was no longer at work, there would be no claim against Speedway anyway. Petitioner contends, however, that the question of whether some other claim could be filed against Speedway in those circumstances is an open legal question, and premature for resolution in the instant context. The point is that, under the Petitioner’s alternative theory, it was a disputed fact upon which a Motion to Dismiss should not have been premised.

no factual issue should therefore have been resolved against the non-moving party by the lower court as a matter of law in granting a Motion to Dismiss.

Consequently, the lower court erred in dismissing the complaint based on factual findings where there were factual disputes. See *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

4. Public Interest Argument

The *Bell* case included a very important holding which about the public policy that must overlay all of workers compensation-related law:

In interpreting the Workers' Compensation Act, the interest of the public, as well as the employee and employer are to be considered. Citing *Mains v. J.E. Harris Co.*, 119 W.Va. 730, 732-33, 197 S.E. 10, 11 (1938).

It must be noted that there is a heavy overlay of the public interest as well as the interest of the individual human rights of working people in the fabric of the instant case. The reason that Speedway is so eager to oust the siblings of the decedent from this litigation is that they well know from the evidentiary proceedings already held over the last five years that the brothers and sisters are the people who actually suffered loss and consequent damages as the result of Linda's death. The lower court found that the daughter, Ms. Moschgat, had active hostility toward her mother during life and towards the decedent's siblings both in life and death. The court earlier found facts which vitiated any claim attempted to be asserted by Ms. Moschgat for damages,³⁴ since she refused all relationship with her mother for a period of seventeen to twenty years prior to her death. Consequently, after Ms. Moschgat litigated the issue of her service as

³⁴While Ms. Moschgat may be entitled to continue to seek damages even if the Petitioner prevails, facts which now constitute the law of the case will make it very difficult for her to convince a jury that she suffered any loss.

administratrix of the estate, lost that battle by virtue of a detailed court order finding her an inappropriate party to serve as such, appealed that ruling and lost again, rather than abiding by that ruling, she thereupon entered into a secret agreement whereby she, and no one else, was compensated for damages for Linda's death. Further, her receipt of this confidential "settlement" from Speedway was conditioned upon Speedway prevailing in the issues before this Court and the siblings receiving nothing.

The public interest at stake in this case is the issue of whether a very wealthy out-of-state corporation can come into West Virginia and essentially engage in conduct which values the human life of minimum wage employees as being of less worth than a truckful of cigarettes, beer and merchandise. It is also whether those persons who actually suffer damages can be precluded from receiving them by someone who stakes a claim without any evidence to demonstrate that they suffered any damages. The deliberate intent cause of action has existed in West Virginia since early in the century, and it has always been there to prevent such outrageous employer conduct as is present in this case. It is important that this Court continue to maintain the viability not only of this cause of action, as set forth by the State Legislature and elucidated by this Court, but also of West Virginia's longstanding body of law that workers compensation statutes and other remedial statutes must be interpreted liberally in favor of compensating for losses suffered.

As this Court recently held in Syl. Pt. 9. of *Marcus v. Holley*, 217 W.Va. 508, 618 S.E.2d 517 (2005): "The Workmen's Compensation Law is remedial in its nature, and must be given a liberal construction to accomplish the purpose intended." Citing Syl. Pt. 3, *McVey v. Chesapeake & Potomac Tel. Co.*, 103 W.Va. 519, 138 S.E. 97 (1927).

The interpretation of the statute that Speedway will ask this Court to impose on West

Virginia law would render people with significant loss no remedy whatsoever against a corporate tortfeasor whose deliberate conduct causes the death of an employee. This is certainly not the tenor or spirit of West Virginia law. Our case law has repeatedly made it clear in many contexts that statutes will be construed liberally to compensate those who are injured. See, e.g., *State ex rel. McKenzie v. Smith*, 212 W.Va. 288, 569 S.E.2d 809 (2002); *Frye v. Future Inns of America-Huntington, Inc.*, 211 W.Va. 350, 566 S.E.2d 237 (2002) (holding that the West Virginia Human Right's Act is a remedial statute and is to be liberally construed to accomplish its objectives and purposes); *West Virginia Ins. Guar. Ass'n v. Potts*, 209 W.Va. 682, 550 S.E.2d 660 (2001) (holding that the state Guaranty Act shall be liberally construed to effect its purpose, which is the "scrupulous protection of those having claims against insurers"); *Bradshaw v. Soulsby*, 210 W.Va. 682, 558 S.E.2d 681 (2001) (holding that the wrongful death act is to be given a liberal construction to achieve its beneficent purposes); *West Virginia Guaranty Assn v. Potts*, 209 W.Va. 682, 550 S.E.2d 660) (holding that the workers' compensation statutes are remedial in nature and must be given a liberal construction to accomplish the purpose intended; *Dairyland Ins. Co. v. Fox*, 209 W.Va. 598, 550 S.E.2d 388 (2001) (holding that the underinsured motorist statute is remedial and it should be liberally construed in order to effect its purpose).

The family of Linda Kannaird suffered the loss of someone they loved dearly, and there should be a remedy for them in the civil justice system.

The Petitioners contend that the lower erred in its determinations as to standing and the right to seek damages. However, if it is determined that the lower court was correct, then the Petitioners contends that the removal of all rights of siblings, which they enjoyed under the law of wrongful death, to seek damages for any loss they may suffer from the death of their decedent, violates the Certain Remedy clause of the W. Va. Constitution.

7. The lower court erred in determining that the deliberate intent statute need not be read *in pari materia* with West Virginia's wrongful death statute.

Closely related to the Certain Remedy violation is the Petitioner's contention that the deliberate intent statute must be read *in pari materia* with West Virginia's wrongful death statute, which makes clear that siblings of a decedent are beneficiaries under the wrongful death statute and can bring a wrongful death lawsuit.

As earlier stated, this Court has on many occasions characterized the deliberate intent cause of action where an employee death resulted as "a wrongful death case," suggesting that it is a breed of wrongful death. See *Zelenka v. Weirton*, *Luikart v. Valley Brook Concrete & Supply, Inc.*, and other cases cited herein.

It is obvious that, when the death of an employee has resulted from deliberate intent-type conduct on the part of the employer, the Court has viewed the deliberate intent cause of action as a type of wrongful death case. When two statutes are in conflict, the court must construe such statutes so as to give effect to each. *Brooks v. City of Weirton*, 503 S.E.2d 814 (1998). Because each must be construed to be given effect, the two statutes must be read *in pari materia*. Consequently, if the Petitioner is successful in establishing facts at trial which prove a deliberate intent claim against the employer, then the deliberate intent statute exposes the employer to an obligation for damages **as if workers' compensation law had not been enacted**. Thus, it would be necessary to look at the availability of damages had the deliberate intent statute not been enacted, and that would encompass wrongful death damages to the siblings under the wrongful death statute. Further, any other construction of the interplay of these two statutes would call into question the constitutionality of a statute revoking a right without replacing it with another

alternative avenue for redress, as set forth more fully above.

Summary

Eugenia Moschgat would have nothing to do with her natural mother, Linda Kannaird, during Linda's lifetime. But as soon as she heard of Linda's death, Eugenia rushed to West Virginia, taking a swift and sure interest in pursuing litigation and seeking damages for her death. Her primary purpose was to sign up as administratrix of the estate and collect damages for the death of the mother with whom she would have nothing to do during lifetime. The issue of whether her hostility towards the decedent rendered her an improper person to conduct the wrongful death/deliberate intent litigation was fully tried and decided. The issue of the standing of the Petitioners to pursue and conduct the wrongful death and the deliberate intent claims in the underlying litigation was also fully tried and decided. The lower court ruled that Moschgat was not the proper person to conduct such litigation; that she was hostile to the decedent and to the other potential beneficiaries. The lower court further held that the Petitioners had an interest greater than Moschgat in seeking damages in the litigation. She was removed by court order, and the Petitioner, Dianna Mae Savilla was appointed in her stead. Ms. Moschgat appealed this ruling to the Supreme Court, and the appeal was refused. Thus, the matters decided by the January 2001 order became **the law of the case**. Speedway filed nothing in the lower court or in the Supreme Court which reflected any objection to the Petitioner being appointed administratrix or which challenged her standing to be in charge of the litigation. This entire process resulted in the lower court's order being final. The fact that Ms. Moschgat did not like the courts' decisions on those issues did not permit her to evade the court order by doing an end run around it by entering a secret settlement with Speedway which benefitted only herself and was in fact

conditioned upon the actual administratrix and the other beneficiaries receiving nothing. Likewise, the fact that Speedway was fifteen months late in coming up with the standing issue should not permit them to go back to square one and re-litigate issues already litigated. This Court can end the examination of this appeal with this issue.

If the Court proceeds on to the statutory interpretation issue, Petitioner contends that, the early *Collins* case, which is still good law, provides very clearly that "an administratrix was a proper person to pursue the deliberate intent claim." Further, *Erie v. Stage Show*, supra, *Parsons v. Shoney's*, supra, and the other cases decided in this arena, make clear that in a deliberate intent action, if an employee is able to establish that the employer acted with conscious, subjective deliberation and intentionally exposed employee to specific unsafe working condition, then the employer loses its workers' compensation immunity and may be subjected to suit for damages **as if workers' compensation law had not been enacted**. Had the workers compensation law not been enacted, the siblings would clearly have a claim for damages.

The Petitioner asserts the instant appeal provides this Court the opportunity to expound on the law relating to deliberate intent and its interrelationship with wrongful death. However, if this is not an area that the Court wishes to expound upon on at this time, this case could also be resolved by a per curiam opinion pursuant to the doctrine of the law of the case and/or the case law cited herein with this Court giving directions to the lower court under the factual circumstances here present to permit the sisters and brothers to present their claims to a jury and present their claim for damages.

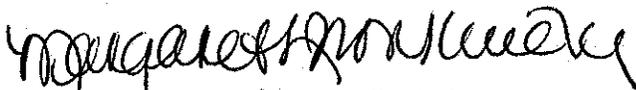
As a matter of policy, certainly it *cannot* be the law of West Virginia that a wealthy Delaware corporation can enter West Virginia and engage in conduct which, under our law

constitutes deliberate intent and results in an employee's death, and yet have our court system determine that there is no valid claim against such a corporation by those who actually suffered damages. The idea that West Virginia, a state of working people with a jurisprudential history of fairness to those who risk their lives for their employers, could embrace such a concept would be shocking to our collective conscience.

This case is not only of grave importance to the parties, but it presents this Court with an opportunity to expand and clarify our jurisprudence in the area of the interrelationship of the wrongful death and the deliberate intent statutes. If the Court does not wish to expound on those areas at this time, then the case could be decided as a *per curiam* by reiteration of the syllabus points previously decided under *Collins*, *TermNet*, and *Frazier*, and remanded to the lower court with directions that under the factual circumstances here present, the Petitioners are entitled to present their claims for damages to a jury.

In consequence of all of which, the Petitioner asserts that dismissal of the cause of action against Speedway was erroneous, and requests that this Court reverse the order of the Kanawha County Circuit Court and remand this matter for trial with directions.

Petitioner by Counsel



Margaret L. Workman, Bar # 5616
Margaret Workman Law, L.C.
1596 Kanawha Boulevard East
Charleston, WV 25311
(304) 343-9675

received
1-11-01

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Anthony Wayne Huffman, as Administrator
for the Estate of Betty Lou Huffman; Deceased, Plaintiff,

vs.

Civil Action No. 00-C-974
(Consolidated)
Judge Zakaib

Speedway Superamerica, LLC, d/b/a
Rich Oil Company, a Delaware corporation,
City of Charleston, a municipality,
Charleston Fire Department,
Bruce Gentry and Rob Warner, Defendants.

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CATHY S. GAISSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

ORDER

Nature of Ruling

The Petitioners, Denise Harrison, Donna Cobb, Dianna Mae Savilla, John Good, Joe Good, Mike Good, Earl Good, Roger Good, Jim Good, and Vernon Good, filed a Petition for Declaratory Judgment in the above-styled case, alleging that the administratrix of the estate of their sister, Linda Kannaird, had violated her fiduciary duty to them and demonstrated hostility to them and to their interests in connection with the wrongful death claim arising from Linda Kannaird's death, and sought to have such administratrix removed and one of their number appointed in her stead. After granting the petitioners the right to intervene for purposes of full hearing on their Petition for Declaratory Relief, this Court took evidence of the allegations of fact and heard arguments of law. In the instant ruling, this Court grants the Petition for Declaratory Relief, and based on the findings of fact and conclusions enunciated herein, orders that Eugenia Moschgat be removed as Administratrix of the Estate of Linda Kannaird and that Dianna Mae Savilla be appointed Adminsitratrix of the Estate of Linda Kannaird.

EXHIBIT 1

Procedural History

On June 28, 2000, the petitioners filed a Petition for Declaratory Relief, seeking to have the administratrix, Eugenia Moschgat, removed and one of their number appointed administrator/rix of the estate of Linda Kannaird; a Motion to Intervene, for purpose of having their Petition for Declaratory Relief heard, and a Motion for a Stay of Proceedings in the underlying wrongful death litigation pending before the Circuit Court of Kanawha County. The Motion to Intervene was granted for the purpose of permitting the intervenor-petitioners to have their petition for declaratory relief heard. A temporary stay of the underlying litigation was granted on July 5, 2000, but later lifted as to discovery. Hearings were held on the Petition for Declaratory Relief on July 5, 2000, July 31, 2000, August 1, 2000, August 4, 2000, and August 21, 2000.

Findings of Fact

(1) Linda Kannaird died on February 18, 2000, in Kanawha County, West Virginia. Prior to her death, she was a resident of Charleston, Kanawha County, West Virginia.

(2) On the 28th day of February, 2000, Eugenia Moschgat, biological daughter of Linda Kannaird, was upon her application appointed by the County Commission as the administratrix of the estate of Linda Kannaird. Ms. Moschgat was thirty-four years old at the time of the hearings in this matter, and a resident of North Carolina.

(3) Thereafter, Eugenia Moschgat retained the Ranson Law Firm, J. Michael Ranson and Cynthia Salmons, to represent her interests in connection with a wrongful death claim on behalf of the estate of Linda Kannaird.

(5) Linda Kannaird's brothers and sisters, the Petitioners herein, are part of a large, close-knit family, each of whom had a close and loving relationship with Linda Kannaird. All are life-long residents of Kanawha County, except for petitioner Dianna Mae Savilla who resides in Putnam County.

(5) As brothers and sisters of Linda Kannaird, the Petitioners are in the categories of persons who are named as beneficiaries under the wrongful death statute, W.Va. Code § 55-7-5 et seq.

(6) The petitioners were never apprised by the administratrix or by the Ranson Law firm of such representation or of the nature of such representation, nor did the administratrix or her counsel ever contact them or otherwise communicate with them as to the nature of the representation or as to their rights thereunder, except that petitioner Donna Cobb was told the name of one of the lawyers in the Ranson Firm, Cynthia Salmons. Thereafter, Petitioner Cobb contacted Ms. Salmons by telephone but received no information or legal advice concerning the wrongful death litigation.

(7) Administratrix Moschgat failed to share any information with Petitioners as to the existence of a will, as to the existence of insurance policies or information on beneficiaries thereon, and as to the existence of any preliminary action or investigation with respect to a wrongful death lawsuit, or that such a suit was being planned, although petitioners specifically sought such information. Nor did the administratrix or her counsel, prior to the petitioners obtaining their own counsel, ever contact any of the petitioners to provide any information or advice, to explain to them their legal rights under the statute, or to interview them with respect to facts in their knowledge which may be very significant in connection with the investigation of such

a wrongful death claim.

(8) Ms. Moschgat by her own choice had been totally estranged from her mother, the decedent, Linda Kannaird, for a period of approximately seventeen to twenty years prior to Linda Kannaird's death, and had no relationship whatsoever with her during that approximate period of time.

(9) Linda Kannaird for many years attempted to communicate with or otherwise have a relationship with Ms. Moschgat, but was refused. She was not permitted to ever see her grandson, who was approximately fourteen years old at the time of Linda Kannaird's death, or to have any communication or relationship with him. The decedent during life felt great sadness and later anger that her only biological child refused to have any relationship with her.

(10) Evidence from the petitioners, as well as from Ms. Moschgat's step-mother and her step-sister, and from writings and cards subpoenaed from them uniformly indicated that Ms. Moschgat recognized her step-mother as her mother, rather than Linda Kannaird.

(11) The only significant asset in the estate of Linda Kannaird is the potential recovery under the wrongful death statute.

(12) Ms. Moschgat regularly visited West Virginia with her son, and her son frequently spent summers in West Virginia with his grandfather. However, during these visits, Ms. Moschgat never visited or communicated with Linda Kannaird, or permitted her child to visit or communicate with Linda Kannaird. Nor did Ms. Moschgat visit with, communicate with, or have any relationship with any of the petitioners. Although biologically, Linda Kannaird and Eugenia Moschgat were mother and daughter, there was a total estrangement between them, and such estrangement was by Ms. Moschgat's choice for all of her adult life. Similarly, Ms. Moschgat

was estranged from the siblings of Linda Kannaird and their extended families.

(13) Statements made by Ms. Moschgat during the burial services and the surrounding time frame indicated that she did not share petitioners' grief, having experienced any such grief many years prior thereto.

(14) Although Ms. Moschgat permitted the petitioners to have a few photographs and few small items from the Kannaird residence just after the death, she later ejected them from the premises and refused them any of the remaining photographs, memorabilia, and other personal effects of the decedent, none of which had any significant monetary value, and to which Ms. Moschgat indicated she had no sentimental attachment, but which had great sentimental value to the petitioners. Such memorabilia was removed from the residence of Linda Kannaird and disposed of by Ms. Moschgat despite the fact that the petitioner siblings expressed their desire to have some of such memorabilia and personal effects of their sister.

(15) Administratrix Moschgat, a resident of North Carolina, departed the jurisdiction after the burial service, with the decedent's vehicle, without imparting any information to the petitioners as to any of the matters referenced herein, other than to say that she was not planning to file a lawsuit.

(16) In March, 2000, having received no information either from the administratrix or her counsel and having been permitted no opportunity to offer any input, petitioners retained Margaret L. Workman to represent their interests in the wrongful death litigation.

(17) Thereafter, Margaret L. Workman contacted the Administratrix to determine the status of such matters on behalf of the petitioners. Ms. Moschgat exhibited an attitude of hostility towards petitioners, stating that the matter was "not any of their business." Ms. Moschgat

indicated during that conversation that she had retained counsel, Ms. Cynthia Salmons.

(18) In March, 2000, Margaret L. Workman, attorney for the petitioners, contacted Ms. Salmons seeking to resolve the conflict then existing between the petitioners and Ms. Moschgat by proposing that one of the petitioners serve as co-administrator, and that Ms. Moschgat and petitioners each be able to have their own counsel in connection with wrongful death litigation which was expected to ensue, and that such counsel work as co-equals in the process of preparing and litigating this case. Ms. Salmons refused any such agreement. On the 30th day of November, 2000, administratrix Moschgat by counsel again refused to consider serving as co-administratrix with any of the petitioners.

(19) Petitioners have reason to believe that the deceased did make a will. During her life, she told others that she had made a will. However, the petitioners were ejected and all papers were removed from the residence of the decedent by the administratrix before petitioners were permitted any real examination of the premises.

(20) The administratrix, Eugenia Moschgat, has demonstrated an attitude of general hostility towards the petitioners, both prior to the death of Linda Kannaird and subsequent thereto. Furthermore, Ms. Moschgat demonstrated an attitude of general hostility toward Linda Kannaird during her lifetime. Ms. Moschgat has not during her adult lifetime demonstrated any interest in Linda Kannaird until her death and the ensuing wrongful death litigation.

(21) The administratrix, Eugenia Moschgat, has refused throughout the proceedings to consider serving as co-administrator with any of the petitioners.

(22) The petitioners have unanimously agreed that, if Ms. Moschgat is removed as administratrix, petitioner Dianna Mae Savilla should serve as the administratrix of the estate of

keep beneficiaries fully informed and to hold their interests at least as high as the interests of the administrator's.

(7) An administrator of an estate in a wrongful death claim may be removed for failure to adhere to the fiduciary duty required by law. McClure v. McClure, 184 W. Va. 649, 403 S.E.2d 197, Syl. Pt. 5 (1991).

(8) Beneficiaries under the wrongful death statute have the right to bring action to settle disagreements over the proper administration of a wrongful death estate. A petition for a declaratory judgment is the proper means of seeking removal of an administrator of an estate in a wrongful death claim and the circuit court is the proper forum. Trail v. Hawley, 163 W. Va. 626, 629, 259 S.E.2d 423, 425 (1979); McClure, 184 W. Va. at 654, 403 S.E.2d at 202 (citing Welsh v. Welsh, 136 W. Va. 914, 69 S.E.2d 34, Syl Pt. 4 (1952)).

(9) When a wrongful death action is brought by the personal representative of the decedent's estate, such representative serves as trustee for the heirs who will receive any recovery. Trail, 163 W. Va. at 628, 259 S.E.2d at 425 (citing Thompson v. Mann, 65 W. Va. 648, 64 S.E. 920 (1909)). See also McClure, 184 W. Va. at 649, 403 S.E.2d at 197.

(10) The primary damages in wrongful death are sorrow, grief, mental anguish, and loss of society. Voelker v. Frederick Business Properties Co., 195 W. Va. 246, 465 S.E.2d 246, Syl. Pt. 2 (1995); W. Va. Code § 55-7-6(c). Loss of society damages are determined by loss of relationship, harmonious family relationship, participation in family activities, and lack of absence for extended periods, among other similar factors. Id. at 251-52. Furthermore, a beneficiary has the right to present evidence to a jury in asserting their claim and proving their damages.

Voelker, 195 W. Va. at 246, 465 S.E.2d at 246, Syl Pt. 2.

(11) The right of administration of an estate is generally held to belong to the person who stood nearest the decedent in blood, affection, and interest, if he was a suitable person. Further, the right of administration of an estate ordinarily belongs to the one owning an estate. In Re Stollings, 82 W.Va. 18, 95 S.E.2d 446 (1918). Because (1) Eugenia Moschgat had no relationship whatsoever with the decedent and had not had any such relationship by her choice for all of her adult life; (2) the petitioners each had a close personal relationship with the decedent; and (3) loss of relationship is the primary element of damages in wrongful death, especially where there is no financial dependence, the petitioners are the primary owners of the wrongful death estate and as such, one of their number is the most suitable administrator.

(12) The position adopted by the administratrix Moschgat in the declaratory judgment proceedings reflects that she views the role of the administratrix as a "super-beneficiary" of sorts, who possesses the right to determine who will and will not be allowed to testify, to be in charge of negotiating and proposing settlements, and to otherwise make strategical decisions in the wrongful death litigation. This contention by the administratrix Moschgat does not comport with the rights of the other beneficiaries as set forth in law. Voelker, 195 W. Va. at 654, 465 S.E.2d at 202 (also supporting the contention that beneficiaries may bring action against an administrator to determine whether the administrator is fulfilling her fiduciary duties in connection with prosecution of a wrongful death action); See also, McClure, 184 W. Va. at 654, 403 S.E.2d at 202 (citing Trail, 163 W. Va. at 626, 259 S.E.2d at 423) (describing the personal representative as a merely nominal party, contrary to administratrix Moschgat's position.)

(13) The evidence heard in the petition for declaratory relief supports petitioners' contention that they will have a greater interest in a recovery, if any, from the wrongful death

action because, unlike the administratrix Moschgat, they have suffered the loss of society and relationship with the decedent. Voelker, 195 W. Va. at 246, 465 S.E.2d at 246, Syl Pt. 2 (describing the recovery of damages to include loss of relationship and sorrow); See also W. Va. Code § 55-7-6(c).

(14) The administratrix Moschgat demonstrated hostility towards the petitioners by ejecting them from the home of Linda Kannaird, by disposing of Linda Kannaird's memorabilia, photographs, and other personal effects without permitting the petitioners to have access to them, by indicating that the litigation was none of their business, by refusing to have any relationship with them or with the decedent, Linda Kannaird, during any of her adult lifetime, by failing to give any information to them about the wrongful death litigation or their rights thereunder, and by taking the position that, as administratrix, she occupied a position superior to theirs in the wrongful death litigation. Further, the Court had the opportunity during the course of the several hearings on the Petition for Declaratory Relief to observe the demeanor and conduct of the parties, and such observations further support the conclusion that there is undeniable conflict and definite hostility between the petitioners and Ms. Moschgat.

(15) The refusal of the administratrix Moschgat to even consider serving as co-administrator with one of the petitioners further evidences her hostility to them and to their interests.

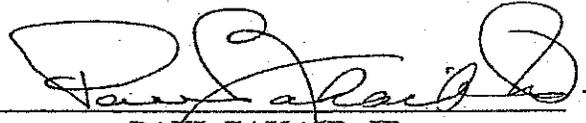
In consequence of all of which, this Court does hereby **ORDER** that the relief requested by the petitioners in the Petition for Declaratory Relief be granted, and that Eugenia Moschgat be removed as administratrix of the estate of Linda Kannaird. The Court does **FURTHER ORDER**

that Dianna Mae Savilla be appointed administratrix of the estate of Linda Kannaird for purposes of pursuing the underlying wrongful death litigation on behalf of the beneficiaries under the wrongful death statute, W.Va. Code § 55-7-1, et seq. An objection and exception is saved to all * parties aggrieved by this Final Order.

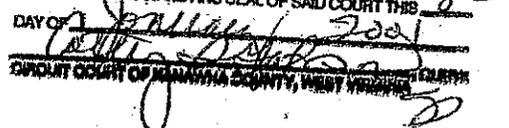
The Court will advise all other counsel of record in the consolidated cases of the change of administratrix.

It is **FURTHER ORDERED** that a certified copy of this Final Order be sent to all counsel of record in the consolidated actions.

ENTER this 20th day of January, 2001:



PAUL ZAKAIB, JR.
CIRCUIT JUDGE

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY B. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 8th
DAY OF January, 2001

CIRCUIT CLERK OF KANAWHA COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2005 APR -8 P11 3-03
CATHY S. LINTON, CLERK
KANAWHA CO. CIRCUIT COURT

DIANNA MAE SAVILLA, Administratrix
of the Estate of LINDA SUE GOOD KANNAIRD,
deceased,

Plaintiff,

v.

CIVIL ACTION NO. 00-C-974
(Consolidated)
Judge Zakaib

SPEEDWAY SUPERAMERICA, LLC, d/b/a
RICH OIL COMPANY, a Delaware corporation,
CITY OF CHARLESTON, a municipality,
CHARLESTON FIRE DEPARTMENT,
BRUCE GENTRY, and ROB WARNER,

Defendants.

ORDER

This matter came on to be heard by the Court on the Motion to Dismiss Plaintiff's Second Amended Complaint of defendant Speedway SuperAmerica, LLC, d/b/a Rich Oil and the Plaintiff's Petition to Certify Questions to the West Virginia Supreme Court of Appeals. Upon consideration of the motions, memoranda, responses and replies of the respective parties and being fully advised, the Court makes the following findings of fact and conclusions of law:

Findings of Fact

1. Linda Kannaïrd died of drowning on February 18, 2000.
2. At the time of her death, Ms Kannaïrd was working in the course of her employment with SSA at its Rich Oil Store in Sissonville, West Virginia.
3. At the time of her death, Ms. Kannaïrd was unmarried. She had no person wholly dependent on her for financial support. She was survived by one child, Eugenia Moschgat.

4. Eugenia Moschgat was originally named as Administratrix of Linda Kannaird's estate. She was subsequently replaced by Court order by Linda Kannaird's sister, Dianna Mae Savilla. In addition to her daughter, Ms. Kannaird was survived by ten (10) brothers and sisters.

5. Dianna Mae Savilla, as Administratrix of Linda Kannaird's estate, is plaintiff in this action and asserts a cause of action for death by deliberate intention against SSA pursuant to W. Va. Code § 23-4-2. She further asserts a cause of action for negligence against City of Charleston, Charleston Fire Department, Bruce Gentry and Rob Warner.

CONCLUSIONS OF LAW

1. Pursuant to W. Va. Code § 23-2-6, SSA is immune from liability for the death to or injury of an employee unless a plaintiff with standing can avoid that immunity as provided by law.

2. SSA's immunity can only be avoided by a successful action against it for intentional injury under W. Va. Code § 23-4-2, part of the Workers' Compensation Act. Plaintiff has alleged such a cause of action.

3. The deliberate intention cause of action under W. Va. Code § 23-4-2 supersedes all other causes of action, common law or statutory. W. Va. Code § 23-4-2; Bell v. Vecellio & Grogan, Inc., 197 W. Va. 138, 475 S.E.2d 138 (1996); Gallapoo v. Wal-Mart Stores, Inc., 197 W. Va. 172, 475 S.E.2d 172 (1996).

4. W. Va. Code § 23-4-2(b), in effect at the time of injury (now §23-4-2(c), but referred to herein by its original citation) provides that a deliberate intention action may be brought by "the employee, the widow, widower, child or dependent of the employee" Such individuals may recover workers' compensation benefits that are available to them and may sue "for any excess of damages over the amount received or receivable under this chapter."

5. The Wrongful Death Act, W.Va. Code §§ 55-7-5 and 55-7-6, is not applicable to deliberate intention actions brought pursuant to W.Va. Code § 23-4-2 and, therefore, is not applicable to this case. The statutes were not enacted in the same time frame. In addition, they neither amend each other nor even refer to each other. The two statutes are not in pari materia. Berkeley County Pub. Serv. Sewer Dist. v. West Virginia Pub. Serv. Comm'n, 204 W.Va. 278, 512 S.E.2d 478 (2000).

6. Since Linda Kannaird is deceased, an action against her employer, SSA, can be brought only by her widower, child or dependent. Since she did not have a widower, or dependent, only her child, Eugenia Moschgat, can pursue a deliberate intention action against SSA.

7. Pursuant to W.Va. Code § 23-4-2, Dianna Mae Savilla, as Administratrix of the estate of Linda Kannaird, has no cause of action against SSA. Further, the brothers and sisters of Linda Kannaird are not within the classes of persons who may recover workers' compensation benefits or damages for the death of Linda Kannaird.

8. Therefore, plaintiff Dianna Mae Savilla, has no standing to pursue this action as to SSA, and her complaint, as to SSA, should be dismissed.

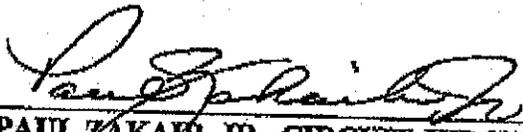
9. Only Eugenia Moschgat may pursue a claim and seek to recover damages for the death of Linda Kannaird.

10. Pursuant to W.Va. Code § 58-5-2, the decision to certify questions of law to the Supreme Court of Appeals is within the discretion of the circuit court. The issue which plaintiff seeks to certify to the Supreme Court of Appeals relates to a statute, W.Va. Code § 23-4-2, which the Court finds is clear and unequivocal on the issue before the Court. The Court, therefore, finds that certification is unnecessary and improper in this case.

The Court further concludes that there is no just reason for delay in the entry of a final order on these motions.

It is, therefore, **ORDERED** that the motion to dismiss of defendant Speedway SuperAmerica, LLC, d/b/a Rich Oil be, and it is hereby, granted; and it is further **ORDERED** that the plaintiff's Petition to Certify Questions as to said defendant be, and it is hereby, denied; and it is further **ORDERED** that this action be, and it is hereby, dismissed as to defendant Speedway SuperAmerica, LLC, d/b/a Rich Oil, with prejudice; and it is further **ORDERED** and directed that the Clerk of this Court enter final judgment in favor of defendant Speedway SuperAmerica, LLC, d/b/a Rich Oil and against Plaintiff.

Dated this 8th day of April, 2005.


PAUL ZAKAY, JR., CIRCUIT JUDGE

RECORDED

4/14/05
Dated: 4/14/05
By: 
Clerk

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IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA
In Charleston

Dianna MAE SAVILLA, Administratrix
of the Estate of LINDA SUE GOOD KANNAIRD,
deceased,

Petitioner,

vs.

No: 05-2519

SPEEDWAY SUPERAMERICA, LLC, d/b/a
RICH OIL COMPANY, LLC, a Delaware corporation,
Respondent

CERTIFICATE OF SERVICE

I, Margaret L. Workman, counsel for the Petitioner the above-styled case, certify that on the 1ST day of May, 2006, I served a true and correct copy of the foregoing **PETITIONER'S MEMORANDUM IN SUPPORT OF PETITION FOR APPEAL** upon all counsel of record by depositing a true copy thereof in the U. S. Mail, postage prepaid, to them at their office addresses as indicated below:

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