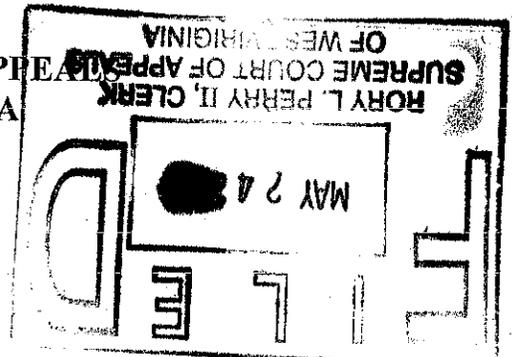


IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA
Charleston



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

Petitioner,

V.

No: 33053

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

Respondent.

**RESPONSE OF DEFENDANT SPEEDWAY SUPERAMERICA LLC,
D/B/A RICH OIL, TO PETITIONER'S MEMORANDUM IN
SUPPORT OF PETITION FOR APPEAL**

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**RESPONSE OF DEFENDANT SPEEDWAY SUPERAMERICA LLC,
D/B/A RICH OIL, TO PETITIONER'S MEMORANDUM
IN SUPPORT OF PETITION FOR APPEAL**

Having been granted permission to file her appeal out of time by this Honorable Court, Petitioner, Dianna Mae Savilla, Administratrix of the Estate of Linda Sue Kannaird, filed her petition for appeal on September 9, 2005. The appeal is from the final order of the Circuit Court of Kanawha County, West Virginia, the Honorable Paul Zakaib, Judge, entered on April 8, 2005, which granted the Motion to Dismiss of Speedway SuperAmerica LLC, d/b/a Rich Oil ["SSA"]. In fact, as is apparent from the record, the circuit court considered certain matters outside the pleadings, thus converting the motion to one for summary judgment under Rule 56 of the West Virginia Rules of Civil Procedure. W. Va. R. Civ. P. 12(b) (2006); Gunn v. Hope Gas, Inc., 184 W. Va. 600, 402 S.E.2d 505 (1991). In addition, the circuit court's order denied Petitioner's Motion to Certify Questions to this Court.

STATEMENT OF FACTS

Petitioner's statement of facts, including the inappropriate characterization of SSA and its counsel, consists of a contrived diatribe against SSA which has no proper place in Petitioner's brief. Thus, SSA and its counsel will not respond in kind to Petitioner's personal attacks. It seems clear that Petitioner's failure to find any support for her position in the case law has led to a desperate attempt to divert the Court's attention from the only matters at issue – i.e., who is the proper plaintiff in a suit brought pursuant to W. Va. Code § 23-4-2. and who are the proper persons to recover in such a suit.

Additionally, the outright hostility of Petitioner towards Eugenia Moschgat, decedent's daughter, is an apparent irreconcilable conflict given the position taken by Petitioner's counsel that Ms. Moschgat is one of the beneficiaries of Ms. Kannaird, whom Petitioner's counsel claims to represent.¹

It is clear that Ms. Moschgat is a beneficiary under either interpretation of the statute. The majority of the facts asserted by Petitioner have no bearing on the outcome of this appeal. The operative facts for purposes of the appeal are that Ms. Kannaird, who was an employee of SSA, is alleged to have died in the course of her employment, there is no widower or dependent, and Ms. Moschgat was decedent's only child.

With regard to the procedural history, Petitioner persists in wasting the Court's time by arguing that SSA's removal of this case to federal court was somehow improper and constituted misconduct. Again, this has nothing to do with the matter at issue. Furthermore, Petitioner continues improperly to fail to acknowledge that the Fourth Circuit Court of Appeals upheld, in all respects, the propriety of the removal, which was, in any event, initiated by the other

¹ Should the Court rule that Petitioner is the proper plaintiff, but Ms. Moschgat is the only potential beneficiary, Petitioner could not possibly continue in her fiduciary role.

defendants, not SSA. The district court ultimately remanded the case when Petitioner moved to dismiss her federal constitutional claim, something she could have done immediately upon removal instead of prolonging the proceeding by insisting the case was not removable in the first instance. Thus, it is Petitioner that initiated the delay of which she complains.

Turning to the merits of the appeal, SSA will address Petitioner's arguments in the order presented.

ARGUMENT

1. THE LAW OF THE CASE DOCTRINE DOES NOT SERVE TO CURE PETITIONER'S LACK OF STANDING.

For the first time, in her brief, Petitioner raises an argument based on the "law of the case doctrine," an issue not mentioned in Petitioner's assignment of error on appeal. The law of the case doctrine has no applicability to any matter at issue on this appeal and, in any event, cannot be used to allow waiver of subject matter jurisdiction.

The law of the case doctrine, which has been recognized in West Virginia law for many years, is a rule established for carrying out public policy purposes. Case law shows that "the doctrine is a salutary rule of policy and practice, grounded in important considerations related to stability in the decision making process, predictability of results, proper working relationships between trial and appellate courts, and judicial economy." State ex rel. Frazier & Oxley v. Cummings, 214 W. Va. 802, 808, 591 S.E.2d 728, 734 (2004) (citing with approval United States v. Rivera-Martinez, 931 F.2d 148, 151 (1st Cir. 1991)). In meeting these policy concerns, the "law of the case" doctrine simply directs that where the West Virginia Supreme Court of Appeals has made a final determination on an issue, that same issue cannot later be overturned.

The West Virginia Supreme Court has specifically defined this doctrine as follows: "when a question has been **definitely determined** by [the Supreme Court of Appeals] its decision is conclusive on the parties, privies and courts, including this Court, upon a second

appeal or writ of error and it is regarded as the law of the case." Syl. pt. 1, Mullins v. Green, 145 W. Va. 469, 115 S.E.2d 320 (1960) (emphasis added). See also Syl. pt. 3, Bass v. Rose, 216 W. Va. 587, 609 S.E.2d 848 (2004) (per curiam). While the bulk of cases dealing with the law of the case doctrine stem from instances in which the Supreme Court of Appeals has heard an appeal and remanded the case for further proceedings consistent with its opinion, the West Virginia Supreme Court of Appeals has recently noted that a "definite determination" also occurs where a circuit court has entered a final order and the Supreme Court of Appeals refuses to hear an appeal on that issue. State ex rel. TermNet Merchant Services, Inc. v. Jordan, 217 W. Va. 696, 619 S.E.2d 209 (2005) ("[w]hen this Court refused to hear Petitioner's appeal of that judgment, it became the law of the case."). However, where the law of the case doctrine is invoked for issues not explicitly decided by the Supreme Court of Appeals but on issues implicitly decided, the implicit conclusion allegedly made by the Court must be "necessary to a decision in the case," or it is merely dicta, which neither creates precedent nor establishes the law of the case." Frazier & Oxley, 591 S.E.2d at n. 8 (citing In re Kanawha Valley Bank, 144 W. Va. 346, 382-83, 109 S.E.2d 649, 669 (1959)).

There are, as with most rules of law, exceptions to the application of the law of the case doctrine. The Supreme Court of Appeals concedes that "the rule known as 'law of the case' is not absolute but yields to the ends of justice." Highland v. Davis, 121 W. Va. 524, 527, 6 S.E.2d 922, 923 (1939). As such, the law of the case doctrine may "be departed from . . . where the court has become convinced that in the first instance it erred, and that a different course must be pursued in order that justice may be done." Id.

In this case, the circuit court order referred to by Petitioner merely substituted one person as administratrix in place of another. As discussed, *infra*, in this memorandum, it has never been SSA's position that Eugenia Moschgat, as administratrix, should pursue this action against

SSA rather than Linda Savilla, as administratrix. It is SSA's position that whoever was found to be the proper administratrix could pursue the wrongful death action against the City of Charleston and the Charleston Fire Department. SSA further contends that neither individual, as administratrix, is the proper party to pursue a deliberate intent action under the Workers' Compensation Act. That action is preserved to the "employee, the widow, widower, child or dependent. . . ." W. Va. Code § 23-4-2. Therefore, the circuit court's ruling as to the proper administratrix and this Court's refusal to hear an appeal thereof is simply irrelevant to the matter at issue.

Furthermore, the more significant issue of this appeal, i.e., who may recover damages, is not dependent on the identity or status of the nominal plaintiff. Even if Petitioner is held to be the proper plaintiff in this case, she may recover only for the benefit of Eugenia Moschgat, daughter of the decedent.

Additionally, even if the law of the case doctrine could be construed to hold that Petitioner is the proper plaintiff herein, it cannot be so applied, because the issue is one of standing and, hence, jurisdictional. A review of West Virginia case law and the holdings of other courts throughout the country suggest that the law of the case doctrine will not prevent a court from re-examining a claim of lack of subject matter jurisdiction. Even in instances in which courts have specifically ruled on subject matter jurisdiction once, most federal and state courts permit the issue to be relitigated. Thus, the doctrine may not be used to waive subject matter jurisdiction.

West Virginia has long recognized that "standing is an element of jurisdiction over the subject matter." State ex re. Paul B. v. Hill, 201 W. Va. 248, 496 S.E.2d 198 (1997). See also State ex rel. Abraham Linc. Corp. v. Bedell, 216 W. Va. 99, 602 S.E.2d 542 (2004). Quite ironically, the case cited by the Petitioner in support of her argument that the law of the case

prohibits Speedway's dismissal from the current action holds that "[l]ack of jurisdiction may be raised for the first time in this court." TermNet, 619 S.E.2d at 211. The Court held that, despite the law of the case, contempt orders issued in the matter were void because the circuit court lacked subject matter jurisdiction.

In fact, "[l]ack of jurisdiction of the subject matter may be raised in any appropriate manner . . . and at any time during the pendency of the suit or action." McKinley v. Queen, 125 W. Va. 619, 625, 25 S.E.2d 763, 766 (1943). It stands to reason then that standing, as a component of subject matter jurisdiction, can also be raised at any time during litigation. State ex rel. Abraham Linc. Corp., 602 S.E.2d at 554. Most importantly, Rule 12(h)(3) of the West Virginia Rules of Civil Procedure indicates that "[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." W. Va. R. Civ. P. 12(h)(3).

Because jurisdiction over the subject matter is such an important issue, the West Virginia Supreme Court of Appeals has made clear that "[u]nlike personal jurisdiction, subject-matter jurisdiction may not be waived or conferred by consent and must exist as a matter of law for the court to act. For this reason, lack of jurisdiction of the subject matter may be raised for the first time in this Court and even upon this Court's own motion." State ex rel. Smith v. Thornsbury, 214 W. Va. 228, 233, 588 S.E.2d 217, 222 (2003). See also Syl. Pt. 6, State ex rel. Hammond v. Worrell, 144 W. Va. 83, 106 S.E.2d 521 (1958) (citing Syl. Pt. 3, Charleston Apartments Corp. v. Appalachian Electric Power Co., 118 W. Va. 694, 192 S.E. 294 (1937)). The Supreme Court has even gone so far as to hold that orders entered by a lower court are void because when entered, the court lacked subject matter jurisdiction. See, e.g., Smith, supra.

Given the Supreme Court's directive that subject-matter jurisdiction cannot be waived, logic dictates that the law of the case doctrine, which is merely implemented as a matter of

policy, does not trump the rule prohibiting waiver of subject matter jurisdiction. While the West Virginia Supreme Court of Appeals has not directly spoken on this issue, many other courts have, holding that the law of the case doctrine will not prevent dismissal for lack of subject matter jurisdiction. For example, the Fourth Circuit has held that the law of the case doctrine does not preclude reconsideration of the standing issue, noting

[t]he ultimate responsibility of the federal courts, at all levels, is to reach the correct judgment under law. Though that obligation may be tempered at times by concerns of finality and judicial economy, nowhere is it greater and more unflagging than in the context of subject matter jurisdiction issues, which call into question the very legitimacy of a court's adjudicatory authority. These questions are of such overriding import that the Supreme Court has, in other contexts, carved out special exceptions for them to the general rules of procedure. . . . Thus, the Supreme Court itself has decided that the value of correctness in the subject matter jurisdiction context overrides at least some of the procedural bars in place to protect the values of finality and judicial economy. . . . Law of the case, which is itself a malleable doctrine meant to balance the interests of correctness and finality, can likewise be calibrated to reflect the increased priority placed on subject matter jurisdictional issues generally and . . . standing in particular which represents perhaps the most important of all jurisdictional requirements.

American Canoe Ass'n, Inc. v. Murphy Farms, Inc., 326 F.3d 505, 515 (4th Cir. 2003). See also CNF Constructors, Inc. v. Donohoe Construction Co., 57 F.3d 395 (4th Cir. 1995) (per curiam) (stating that the law of the case doctrine is discretionary and will not prevent a circuit court from re-reviewing a claim of lack of jurisdiction); Amen v. City of Dearborn, 718 F.2d 789 (6th Cir. 1983) (holding that the law of the case doctrine does not foreclose reconsideration of subject matter jurisdiction); Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 118 (3rd Cir. 1997) (stating that "the law of the case, as it relates to jurisdiction, . . . appl[ies] only to transfer cases and not to cases that raise serious jurisdictional concerns, such as the plaintiff's standing to sue."); Baca v. King, 92 F.3d 1031, 1034 (10th Cir. 1996) (declaring that the law of the case doctrine "is not a fixed rule that prevents a federal court from determining the question of its own subject matter jurisdiction in a given case.").

State courts also generally agree that the law of the case doctrine cannot be used to waive subject matter jurisdiction. See, e.g., Westbrook v. Savin Rock Condominiums Ass'n, Inc., 50 Conn. App. 236, 240, 717 A.2d 789, 792 (1998) (holding that subject matter jurisdiction may be re-evaluated, and recognizing that the "law of the case is not written in stone but is a flexible principle of many facets adaptable to the exigencies of the different situations in which it may be invoked."); Stewart v. Kingsley Terrace Church of Christ, Inc., 767 N.E.2d 542, 546 (Ind. 2002) (holding that the law of the case doctrine will not prevent a court from reexamining subject matter jurisdiction because that issue goes to the very heart of a court's authority); Hughes v. Pennsylvania State Police, 152 Pa. Commw. 409, 619 A.2d 390 (1992) (recognizing that the law of the case doctrine will not preclude reconsideration of subject matter jurisdiction); Morning View Care Center v. Ohio Dept. of Job and Family, 2004 WL 2591237 (Ohio 2004) (holding that the law of the case doctrine does not preclude the Court of Appeals from dismissing for lack of subject matter jurisdiction).

Therefore, Petitioner's argument regarding the law of the case doctrine is misplaced. SSA's argument with regard to the proper party to pursue a deliberate intent suit implicates subject matter jurisdiction which cannot be waived. In any event, the circuit court's ruling as to who was the proper administratrix is irrelevant to the issue of who may bring a deliberate intent suit and, more specifically, as to who may recover damages in such a suit.

**2. PURSUANT TO WEST VIRGINIA'S WORKERS' COMPENSATION ACT,
ONLY DECEDENT'S DAUGHTER HAS A CAUSE OF ACTION TO
RECOVER DAMAGES FOR DECEDENT'S DEATH.**

Petitioner's analysis is flawed in part because it ignores the effect of W. Va. Code § 23-2-6, which is where the analysis must begin. That statute, without more, would completely bar any action by anyone against SSA in this case. Having first created complete immunity for employers from civil liability for work-related injuries, the Legislature then created a statutory

exception to that immunity. The sole exception is provided where an injury is "intentionally" caused by an employer. W. Va. Code § 23-4-2. Petitioner has consistently conceded that she must plead and prove that SSA acted with deliberate intent in causing the death of Linda Kannaird so that Petitioner can remove the bar established by W. Va. Code 23-2-6 and proceed with her wrongful death action. What she continues to fail to recognize is that W. Va. Code § 23-4-2 completely replaces the wrongful death statute as the basis for any lawsuit that seeks recovery from an employer for the death of an employee who is killed on the job.² There are two issues on the appeal: (1) whether Petitioner has standing to prosecute the action on behalf of decedent's estate; and (2) regardless of who may prosecute the action, whether damages may be awarded to anyone other than decedent's daughter, Eugenia Moschgat. It is ultimately this second issue that is fatal to Petitioner's case and, therefore, it will be considered first.

A. Decedent's Daughter, Eugenia Moschgat, is the Only Person Who May Recover for Decedent's Death in a Deliberate Intent Case

The question of who may recover damages for Linda Kannaird's death is settled West Virginia case law, not dependent on an analysis of whether a W. Va. Code § 23-4-2 action is purely statutory as SSA contends or an action "as if this chapter had not been enacted," as plaintiff contends. The very case most strongly relied on by Petitioner actually destroys her claim.

Plaintiff relies on Collins v. Dravo Contracting Co., 114 W. Va. 229, 171 S.E. 757 (1933), which she contends is still good law. Pointing out that the pertinent language of W. Va. Code § 23-4-2(b) [now W. Va. Code § 23-4-2(c)] was the same at the time of the Collins

² Petitioner can pursue damages in a wrongful death action from a nonemployer, such as the City of Charleston, Charleston Fire Department, and City firefighters Bruce Gentry and Rob Warner as those defendants are not afforded protection under the Worker's Compensation Act. Under the Wrongful Death Act, W. Va. Code § 55-7-6, the action is brought by the personal representative of the deceased person, and damages are distributed to "the surviving spouse and children, including adopted children and stepchildren, brothers, sisters, parents and any persons who were financially dependent upon the decedent at the time of his or her death. . . ." W. Va. Code § 55-7-6(b) (emphasis added). Contrary to the requirements of W. Va. Code § 23-4-2, a showing of financial dependency on the decedent by siblings is not required. Rice v. Ryder, 184 W. Va. 255, 400 S.E.2d 263 (1990).

decision as it is today, Petitioner notes that the Collins Court held that an administratrix was the proper person to pursue a deliberate intent claim.

Conceding that issue for the purpose of this part of the argument, Petitioner apparently failed to read, or, at least, certainly failed to advise the Court of the rest of the paragraph in which the Court's holding appears. For while it is true that the Court in Collins found that the administratrix could properly pursue the suit as plaintiff under the Wrongful Death Act, W. Va. Code § 55-7-6, the Court further found that W. Va. Code § 55-7-6 would apply, but only "to the extent not inconsistent with Code, § 23-4-2." Collins, 171 S.E. at 759. In its death knell to Petitioner's case, the Court went on to hold that "[s]ince Code, 23-4-2, names the beneficiaries who take, the recovery under its terms would be distributed to "the employee, the widow, widower, child or dependent" and not in accordance with Code, 55-7-6." Id. Thus, the very case relied on by Petitioner conclusively holds that the persons entitled to "take" are those enumerated in W. Va. Code § 23-4-2, not those enumerated in W. Va. Code § 55-7-6. The same conclusion was reached by the Court in Mandolidis v. Elkins Industries, Inc., 161 W. Va. 695, 246 S.E.2d 907, 911-12 (1978).

All of this, of course, is consistent with the Workers' Compensation Act itself. Under the Act, brothers and sisters, unless invalid and dependent, may not recover workers' compensation benefits. Since a deliberate intent action under W. Va. Code § 23-4-2 is brought "for any excess of damages over the amount received or receivable under this chapter," it logically follows that individuals who may not receive workers' compensation benefits also may not sue for damages.

Incredibly, after somehow missing the above language in the memorandum supporting her petition, Petitioner now attempts to mislead the Court by suggesting that the ruling in Collins is dicta. It is not. It is an integral part of the opinion, which Petitioner does not even try to

distinguish. Obviously, she could not do so in any event. Instead, Petitioner picks the portion of Collins that she likes and discards the rest.

Since no dependents were identified in the Complaint or in the discovery herein, the employee is deceased and there is no widower, only the daughter is entitled to take. Notably, decedent's daughter, through her independent counsel,³ has a separate settlement pending with SSA. Petitioner can hardly take issue with the case she has cited as settled law. In fact, Petitioner has a fiduciary obligation to Eugenia Moschgat to preserve her right to recovery. Instead, Petitioner has taken an adverse and hostile position toward Ms. Moschgat.

The Collins case relied on by Petitioner conclusively defeats Petitioner's claim on the issue of who may recover and thus, in effect, mandates a decision favorable to SSA. SSA concedes that Collins ruled that the proper plaintiff in an action such as this is the administratrix. However, even if the Court follows this precedent, Collins mandates a finding that Eugenia Moschgat is the only beneficiary of any award.⁴ However, SSA contends that recent changes in the workers' compensation law as interpreted by the Court, support the conclusion that Ms. Moschgat is the proper plaintiff as well.

B. Decedent's Daughter, Eugenia Moschgat, is the Only Person Entitled to Bring an Action Against SSA for Decedent's Death

The conversion of W. Va. Code § 23-4-2 from a statute that preserved a common law negligence action to an independent statutory action began in 1978. That year, the West Virginia Supreme Court of Appeals interpreted W. Va. Code § 23-4-2 in a way that greatly expanded the

³ As Petitioner notes in her brief, SSA was and is well aware that Ms. Moschgat has separate counsel. This does not affect the obligation of Petitioner as fiduciary to Ms. Moschgat if Petitioner's legal argument is correct. Petitioner has seriously violated that obligation, and the damage to Ms. Moschgat is irreparable.

⁴ Petitioner suggests that SSA's only motive for taking the position it has is to achieve a small settlement. First, SSA's motive is not an issue here. Although not relevant to any issue before the Court, it should be noted that the pending settlement reached by SSA with Ms. Moschgat was consistent with settlements reached with other victims of the same flood.

situations in which an employee could prove that his employer had intentionally injured him. Mandolidis v. Elkins Industries, Inc., 161 W. Va. 695, 246 S.E.2d 907, 911-12 (1978). Rather than requiring an actual intention by the employer to cause injury, a worker had only to show recklessness, or a "knowledge and an appreciation of the high degree of risk of physical harm to another created thereby." Id. at 914. Where this higher degree of culpability was established, the employee had a common law action, because "[t]he workmen's compensation system completely supplanted the common law tort system only with respect to Negligently caused industrial accidents. . . ." Id.⁵

In 1983, the West Virginia Legislature substantially changed W. Va. Code § 23-4-2 in order to correct what it believed were some of the excesses of the Mandolidis decision. Federal courts inferred, from cases decided by the West Virginia Supreme Court of Appeals, that these amendments did not change the underlying cause of action. See Parson v. Shoneys, Inc., 580 F. Supp. 129 (S.D. W. Va. 1983); Thomas v. Kroger Co., 583 F. Supp. 1031 (S.D. W. Va. 1984). In Parsons, the injured employee's husband brought a claim for loss of consortium as a result of injuries to his wife that he alleged were intentionally inflicted by Shoneys. Shoneys defended on the ground that spouses are not named among the classes of individuals who are allowed to recover for intentionally inflicted injuries under W. Va. Code § 23-4-2(c) [formerly W. Va. Code § 23-4-2(b)]. Apparently unaware of Collins, supra, the federal court decided that W. Va. Code § 23-4-2 did not create a new cause of action, but preserved a common law action against an

⁵ This was consistent with earlier decisions that had held that an intentional injury did not create a new, statutory cause of action, but opened the door to actions under common law against the employer. In Brewer v. Appalachian Constructors, Inc., 133 W. Va. 739, 65 S.E.2d 87, 92 (1951), the Court quoted the intentional injury subsection of the statute, which is essentially unchanged from today's W. Va. Code § 23-4-2(c), and said that "[w]e are of the opinion . . . that the statute merely preserves unto an employee his common law right of action to sue for such an injury."

employer. Thus, the Court concluded, as the common law recognized a right of consortium, it was available in a Mandolidis action as well. In Thomas, the Court contrasted W. Va. Code § 23-5A-1, which created a cause of action for retaliatory discharge, with a Mandolidis action, which did not create a cause of action but preserved the employee's common law right of action.⁶ Interestingly, Petitioner relies heavily on Parsons v. Shoneys, decided before the change in the law, refusing to recognize the results of the Legislature's actions or the fact that the Parsons decision is inconsistent with Collins and Mandolidis.

In 1996, the West Virginia Supreme Court of Appeals clarified the effects of the statutory changes to the Workers' Compensation Act in 1983. The Court stated that the new statute was a legislative response to the changes brought about by the Mandolidis decision and that the statutory changes supplanted the common law right of recovery for intentional injuries caused by an employer. In Bell v. Vecellio & Grogan, Inc., 197 W. Va. 138, 475 S.E.2d 138 (1996), the Court was faced with a deliberate intent action brought by a West Virginia ironworker who was injured in Maryland. The trial court had granted summary judgment for the employer on the grounds that the employee had a common law tort action against the employer, and such action must be brought in Maryland, where the injury occurred. The West Virginia Supreme Court of Appeals reversed, ruling that "the deliberate intention cause of action expressed within W. Va. Code § 23-4-2(c) (1991) supersedes a common law cause of action against an employer and is woven within the workers' compensation fabric in this State. . . ." Id. at 139.

The Court reviewed the history of the deliberate intention exception, the Mandolidis decision and the legislative actions to revise the law to make recovery more difficult. "In all cases prior to the revision of W. Va. Code § 23-4-2 in May 1983, including Mandolidis,

⁶ But see Knox v. Laclede Steel Co., 861 F. Supp. 519 (N.D. W. Va. 1994), in which the district court concluded that the deliberate intention provisions of the state's workers' compensation law were now part of the statutory scheme, rather than allowing recourse to common law. Knox correctly anticipated the West Virginia Supreme Court of Appeals' subsequent interpretation of the statute.

deliberate intention was an act defined under amorphous common law principles" Bell, 475 S.E.2d at 141. After the Legislature changed the law, the common law action ceased to exist, and it was replaced with a statutory scheme for recovery.

In our view, the enactment of W. Va. Code § 23-4-2(c) (1983) and its subsequent revision represents the wholesale abandonment of the common law tort concept of a deliberate intention cause of action by an employee against an employer, to be replaced by a statutory direct cause of action by an employee against an employer expressed within the workers' compensation system.

The integration of deliberately intended injuries within the Workers' Compensation Act as part of the workers' compensation design, and out of the common law, is a logical, consistent, and practical judicial response to the Legislature's response to the problems which were perceived to have emerged from the Mandolidis opinion.

Bell, 475 S.E.2d at 143.⁷

In later cases, the West Virginia Supreme Court of Appeals has reiterated its interpretation of the deliberate intent cause of action as arising under statutory rather than common law. "[W]e have specifically recognized that a deliberate intention action is sanctioned and governed by the workers' compensation statutory law in this State, and not by the common law." Roberts v. Consolidation Coal Co., 208 W. Va. 218, 539 S.E.2d 478, 493 (2000). See also Tolliver v. Kroger Co., 201 W. Va. 509, 498 S.E.2d 702 (1997); Michael v. Marion County Bd. of Educ., 198 W. Va. 523, 482 S.E.2d 140 (1996).

In Gallapoo v. Wal-Mart Stores, Inc., 197 W. Va. 172, 475 S.E.2d 172 (1996), the Court, quoting at length from Bell, reaffirmed the statutory nature of a "deliberate intention" action under W. Va. Code § 23-4-2. The Court noted that "we have held in Bell that the deliberate

⁷ The Court went on to note in a footnote that "[b]ecause we have now assigned the Mandolidis opinion as a relic of the common law with no relevance in our current workers' compensation jurisprudence, it might be an appropriate time to introduce 'deliberate intention' into our lexicon of causes of action instead of 'Mandolidis' - it no longer exists!" Bell, 475 S.E.2d at 144.

intention direct cause of action that an employee may have as against an employer is a benefit and a privilege 'under this chapter'. . . ." 475 S.E.2d at 176. See also, Easterling v. American Optical Corp., 207 W. Va. 123, 529 S.E.2d 588, 597-98 (2000).

The West Virginia Supreme Court of Appeals has specifically and unequivocally concluded that the deliberate intent provisions contained in W. Va. Code § 23-4-2 are statutory and have completely replaced the common law right of action. Nothing in the plain language of the Workers' Compensation Act authorizes an administratrix like Savilla to prosecute this action on behalf of beneficiaries of an estate. As a statutory cause of action, a deliberate intention lawsuit can only be brought by the classes of persons identified in the Workers' Compensation Act as benefits recipients. As the West Virginia Supreme Court of Appeals has indicated, it is not the role of the Court to rewrite statutory provisions simply because they are not to a court's liking. Zelenka v. City of Weirton, 208 W. Va. 243, 539 S.E.2d 750 (2000).⁸ See also Arlia v. Blankenship, 234 F. Supp.2d 606, 612 (S.D. W. Va. 2002) ("[w]hen the [statutory] language is plain and 'the statutory scheme is coherent and consistent,' we need not inquire further."); Taylor v. Nationwide Mutual Ins. Co., 214 W. Va. 324, 589 S.E.2d 55 (2003) ("[a] statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten by [the] court simply to address public policy concerns; rather it is the role of the legislature to address issues of public policy."); Daniel v. Beaver, 300 F. Supp.2d 436 (S.D. W. Va. 2004). A party who is not expressly listed in the deliberate intent statute as being entitled to bring an action against an employer simply has no right to do so. While Eugenia Moschgat, the

⁸ Savilla has previously cited the Zelenka decision for the proposition that this type of action can be brought by an estate. As Savilla herself has correctly pointed out, however, this issue was not before the Court and has never been addressed. In fact, in her concurring opinion in Zelenka, Justice Davis noted that the "case was not filed in the circuit court by the spouse, children or other dependents of the decedent," clearly recognizing the classes of persons who may bring an intentional injury case.

decedent's daughter, fits within one of the classes of potential plaintiffs, she has not personally brought this lawsuit.⁹ The deliberate intent lawsuit against SSA has been brought by Savilla, on behalf of Linda Kannaird's estate, and the estate is not one of the classes of potential plaintiffs. While Savilla may argue that she has standing to bring a wrongful death action, such as the action against SSA's co-defendants, she does not have such standing under the provisions of the deliberate intent statute. As this action involves a death to an employee in the course of her employment, the provisions of the Wrongful Death Act have no application with regard to SSA.

Collins notwithstanding, the Workers' Compensation Act simply does not authorize an estate to bring an action against SSA pursuant to the deliberate intent provisions:

If injury or death results to any employee from the deliberate intention of his or her employer to produce such injury or death, **the employee, 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 under this chapter. . . .

W. Va. Code § 23-4-2(c) [formerly W. Va. Code § 23-4-2(b)] (emphasis added).

Nowhere in the deliberate intent statutory scheme is an estate representative authorized to bring an action on behalf of beneficiaries. This is consistent with the purpose of the Workers' Compensation Act, which is to provide benefits for certain limited classes of persons who are, or could be, dependent upon the injured worker. Qualified persons have a direct cause of action under the Act. Compare the Workers' Compensation Act with the wrongful death provisions of W. Va. Code § 55-7-6, which begins by explicitly stating that "[e]very such action shall be brought by and in the name of the personal representative of such deceased person. . . ."

⁹ While Eugenia Moschgat did initially bring a wrongful death action on behalf of the estate, Savilla proceeded to have her removed as the Administratrix. Ms. Moschgat, as Administratrix, would have had no more right to pursue this action against SSA than Petitioner.

As noted above, the West Virginia Supreme Court of Appeals has determined that "the deliberate intention cause of action expressed within W. Va. Code § 23-4-2(c) (1991) supersedes a common law cause of action against an employer and is woven within the workers' compensation fabric of this State. . . ." Bell, 475 S.E.2d at 139. The statute specifically states that the "privilege" of bringing such an action belongs solely to the designated classes of persons; in this case, only the child of Linda Kannaird. Just as Eugenia Moschgat is the only person who could recover workers' compensation benefits for the death of Linda Kannaird, she is the only person with standing to seek to recover damages over the amount received or receivable under the Workers' Compensation Act. Since the legislature chose not to include the estate representative within the categories of persons entitled to bring a deliberate intent action, Savilla's action must fail. To permit Savilla to continue with the deliberate intent action is to ignore the clear, express language of the statute.

Furthermore, 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) on which Petitioner relies, does not help her on this issue. In the first place, Erie dealt only with the issue of insurance coverage for intentional injury cases. That issue did not arise in this case. Petitioner contends that the Court held that the language "as if [the Workers' Compensation Act] had not been enacted[.]" required damages to be awarded as if the statute had not been enacted. In fact, the Court only held that the damages awarded in such a case are the types of damages available under the common law and not workers' compensation benefits, a point with which SSA does not argue. Erie, 553 S.E.2d at 267. The case in no way addresses the issue of who has a right to sue or, more importantly, who has a right to recover damages, an issue resolved more than seventy years ago in Collins, supra, and conceded by Petitioner's counsel to be good law.

Petitioner contends, as she has done consistently throughout the case, that applying SSA's argument would deprive decedent's brothers and sisters of a legal right they would otherwise have had. Nothing could be further from the truth. Under the Workers' Compensation Act, no one has a right to sue for a work-related injury. W. Va. Code § 23-2-6 provides complete immunity to SSA. W. Va. Code § 23-4-2(b), in effect at the time [now W. Va. Code § 23-4-2(c)] gives a certain group of people, "the employee, the widow, widower, child or dependent," a cause of action for damages if deliberate intent can be proven. Collins, relied on by Petitioner, conclusively held that the above classes of persons are all those who are granted a right to recover, and the persons enumerated in the Wrongful Death Act may not recover.

Therefore, it is indisputable that, even if Petitioner is the proper plaintiff, she may recover only for the benefit of Eugenia Moschgat who has a pending settlement with SSA. Under such circumstances, Petitioner has a fiduciary obligation to Eugenia Moschgat which she has clearly violated.

SSA further asserts that under recent decisions in Bell and others, the Court has made it clear that a deliberate intent action is purely a statutory cause of action regardless of the fact that the damages recovered are not workers' compensation benefits. Since the statute grants a cause of action to "the employee, the widow, widower, child or dependent," it seems appropriate that only persons in these categories should be plaintiffs. In this action, since the interests of Petitioner and Eugenia Moschgat are clearly adverse, it would be highly inappropriate for Petitioner to continue this action where the only person who may benefit from any award is Eugenia Moschgat, and she has already resolved her claim.

For the reasons stated, SSA respectfully submits that the Court should affirm the order of the Circuit Court of Kanawha County, West Virginia dismissing this action as to SSA.

**3. PETITIONER'S POLICY ARGUMENT IS A THINLY VEILED
APPEAL TO SYMPATHY AND HAS NO MERIT**

Petitioner's policy argument is that the brothers and sisters of the decedent are somehow more deserving of recovering damages than decedent's daughter. Although a reading of the various depositions in this case might or might not lead to such a conclusion, the decision of who is entitled to benefits cannot turn on this issue. W. Va. Code § 23-4-2(c) simply does not say that a child may recover "unless there is someone more deserving who is not within the class of beneficiaries."

Assuming, arguendo, that the Wrongful Death Act applies, a situation similar to the one as to which Petitioner now complains could occur. Suppose, for example, the decedent was raised by an uncle or aunt to whom she was very close and had no contact with her surviving parents. Petitioner's argument would suggest that policy reasons would permit the uncle and aunt to recover. However, they clearly cannot do so under W. Va. Code § 55-7-6. In such a scenario, only decedent's parents, estranged or not, could recover.

To carry Petitioner's argument to its logical extreme, one could envision a situation in which a decedent died leaving an unrelated companion and an estranged child. Here, again, the logical extension of Petitioner's argument would be to contend that the companion should be entitled to recover. However, it is quite clear that there is no authority for such a result under either the deliberate intent statute or the Wrongful Death Act. Unfortunately, Petitioner's arguments are more related to her view of social policy than to the clear language of the law.

Simply put, interpretation of a statute does not, and cannot, depend on an emotional response to an unusual situation. This is why it is important to apply statutes as written rather than attempting to avoid the proper outcome merely because one does not like the result in a particular case. Here, the deliberate intent statute is so clear as to abide no interpretation. Only

Eugenia Moschgat may recover damages for the death of her mother in a deliberate intent suit against her mother's employer.

4. THE PETITIONER'S CLAIMS HEREIN ARE NOT SUBJECT TO THE CERTAIN REMEDY PROVISIONS OF THE WEST VIRGINIA CONSTITUTION.

The certain remedy provision of the West Virginia Constitution is one of three rights contained in Article III, Section 17.

The first right provides that the "courts of this State shall be open[.]" For convenience, we term this the "open-court" provision. The second right is embodied in the language "every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law[.]" For simplicity, we term this the "certain remedy" provision. The third right is that "justice shall be administered without sale, denial or delay."

Gibson v. West Virginia Dept. of Highways, 185 W. Va. 214, 406 S.E.2d 440, 447 (1991).

Out of apparent desperation, Petitioner cites the "certain remedy" provision of the West Virginia Constitution in her attempt to show that the siblings of the decedent deserve a right to seek damages under the provisions of the West Virginia's Workers' Compensation Act, even though the legislature did not include siblings in its list of appropriate claimants under the deliberate intent provision of the statute.

Petitioner cites a variety of West Virginia cases that purportedly support this notion. Initially, Petitioner cites Gibson v. West Virginia Dept. of Highways, 185 W. Va. 214, 406 S.E.2d 440, 447 (1991), in which the Supreme Court of Appeals of West Virginia held that a statute which created a ten-year period of repose for deficiencies in the planning, design, or supervision of construction and improvements to real property (W. Va. Code § 55-2-6a) does not violate the "certain remedy" provision of the State Constitution. In Gibson, the Court opined about several theories for undertaking, interpreting and evaluating the "certain remedy" clause of many state constitutions (and Magna Carta). The first approach "finds that the certain remedy

provision applies only to vested rights." *Id.* at 448. Under this theory, since claims for wrongful death were not recognized at common law (explained in some detail by Petitioner), all claims for wrongful death stem from statutory constructions of the wrongful death statutes.

In this vein, the West Virginia Legislature possesses the power to modify existing statutory laws to create or modify rights and privileges to bring suit. In *Gibson*, the Court cited *Singer v. Sheppard*, 464 Pa. 387, 399, 346 A.2d 897, 903 (1975), where the Supreme Court of Pennsylvania held that in interpreting its "certain remedy" provision, "we should remember that no one 'has a vested right in the continued existence of an immutable body of negligence law. . . . [T]he practical result of a [contrary] conclusion would be the stagnation of the law in the face of changing societal conditions.'" *Id.* at 448.

Thus, before the enactment of the deliberate intent language of W. Va. Code § 23-4-2(c), siblings of decedents in a wrongful death action may have had a cause of action against an employer. However, the enactment of W. Va. Code § 23-4-2(c) has eliminated any such cause of action. Similar to the statute of repose at controversy in *Gibson*, as to claims made by siblings after the enactment of W. Va. Code § 23-4-2(c), "there is no vested right." One of the leading cases on the "vested rights" theory is *Freezer Storage, Inc. v. Armstrong Cork Co.*, 476 Pa. 270, 382 A.2d 715, 720 (1978).

The Court in *Gibson* also favorably cited the North Carolina decision of *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868, 882 (1983). In *Lamb*, the North Carolina Supreme Court adopted the vested rights approach and held that "since plaintiff's cause of action had not accrued at the time this legislation was passed, no vested right is involved." 406 S.E.2d at 449. The court also found that its certain remedy provision gave the legislature authority to define the scope of the remedy. Similarly, in this case, since the deliberate

intent provision was passed long before this cause of action accrued, no vested right of decedent's siblings was involved.

A second theory espoused in Gibson for evaluating the "certain remedy" provision "acknowledges that the legislature has the right to alter or abolish a common law right of action." 302 S.E.2d at 880. As there was no common law remedy for wrongful death, this theory is unnecessary in evaluating the claims of Petitioner.

However, the final theory discussed in Gibson is most persuasive in this matter. The Gibson Court held that legislative enactments may be held unconstitutional by the "certain remedy" provision and must be evaluated according to certain criteria. The Court began its analysis by accepting the premise that there is a presumption of constitutionality when it comes to legislative enactments. State ex rel. Frieson v. Isner, 168 W. Va. 758, 285 S.E.2d 641 (1981); State ex rel. Kanawha County Bldg. Comm'n v. Paterno, 160 W. Va. 195, 233 S.E.2d 332 (1977). However, the Court focused its inquiry on the nature of a "vested right." The Court opined:

The term "vested right," as used in the certain remedy provision, means that an actual cause of action which was substantially affected existed at the time of the legislative enactment. The United States Supreme Court has acknowledged that an accrued cause of action is a vested property right and is protected by the guarantee of due process. See Gibbes v. Zimmerman, 290 U.S. 326, 54 S. Ct. 140, 78 L.Ed. 342 (1933). **On the other hand, where the cause of action has not yet accrued, the Supreme Court has held that due process principles do not prevent the creation of new causes of action or the abolition of old ones to attain proper legislative objects.** See Silver v. Silver, 280 U.S. 117, 50 S. Ct. 57, 74 L.Ed. 221 (1929). See also Burmester v. Gravity Drainage Dist. No. 2, 366 So.2d 1381 (La. 1978); Lamb v. Wedgewood, *supra* (emphasis added). Here, the cause of action had not accrued and, therefore, was not vested at the time the statute of repose limitation period ended.

302 S.E.2d at 881. In the instant case, as in Gibson, the Petitioner's cause of action had not accrued at the time of the passage of the deliberate intent statute, and "therefore, was not vested"

at the time the Petitioner filed her Complaint. The second inquiry made by the Gibson court involved whether the legislative enactment "severely limits existing procedural rights." Id. The limitation of the group of class members who may sue for the death of a decedent simply does not limit the "existing procedural rights" of decedent's (statutorily included) potential heirs. According to the Gibson court, "[t]he determination is whether there is a rational basis for the" legislative change. Id. A rational basis for why the legislature chose to limit the class of persons who may sue under the deliberate intent statute is simple to construe. Clearly, the workers' compensation statutes were intended to impose a balance between the possible liability imposed upon an employer and the loss suffered by an employee or certain beneficiaries of a deceased employee.

Petitioner continues her argument by citing O'Dell v. Town of Gauley Bridge, 188 W. Va. 596, 425 S.E.2d 551 (1992). In O'Dell, the Supreme Court of Appeals of West Virginia again heard a case involving the "certain remedy" provision of the West Virginia Constitution. The Court held that the statute immunizing political subdivisions from liability if a claim is covered by workers' compensation or employer's liability law is constitutional; said statute is not merely duplicative of immunity from suit under Workers' Compensation Law; and the statute provides immunity for all damages arising from tortious injury, not merely for those compensated by workers' compensation.

When addressing the issue of "certain remedy" in O'Dell, the Court revisited Gibson (including lengthy notes concerning the "vested" cause of action issue) and other cases. In its initial evaluation, the Court stated:

Clearly, our discussions in Gibson, Lewis, and Randall of the "certain remedy" provision reflect that in order to successfully invoke its protection, one of several events must be shown. First, it must be shown that the legislation impairs vested rights which, in the context of a cause of action, means that the individual had an existing claim prior to the passage of the legislation.

425 S.E.2d at 561. Because, as discussed supra, the right to sue claimed by decedent's siblings was not "vested" at the time the deliberate intent statute was passed, such a right is not protected by the "certain remedy" provision of the West Virginia Constitution. The Court did add that "[i]n the alternative, it must be shown that the legislation severely limits existing procedural remedies permitting adjudication of the plaintiff's claim." Id. In the instant case, again discussed supra, the legislative change in enacting the deliberate intent statute only affects a small portion of claimants under the wrongful death statute. The O'Dell Court addressed this issue. In finding that the "certain remedy" provision did not apply to the statute in O'Dell, the Court found that:

[t]he rule we adopted accorded substantial latitude to legislative enactments. Inherent in our approach is the consideration of the reasonableness of the method chosen to alter or repeal existing rights. In our "certain remedy" analysis as opposed to our examination of equal protection principles, 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.

Id. Similarly, the impact of the deliberate intent clause is limited and not absolute. All claimants under the wrongful death statute are not unilaterally prohibited from bringing a cause of action for wrongful death; rather certain claimants are permitted to bring an action under the deliberate intent statute. This is the same position taken by the Court in O'Dell, where it wrote:

In the present case, the statutory bar is not absolute, but is limited to a narrow class, i.e., those who have received workers' compensation benefits for the injury. We have accepted the legislative reasons for the enactment as valid, and, consequently, we find the "certain remedy" provisions of Article III, Section 17 of our state constitution not to have been violated.

Id. There is no reason to second-guess the intent of the Legislature in its adoption of the deliberate intent statute or to question the rational basis of its choices.

Petitioner concludes her arguments by citing unrelated cases that address broad generalities in the discipline of workers' compensation law. Petitioner does not address whether

the "right" to the cause of action claimed by decedent's siblings was "vested." In that regard, it is clear that any rights which decedent's siblings might have had in bringing the instant action were extinguished at the time of the adoption of W. Va. Code § 23-4-2(c) [formerly W. Va. Code § 23-4-2(b)] and therefore their cause of action was never vested (and, despite Petitioner's claims, a wrongful death action was never permitted at common law). The analysis of the history of the wrongful death and workers' compensation statutes is therefore unnecessary because none of that analysis is relevant unless the Legislature extinguished a "vested" cause of action of Petitioner. Since the cause of action never "vested" in the Petitioner, no viable cause of action was extinguished. Finally, the legislature's promulgation of a deliberate intent statute to permit certain parties to bring an action for wrongful death is rational and limited.

5. THERE IS NO SET OF FACTS WHICH PLAINTIFF COULD HAVE PROVEN THAT WOULD HAVE ENTITLED HER TO RELIEF.

Petitioner contends that there are certain facts that she could have proven that would have entitled her to relief.

A. Here, Petitioner raises again the issue of the alleged dependence of "Sissy" Harrison on decedent. However, here, Petitioner asserts only that Ms. Harrison was partially financially dependent on decedent. Even this is not supported by the record, but it does not matter. Partial dependency is insufficient. In order to be within the class of persons who may recover in an action brought under W. Va. Code § 23-4-2(c), if a person is not an employee, widow, widower or child, he or she must be a dependent. "Dependent" is defined for purposes of Chapter 23, as:

[a] widow, widower, child . . . stepchild . . . father, mother, grandfather or grandmother, who at the time of the injury causing death, is dependent in whole or in part for his or her support upon the earnings of the employee; and invalid brother or sister wholly dependent for his or her support upon the earnings of the employee at the time of the injury causing death.

W. Va. Code § 23-4-10(d) (emphasis added). There is no contention or evidence that "Sissy" Harrison was either an invalid or wholly dependent on decedent despite what Petitioner has suggested for the first time in her brief. On page 32 of her brief, Petitioner concedes that "Sissy" Harrison was not wholly financially dependent on decedent. Therefore, Ms. Harrison simply does not qualify for a cause of action under W. Va. Code § 23-4-2, and it is difficult to see why Petitioner even raised this non-issue. There is nothing in Ms. Harrison's deposition that remotely suggests total dependency.¹⁰

B. Petitioner asserts that in the event it is upheld that she has no standing to sue, she will then alter her claim and assert that Linda Kannaird had departed her place of employment and was not engaged in her employment at the time of her death. This absurd claim merely highlights Petitioner's desperation. At no time during this action, and certainly not in the complaint or any other pleading, has Petitioner asserted such a claim. This issue was not raised by Petitioner in connection with SSA's motion to dismiss below, and it is disingenuous to raise the issue for the first time now.

Furthermore, the logical outcome of the argument should be apparent. If, in fact, decedent had left work and was no longer continuing in her employment at the time of the injury leading to death, then SSA would have no involvement in this case, since the boat in which decedent was traveling, and which ultimately capsized, was under the sole control of the Charleston Fire Department. So, if Petitioner concedes for the purpose of this argument that her decedent was not injured in the course of and resulting from her employment, then SSA is not implicated in the death and would be entitled to dismissal in any event.

¹⁰ Paragraph 11 of the circuit court's order of January 8, 2001, Exhibit 1 to the Petitioner's brief, on which Petitioner relies so heavily, notes that there is no financial dependence in this case. Note also that the same order refers only to a wrongful death action and finds that the brothers and sisters of Linda Kannaird are beneficiaries under the Wrongful Death Act, W. Va. Code § 55-7-5, et seq. The order simply does not mention W. Va. Code § 23-4-2 or SSA, which was not a party to the Petition for Declaratory Relief resolved by the January 8, 2001 order.

Furthermore, while accidents going to and from work may be held not to be covered by workers' compensation, this is so only in situations in which employees have not yet begun or have concluded the work day and are going to or coming from work by a route chosen by the worker. Bilchak v. SWCC, 153 W. Va. 288, 168 S.E.2d 723 (1969). Plaintiff has contended that such was not the case and that the actions of decedent were controlled by SSA and/or the Charleston Fire Department. There has never been an indication that Petitioner has abandoned that claim. Again, if Petitioner is claiming decedent's work was concluded and her death occurred while following a voluntarily chosen route, SSA is not implicated in the claim.

As can be seen from the foregoing, Petitioner's argument in this regard is specious and should be rejected.

6. THE LAW IS CLEAR AND PETITIONER'S PUBLIC INTEREST ARGUMENT HAS NO BEARING ON THE OUTCOME OF THIS CASE.

Once again, Petitioner, in violation of her fiduciary responsibility, maliciously attacks the character of Eugenia Moschgat and argues that the "public interest" is at stake in this case. Petitioner further maligns the actions of SSA and makes assertions which were not determined by a court of law and are not at issue on this appeal. The primary case relied on by Petitioner, Collins, supra, conclusively demonstrates that Eugenia Moschgat is the only proper beneficiary of this action. Yet Petitioner continues to attack Ms. Moschgat, making it impossible for Petitioner to fairly represent the interests of Ms. Moschgat if Petitioner were found to be the proper plaintiff.

In fact, as has been shown in this brief, West Virginia law has long recognized the classes of individuals who may recover under W. Va. Code § 23-4-2(b) [now W. Va. Code § 23-4-2(c)]. Only one person qualifies for a recovery in this action, Eugenia Moschgat. The public interest is not violated by following settled precedent, even though that precedent benefits some to the exclusion of others. The issue here is clear, and the Court should uphold the dismissal.

Plaintiff cites numerous cases for the proposition that the workers' compensation statutes must be given a liberal construction to accomplish their remedial purposes. Nowhere in any of these cases, however, is a finding that a liberal construction can be used to set aside the plain words of a statute. There is no ambiguity in W. Va. Code § 23-4-2. There is, therefore, no reason for interpretation or construction of any type, liberal or otherwise. Clearly only Eugenia Moschgat has a cause of action against SSA in this case.

7. THE CIRCUIT COURT CORRECTLY RULED THAT THE DELIBERATE INTENT STATUTE AND THE WRONGFUL DEATH STATUTE ARE NOT IN PARI MATERIA, BUT, EVEN IF THEY ARE, THE RESULT DOES NOT CHANGE.

Petitioner suggests that W. Va. Code § 23-4-2 and W. Va. Code § 55-7-6 (the Wrongful Death Act) must be read in pari materia. In fact, the two statutes clearly apply to different situations. Plaintiff has misconstrued and misapplied the statutory construction principle of "in pari materia." In the first instance, to be read in pari materia requires that two statutes not be inconsistent with one another and relate to the same subject matter. Transamerica Com. Fin. Corp. v. Blueville Bank, 190 W. Va. 474, 438 S.E.2d 817 (1993). Statutes that relate to different subjects are not in pari materia. Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995).

In that regard, the Wrongful Death Act, W. Va. Code §§ 55-7-5, 6, was first enacted in 1863 in contravention of the common law which provided no cause of action for death by wrongful act. See, e.g., Baldwin v. Butcher, 155 W. Va. 431, 184 S.E.2d 428, 429 (1971). Subsequently, in 1913, the Legislature enacted the Workers' Compensation Act. The Workers' Compensation Act provided complete immunity for actions, including wrongful death actions, where the injury related to the decedent's employment. In return, the Workers' Compensation Act provided monetary benefits regardless of fault to certain classes of persons. Those classes

never included brothers and sisters of a deceased worker unless they were invalids and wholly dependent on the decedent for support. W. Va. Code § 23-4-10.

The only exception to the employer's immunity is provided in W. Va. Code § 23-4-2(c) [formerly W. Va. Code § 23-4-2(b)], which permits certain classes of persons — the same classes who can receive workers' compensation benefits under W. Va. Code § 23-4-10 — to pursue an action for the work-related injury or death of an employee caused by the deliberate intent of the employer, but only for damages in excess of those received or receivable under the Workers' Compensation Act. "A deliberate intention action is sanctioned and governed by the workers' compensation statutory law in this state. . . ." Roberts, 539 S.E.2d at 493.

It is clear, then, that both the Wrongful Death Act and the Workers' Compensation Act were enacted in contravention of the common law to address different perceived injustices. They relate to different classes of persons. In Berkeley County Pub. Serv. Sewer Dist. v. West Virginia Pub. Serv. Comm'n, 204 W. Va. 278, 512 S.E.2d 201 (1998), the Court analyzed the concept of in pari materia. The Court observed that it oversimplifies the rule to say that statutes relating to the same subject must always be read in pari materia. In the first place, the inquiry must consider how broadly the phrase "same subject matter" must be defined. In that regard, W. Va. Code § 55-7-5 and W. Va. Code § 23-4-2(c) both relate generally to actions for death of an individual, although that is only part of the scope of W. Va. Code § 23-4-2(c). Otherwise, they relate to different issues and provide recovery for different classes of persons.

Second, the rule of in pari materia is most applicable to statutes (1) relating to the same subject matter which (2) are passed at the same time or (3) refer to each other or amend each other. Here, where each statute is self-contained and was enacted in a different time frame, and where neither refers to the other, a diminished applicability for in pari materia consideration exists. Berkeley County Pub. Serv. Dist., *supra*.

Finally, a related statute cannot be utilized to create doubt in what is otherwise a clear statute. Id. W. Va. Code § 23-4-2(c) is crystal clear in its provisions. The provisions of the Wrongful Death Act, W. Va. Code §§ 55-7-5, 6 cannot properly be used to modify an otherwise clear statute.

The legislative intent in W. Va. Code § 23-4-2(c) is clear from the wording of the statute; that is, where a work-related injury or death is inflicted by deliberate intent of the employer, those persons entitled to receive workers' compensation benefits may also pursue a statutory civil action. This is completely different from the purpose of the Wrongful Death Act, and there is no reason to attempt to read the two in *pari materia*. The acts clearly relate to different subjects. Both are clear in their intent, and no construction is necessary.

Furthermore, even if the statutes were to be read in *pari materia*, the result would be the same. As noted in SSA's first argument herein, this Court in Collins v. Dravo Contracting, Inc., 114 W. Va. 229, 171 S.E. 757 (1933), in effect considered the statutes in *pari materia*. The Court held in that case, decided long before Bell, that, in a deliberate intent case, the personal representative sues under W. Va. Code § 55-7-6, and that section "would apply to the extent not inconsistent with Code, 23-4-2. Since Code 23-4-2(c) names the beneficiaries who take, the recovery under its terms would be distributed to 'the widow, widower, child or dependent' and not in accordance with Code 55-7-6." Collins, 171 S.E. at 759. Therefore, whether or not the Court determines that the two statutes are to be read in *pari materia*, only decedent's daughter, Eugenia Moschgat, is entitled to any recovery in this action.

CONCLUSION

It is absolutely clear that the plain language of W. Va. Code § 23-4-2 specifically limits the classes of persons who may bring a deliberate intent action to avoid an employer's statutory workers' compensation immunity. Under that statute, only an employee, widow, widower, child

or dependent may bring a deliberate intention action or recover damages in such an action. In this case, the employee is deceased. There is no widow or widower. There are no dependents as that term is defined in the Worker's Compensation Act. Significantly, the only qualified entitlement within the classes in the deliberate intent statute is the classification of dependent. All other classes take without qualification. In this case, then, the only remaining person who may bring a deliberate intent action for the death of Linda Kannaird, is her only child, Eugenia Moschgat. Only Ms. Moschgat has "a cause of action against the employer. . . ." W. Va. Code § 23-4-2. As the Circuit Court of Kanawha County recognized in dismissing this action as to Speedway SuperAmerica LLC, D/B/A/ Rich Oil with prejudice, there is simply no room for interpretation. The statutory language is unequivocal. Only Ms. Moschgat has a cause of action, and only Ms. Moschgat may recover damages. The decision of the Circuit Court of Kanawha County should be affirmed.

Respectfully submitted this 24th day of May, 2006.

**SPEEDWAY SUPERAMERICA LLC,
D/B/A RICH OIL**

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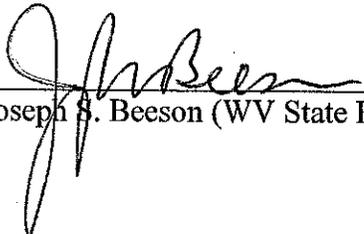
CERTIFICATE OF SERVICE

I, Joseph S. Beeson, hereby certify that the foregoing **RESPONSE OF DEFENDANT SPEEDWAY SUPERAMERICA LLC, D/B/A RICH OIL, TO PETITIONER'S MEMORANDUM IN SUPPORT OF PETITION FOR APPEAL** has been served upon the following counsel of record this 24th day of May, 2006, by depositing a true copy thereof in the United State mail, postage fully paid, addressed as follows:

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