

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

EVELYN L. "PEACH" MURPHY,  
Administratrix of the Estate of  
Andrew John Murphy,

Appellant/Plaintiff Below,

v.

S. W. JACK DRILLING COMPANY;  
KENNETH GREATHOUSE; and  
RODNEY PAXTON.

Appellees/ Defendants Below.

FROM THE CIRCUIT COURT OF LOGAN COUNTY

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**APPELLANT'S SUPPLMENTAL BRIEF**

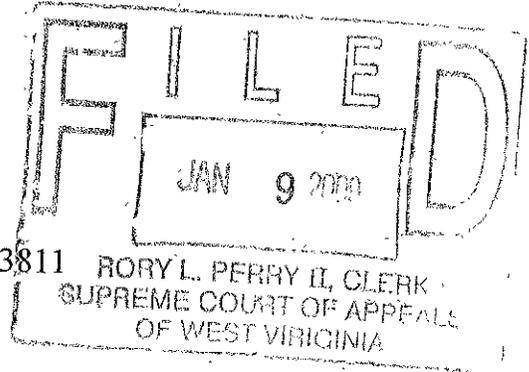
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**To the Honorable Justices of the  
Supreme Court of Appeals  
of West Virginia**

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### III. INTRODUCTION

Comes now the Appellant, Evelyn L. "Peach" Murphy, Administratrix of the Estate of Andrew John Murphy, by counsel, pursuant to the Order entered by this Court on December 19, 2008 allowing the parties to file supplemental briefs on or before January 9, 2009. For Appellant's Supplemental Brief, the Appellant states as follows:

### IV. SUPPLEMENTAL FACTS

The essential facts of this case are set forth in Appellant's Brief, previously filed with this Court. However, in further explanation of the facts surrounding Peach Murphy's filing for wrongful death Workers' Compensation benefits, the Appellant proffers as follows:

Peach Murphy lived with her son A.J. Murphy and her daughter Heather Murphy a few miles outside of Spencer, Roane County, West Virginia. After A.J. Murphy died on November 2, 2005, Ms. Murphy was distraught, as any mother would be upon the death of her child. Ms. Murphy contacted counsel for the Appellant, who agreed to represent her with respect to A.J. Murphy's death. Counsel was not asked nor agreed to represent Ms. Murphy with respect to a claim for Workers' Compensation benefits. Further, counsel had no knowledge that Ms. Murphy had filed for any such benefits until well after the appeal period had expired.

Ms. Murphy applied for wrongful death Workers' Compensation benefits without the benefit or advice of counsel. When Ms. Murphy was denied those

benefits upon the non-judicial determination made by a Brickstreet insurance adjuster, Ms. Murphy thought that her avenue for Workers' Compensation death benefits was concluded but believed that she still had an avenue for recovery for her son's death through her deliberate intent lawsuit.

Without realizing the significance of the Brickstreet insurance adjuster's decision, and again without the benefit of or advice from counsel, Ms. Murphy did not appeal that decision. It is that non-judicial determination of a Brickstreet insurance adjuster that the lower court relied upon in determining that Peach Murphy was not a dependent of A.J. Murphy at the time of his death. It is because of that non-judicial determination that Ms. Murphy has been denied recovery for her son's wrongful death on the job. It was only after the lower court relied upon the determination of a Brickstreet insurance adjuster that Ms. Murphy was not a "dependent" for the purpose of workers' compensation death benefits that the full impact of Ms. Murphy decision to not appeal the decision of the Brickstreet adjuster came to light.

The lower court did not address the issue of whether A.J. Murphy's sister, Heather Murphy, who did not file for benefits under the Workers' Compensation Act, was a dependent of A.J. Murphy. There has been no judicial or administrative decision regarding whether Heather Murphy was a dependent of A.J. Murphy.

As is discussed below, despite the lower court's ruling, the decision of a Brickstreet insurance adjuster, without the benefit of a judicial determination, the

adversary process, or cross examination was not binding on the lower Court. Further, Ms. Murphy was not required to file for Workers' Compensation benefits before bringing a cause of action for the deliberate intention of the Appellees in causing the death of her son. Deliberate intention causes of action are often pursued without the surviving beneficiaries of deceased worker filing for Workers' Compensation benefits.

However, before this argument is addressed, the errors contained within the *Savilla* decision are discussed.

#### V. SUPPLEMENTAL DISCUSSION OF LAW

The lower court's reliance on *Savilla v. Speedway Super America, LLC*, 219 W.Va. 758, 639 S.E.2d 850 (2006) is misplaced inasmuch as the Court in *Savilla* erroneously interpreted and applied *West Virginia Code* § 23-4-2(c), which states 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.”

*West Virginia Code* § 23-4-2(c) (emphasis added).

In interpreting this statute, the Court in *Savilla* changed the plain language of the West Virginia legislature by erroneously interpreting this statute. First, the

Court incorrectly read additional language into the statute by interpreting the statute to limit persons who may “potentially recover” under the statute. Second, the Court read the language “employee” out of the statute all together. Lastly, the Court read the phrase “as if this chapter had not been enacted” to change the plain meaning of the statute. Each misinterpretation is addressed below.

**A. WEST VIRGINIA CODE § 23-4-2(C) DOES NOT SET FORTH THOSE PERSON WHO MAY “POTENTIALLY RECOVER” UNDER THE STATUTE**

*West Virginia Code § 23-4-2(c)* performs two separate and distinct tasks. First, the statute enumerates those persons who may receive workers’ compensation benefits under the West Virginia Workers’ Compensation Act, those being “the employee, the widow, widower, child or dependent of the employee.” This section of the statute simply states that this is the classification of people who may recover administrative remedies under the Workers’ Compensation Act.

Second, the statute creates a separate and distinct cause of action against the employer, as if the Workers’ Compensation Act “had not been enacted,” for excess damages above the Workers’ Compensation Act, whether such a claim is filed or not.

*West Virginia Code § 23-4-2(c)* states:

“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.”

The Court in *Savilla*, in erroneously interpreting this statute, stated:

Pursuant to West Virginia Code § 23-4-2(c) and West Virginia Code § 55-7-6, the persons who can potentially recover “deliberate intention” damages from a decedent’s employer are the persons specified in W. Va. Code 23-4-2(c): the employee’s widow, widower, child or dependent of the employee.

*Syl. Pt. 3, Savilla v. Speedway Super America, LLC*, 219 W.Va. 758, 639 S.E.2d 850 (2006).

The Court in *Savilla* erroneously interpreted *West Virginia Code* § 23-4-2(c) by reading this statute together with *West Virginia Code* § 55-7-6 to produce a result that neither statute intended or envisioned. The Court in *Savilla* combined those persons enumerated in *West Virginia Code* § 23-4-2(c) who have a cause of action under that code section with those persons enumerated in *West Virginia Code* § 55-7-6 who may recover damages for wrongful death, resulting in an erroneous application of law.

The Court’s interpretation in *Savilla* materially changes the plain meaning of *West Virginia Code* § 23-4-2(c), which again only identifies those persons who may bring a cause of action for the deliberate intent of an employer in causing the injury or death of an employee. Notwithstanding the Court’s holding in *Savilla*, *West Virginia Code* § 23-4-2(c) does not set forth the class of persons who can recover such damages.

*West Virginia Code* § 55-7-6 sets forth those persons who can recover wrongful death damages, those persons being:

[T]he surviving spouse and children, including adopted children and stepchildren, brothers, sisters, parents and any person who were financially dependent upon the decedent at the time of his or her death or would otherwise be equitably entitle to share in such distribution...

*West Virginia Code* § 55-7-6(b).

The two statutes must be read separately to ensure that the proper party receives the benefits of the deliberate intent wrongful death action, while still providing that the proper party pursues the deliberate intention wrongful death cause of action.<sup>1</sup> In reading the statutes together, the classification between who may bring a cause of action and who may recover the proceeds of a cause of action are blurred.

In the present case, the record shows that A.J. Murphy is survived by his mother, Evelyn L. "Peach" Murphy, and his sister, Heather. Pursuant to *West Virginia Code* § 55-7-6(b) both or either survivors may recover the proceeds of a wrongful death action. However, as is discussed below, pursuant to *West Virginia Code* § 55-7-6 and Rule 17 of the *West Virginia Rules of Civil Procedure*, the Administratrix of the Estate of Andrew John Murphy is the only party in interest that may bring this cause of action. Therefore, the *Savilla* holding allows a party with no interest in the proceeds of a civil action to pursue such an action, as those

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<sup>1</sup> As is discussed below, this is precisely why *West Virginia Code* § 23-4-2(c) contains the language "as if this chapter had not been enacted."

persons who may recover under *Savilla* are not necessarily the sole beneficiaries of the Estate. This is a violation *West Virginia Code* § 55-7-6 and Rule 17 of the *West Virginia Rules of Civil Procedure*, and the *Savilla* holding must be expanded in keeping with the clear intent of the legislature, and this case remanded and allowed to proceed to trial.

That is, this Court must hold that *West Virginia Code* § 23-4-2(c) only sets forth those persons who may bring a cause of action for the deliberate intention of an employer in causing the injury or death of an employee, one of those persons being the employee. And, in the case of the death of an employee, *West Virginia Code* § 55-7-6(b) actually sets forth those persons who may recover those damages. It is this holding, and this holding alone, that will give both statutes the full meaning as intended by the plain language of the statutes.

**B. THE COURT IN SAVILLA IMPROPERLY OMITTED THE WORD "EMPLOYEE" WHEN INTERPRETING W. VA. CODE § 23-4-2(C)**

The *Savilla* Court went one step further in interpreting *West Virginia Code* § 23-4-2(c) by completely omitting the word "employee" from the list of persons who may bring a cause of action for the deliberate intention of an employer. The Court in *Savilla*, in erroneously interpreting this statute, stated:

Pursuant to *West Virginia Code* § 23-4-2(c) and *West Virginia Code* § 55-7-6, the persons who can **potentially recover** "deliberate intention" damages from a decedent's employer are the persons specified

in W. Va. Code 23-4-2(c): the employee's widow, widower, child or dependent of the employee.

*Syl. Pt. 3, Savilla v. Speedway Super America, LLC*, 219 W.Va. 758, 639 S.E.2d 850 (2006). In omitting this language, the *Savilla* Court changed the plain meaning of *West Virginia Code* § 23-4-2(c) and changed the intention of the legislature.

First, it should be noted that the only party that may bring a wrongful death cause of action, pursuant to *West Virginia Code* § 55-7-6, is the personal representative of the Estate, in this case Evelyn L. "Peach" Murphy as Administratrix of the Estate. Pursuant to the *Savilla* holding, and the lower court's interpretation and application of that holding, no one exists that may recover those damages.

This scheme violates Rule 17 of the *West Virginia Rules of Civil Procedure*, which requires "[e]very action [to be] prosecuted in the name of the real party in interest." In this case, and pursuant to *Savilla*, Ms. Murphy as Administratrix of the Estate was able bring a cause of action for deliberate intention wrongful death although, pursuant to *Savilla*, which omitted the word "employee" from the statute, there existed no party in interest to recover such damages. Because this scheme violates Rule 17 of the *West Virginia Rules of Civil Procedure*, this Court should expand or overturn the *Savilla* holding.

Second, and notwithstanding the *Savilla* decision, this Court has implicitly recognized that "employee" means the estate of the employee. *See Michael v.*

*Marion County Bd. of Educ.*, 198 W.Va. 523, 482 S.E.2d 140 (1996) (spouse of decedent brought deliberate intent cause of action against employer individually and as representative of decedent's estate); *see also Cline v. Jumacris Min. Co.*, 177 W.Va. 589, 355 S.E.2d 378 (1987). Moreover, this Court has expressly allowed an employee's non-dependent executrix of a decedent's estate to pursue a deliberate intention wrongful death cause of action. *See Zelenka v. City of Weirton*, 208 W.Va. 243, 539 S.E.2d 750 (2000). In allowing the estate of a deceased employee to recover Workers' Compensation benefits, this Court stated:

This case was not filed in the circuit court by the spouse, children, or other dependents of the decedent. **In fact, Mr. Zelenka, the decedent, did not have a spouse, child or any other dependents. This case was prosecuted by the apparent non-dependent executrix of the decedent's estate.**

*See Zelenka*, 208 W.Va. at 249, 539 S.E.2d at 756 (emphasis added).

Additionally, the *Roney* decision, cited above, appears to expressly allow the estate of an employee to recover deliberate intention wrongful death damages.

West Virginia employers are provided immunity from all suits by employees for injuries occurring in the workplace, except in civil suits for excess damages allegedly caused by deliberate intention of employer, and if employee can prove under either of the two statutorily enumerated methods that employer acted with deliberation, then employer loses its workers' compensation immunity and may be subjected to suit for damages as if Workers' Compensation Act had not been enacted **and employee is free to bring any claim for injury or death caused by employer's deliberate intention.**

*Roney v. Gencorp*, 431 F. Supp. 2d 622 (S. D. W. Va. 2006) (*Chambers, District Judge*)(emphasis added).

This discussion brings forth two very important points. First, the person that brings a deliberate intent wrongful death cause of action need not be the same person who can recover benefits of a deliberate intent wrongful death action. There could easily be instances where the executrix of the Estate is not a “surviving spouse and children, including adopted children and stepchildren, brothers, sisters, parents and any person who were financially dependent upon the decedent.” Second, it emphasizes the Court’s error in omitting the word “employee” from the *Savilla* holding.

The *Savilla* inconsistencies are further illustrated when Syllabus Point 2 of the *Savilla* opinion is considered.

A personal representative who is not one of the statutorily-named beneficiaries of a deliberate intention cause of action authorized by W. Va. Code § 23-4-2(c) has standing to assert a deliberate intention claim against a decedent’s employer on behalf of a person who has such a cause of action in the wrongful death suit filed pursuant to W. Va. Code § 55-7-6.

*Syl. Pt. 2, Savilla v. Speedway Super America, LLC*, 219 W.Va. 758, 639 S.E.2d 850 (2006).

The first *Savilla* inconsistency is realized when reading this holding in conjunction with Syllabus Point 3 of the *Savilla* opinion. These holdings make clear that although the personal representative of an estate may legally bring a deliberate intention wrongful death cause of action, that cause of action can be

dismissed if the deceased employee is not survived by a spouse, child or dependent. Therefore, what *Savilla* has created is a legal and valid cause of action for which there are potentially no persons who may recover damages. Moreover, *Savilla* sets bad public policy by encouraging an unscrupulous employer to give the young, unmarried employees with no children the most dangerous jobs on a jobsite.

The second *Savilla* inconsistency is illustrated by the present case. When a personal representative legally brings a cause of action for deliberate intention wrongful death, as is required by Syllabus Point 2 of *Savilla*, and there is no person who may recover damages, pursuant to Syllabus Point 3 of *Savilla*, that personal representative represents nobody.

These inconsistencies were created by borrowing an amalgam of language from *West Virginia Code* § 23-4-2(c), combining it with language from *West Virginia Code* § 55-7-6(b), to create a holding inconsistent with both statutes. The only logical way to correct these inconsistencies is for this Court to hold that the word “employee” must be read into Syllabus Point 3 *Savilla* holding, and allow the personal representative of the estate of a deceased employee step into the shoes of the employee to pursue a deliberate intent wrongful death cause of action on behalf of the beneficiaries of the estate as set forth in *West Virginia Code* § 55-7-6(b).

C. THE COURT IN SAVILLA IMPROPERLY INTERPRETED THE PHRASE “AS IF THIS CHAPTER HAD NOT BEEN ENACTED”

The plain meaning of *West Virginia Code* § 23-4-2(c), by including the language ‘as if this chapter had not been enacted,’ is to allow injured West Virginia workers to pursue a cause of action outside of the Workers’ Compensation Act when their employer acts with deliberate intention to cause an employee’s injury or death. In interpreting this statute, the Court in *Savilla v. Speedway Super America, LLC*, 219 W.Va. 758, 639 S.E.2d 850 (2006) stated: “The phrase “as if this chapter had not been enacted” can be most sensibly read in most instances to mean ‘as if the immunity created by’ this chapter had not been enacted.” FN 7, *Savilla v. Speedway Super America, LLC*, 219 W.Va. 758, 639 S.E.2d 850 (2006).

First, it is disturbing that a seemingly unambiguous statute can be “be sensibly read in most instances” in one particular manner, and interpreted a different way in other instances. The *Savilla* decision fails to set forth in what instances *West Virginia Code* § 23-4-2(c) should be interpreted in keeping with the *Savilla* decision. The *Savilla* decision also fails to discuss any alternative interpretations.

Second, the language “as if the immunity created by” is not included in *West Virginia Code* § 23-4-2(c), and changes the plain meaning of the statute. The statute, and the language “as if this chapter had not been enacted” should be given its plain meaning. That is, once a Plaintiff proves the deliberate intention of an

employer in causing the injury or death to an employee, the Plaintiff continues to pursue that cause of action as if the Workers' Compensation Act had not been enacted.

The language "as if the immunity created by" was inserted into *West Virginia Code* § 23-4-2(c) in the *Savilla* decision without further explanation or discussion. This language also changes the plain meaning of *West Virginia Code* § 23-4-2(c) by requiring a Plaintiff who proves the deliberate intention of an employer in causing the injury or death to an employee to continue to pursue a cause of action within the framework of the Workers' Compensation system, rather than allowing a Plaintiff to pursue a cause of action "as if [the Workers' Compensation Act] had not been enacted." Had the West Virginia legislature intended the language "as if the immunity created by" to be inserted in *West Virginia Code* § 23-4-2(c), it would have done so. However, the legislature did not do so, leaving the plain language unambiguous and not subject to interpretation by this Court.

Third, the language "as if this chapter had not been enacted" has been previously been read by the United States District Court for the Southern District of West Virginia to mean exactly what it says. In *Roney*, the Plaintiff was the executor of the Estate of his brother, Henry Clay Roney, Jr., who was employed by Gencorp. See *Roney v. Gencorp*, 431 F. Supp. 2d 622 at 626 (S. D. W. Va. 2006) (*Chambers, District Judge*). The deceased Mr. Roney performed job duties that exposed him to vapors, steams and fumes containing vinyl chloride monomer

(VCM), a carcinogen. *Id.* at 626. Mr. Roney died in 2003 from hepatic angiosarcoma, a cancer that attacks the liver, allegedly from his exposure to VCM. *Id.* at 626.

After the Complaint was filed, the Defendants filed various motions to dismiss. In denying the motions in part, the District Court stated:

West Virginia employers are provided immunity from all suits by employees for injuries occurring in the workplace, except in civil suits for excess damages allegedly caused by deliberate intention of employer, and if employee can prove under either of the two statutorily enumerated methods that employer acted with deliberation, then employer loses its workers' compensation immunity and may be subjected to suit for damages **as if Workers' Compensation Act had not been enacted** and employee is free to bring any claim for injury or death caused by employer's deliberate intention.

*Roney v. Gencorp*, 431 F. Supp. 2d 622 (S. D. W. Va. 2006) (*Chambers, District Judge*)(emphasis added).

The District Court's analysis is in keeping with the plain language of *West Virginia Code* § 23-4-2(c), and gives full effect to the phrase "as if this chapter had not been enacted." Any other interpretation, and the interpretation contained within the *Savilla* decision, fails to give this phrase any meaning. "In the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies." Syl. Pt. 3, *Manchin v. Dunfee*, 174 W.Va. 532, 327 S.E.2d 710 (1984). Because the District Court's analysis in *Roney* is the only appropriate

reading of the unambiguous phrase “as if this chapter had not been enacted,” this language is not subject to interpretation, and this Court should overturn or expand the *Savilla* decision, give that language its plain meaning, and remand this matter to the lower court to proceed to trial.

Therefore, this Court should hold that once an employee proves under either of the two statutorily enumerated methods set forth in *West Virginia Code* § 23-4-2(c) that an employer acted with deliberation, the employer loses its workers’ compensation immunity and may be subjected to suit for damages as if Workers’ Compensation Act “had not been enacted.” Thereafter, the employee is free to bring any claim for injury or death caused by employer’s deliberate intention.

**D. ALTERNATIVELY, THE LOWER COURT’S RELIANCE ON THE NON-JUDICIAL DETERMINATION MADE BY A BRICKSTREET INSURANCE ADJUSTER WAS ERRONEOUS**

The Court in *Savilla* held as follows:

Pursuant to *West Virginia Code* § 23-4-2(c) and *West Virginia Code* § 55-7-6, the persons who can potentially recover “deliberate intention” damages from a decedent’s employer are the persons specified in *W. Va. Code* 23-4-2(c): the employee’s widow, widower, child or dependent of the employee.

*Syl. Pt. 3, Savilla v. Speedway Super America, LLC*, 219 W.Va. 758, 639 S.E.2d 850 (2006).

The lower Court, in reliance upon *West Virginia Code* 23-5-1(b) and a determination made by a Brickstreet Mutual Insurance adjuster that Evelyn L.

“Peach” Murphy was not a dependent for A.J. Murphy, ruled that Ms. Murphy was not a dependent of A.J. Murphy, and entered Summary Judgment on behalf of the Appellees.<sup>2</sup> Stated differently, the lower court held that a non-judicial decision issued by a Brickstreet insurance adjuster, without the benefit of the adversary system or cross-examination, was binding on the circuit court.

Should this Court determine that *Savilla* is good precedent, the lower court erred in its reliance on the decision issued by a Brickstreet insurance adjuster in determining that Ms. Murphy was not a dependent of A.J. Murphy.

First, it should be noted that Ms. Murphy was not required to apply for Workers’ Compensation wrongful death benefits before bringing a cause of action under *West Virginia Code* §23-4-2(c).

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<sup>2</sup> *West Virginia Code* 23-5-1(b) states: Except with regard to interlocutory matters and those matters set forth in subsection (d) of this section, upon making any decision, upon making or refusing to make any award or upon making any modification or change with respect to former findings or orders, as provided by section sixteen, article four of this chapter, the commission, the successor to the commission, other private insurance carriers and self-insured employers shall give notice, in writing, to the employer, employee, claimant or dependant as the case may be, of its action. The notice shall state the time allowed for filing an objection to the finding. The action of the commission, the successor to the commission, other private insurance carriers and self-insured employers is final unless the employer, employee, claimant or dependant shall, within thirty days after the receipt of the notice, object in writing, to the finding. Unless an objection is filed within the thirty-day period, the finding or action is final. This time limitation is a condition of the right to litigate the finding or action and hence jurisdictional. Any objection shall be filed with the office of judges with a copy served upon the commission, the successor to the commission, other private insurance carriers and self-insured employers, whichever is applicable, and other parties in accordance with the procedures set forth in sections eight and nine of this article. In all instances where a private carrier, self-insured employer or a third-party administrator has made claims decisions as authorized in this chapter, they shall provide claimants notice of all claims decisions as provided by rules for self-administration promulgated by the board of managers and shall be bound by each requirement imposed upon the commission by this article.

As explained above, [*West Virginia Code* §23-4-2(c)] clearly states that an employee has a cause of action for injury caused by the deliberate intent of the employer in excess of a claim for benefits under the workers' compensation scheme regardless of whether the employee had actually filed such a claim.

*Roney v. Gencorp*, 431 F. Supp. 2d at 631.

Therefore, the fact that Ms. Murphy did or did not file for benefits under the workers' compensation scheme is not dispositive with respect to whether she qualifies as a dependent under the Act. Had Ms. Murphy not filed for benefits, she would have automatically been considered a dependent and this appeal would be unnecessary. Further, regardless of whether Ms. Murphy filed for such benefits, the question of whether she was a dependent of A.J. Murphy is a question of fact, not a determination to be made by an insurance adjuster.

Based upon the lower court's ruling, Ms. Murphy would have been better off by not filing for workers' compensation benefits and risking the chance of an adverse ruling from the workers' compensation plan administrator. Not only does this set bad public policy because it discourages person who would otherwise be entitled to wrongful death deliberate intent workers' compensation benefits from filing for those benefits, but it negates the plain meaning of *West Virginia Code* §23-4-2(c), which permits the filing of either or both a claim for Workers' Compensation benefits and/or a claim for damages for the deliberate intention of an employer.

Second, *West Virginia Code* § 23-5-1(b) is only applicable to claims submitted under the administrative process of filing a claim for Workers' Compensation benefits, and is only binding upon "the commission, the successor to the commission, other private insurance carriers and self-insured employers" and the jurisdiction of these entities. *West Virginia Code* § 23-5-1(b) does not affect the jurisdiction of the lower Court in a deliberate intention cause of action, which is expressly granted to the lower court by *West Virginia Code* § 23-4-2.

In deciding that the Brickstreet insurance adjuster's determination that Evelyn L. "Peach" Murphy was not a dependent of A.J. Murphy was binding in circuit court, the lower court further relied upon this Court's decision in *State ex rel. Frazier v. Hrko*, 203 W.Va. 652, 510 S.E.2d 486 (1998). However, *Frazier v. Hrko* stands for the narrow proposition that when the Commissioner of Workers Compensation determines that an employer is in default of the workers' compensation system, the matter is final and may not be re-litigated or collaterally attacked.

Our ruling today is limited to employer default rulings by the Commissioner. We decline to consider the impact on trial court proceedings of rulings by the Commissioner concerning other issues (such as whether a claimant was an employee, or whether an injury occurred in the course of employment or was otherwise compensable).

FN 18, *State ex rel. Frazier v. Hrko*, 203 W.Va. 652, 510 S.E.2d 486 (1998).

The *Frazier v. Hrko* decision, by its own language, only addresses the narrow situation set forth in *West Virginia Code* § 23-2-5(d)<sup>3</sup> when an employer is found to be in default of the Workers' Compensation system by the Commissioner of Workers' Compensation. This case does not address the situation here where an adjuster for Brickstreet made an administrative decision denying benefits to a surviving parent. Therefore, the *Frazier v. Hrko* decision has no applicability to the case at bar.

In the present case, the Commissioner of Workers' Compensation never addressed the merits of the application for fatal dependents' benefits completed by Evelyn L. "Peach" Murphy. Ms. Murphy was denied death benefits by an adjuster for Brickstreet insurance who does not even appear to be associated with the Commissioner of Workers' Compensation's Office, and who did not receive any evidence outside of the application for benefits and did not conduct a judicial proceeding that would test that decision.

On this issue, this Court has stated:

[T]hat for preclusion to attach to quasi-judicial determinations of administrative agencies, at least

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<sup>3</sup> *W. Va. Code* 23-2-5(d) states: Failure by the employer, who is required to subscribe to the fund and who fails to resolve the delinquency within the prescribed period, shall place the account in default and shall deprive the default employer of the benefits and protection afforded by this chapter, including section six of this article, and the employer is liable as provided in section eight of this article. The default employer's liability under these sections is retroactive to midnight of the last day of the month following the end of the reporting period for which the delinquency occurs. The commission shall notify the default employer of the method by which the employer may be reinstated with the fund. The commission shall also notify the employees of the employer by written notice as hereinafter provided in this section.

where there is no statutory authority directing otherwise, the prior decision must be rendered pursuant to the agency's adjudicatory authority and the procedures employed by the agency **must be substantially similar to those used in a court.**

*State v. Miller*, 194 W. Va. 3, 459 W.E.2d 114 (1995) (emphasis added) citing *Vest v. Board of Educ. Of the County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781; *Liller v. West Virginia Human Rights Comm'n*, 180 W. Va. 433, 440 376 S.E.2d 639, 646 (1988).<sup>4</sup> Moreover, other decisions issued by this Court stand for the proposition that decisions by an administrative agency are not binding as res judicata or collateral estoppel in Circuit Court. See *Page v. Columbia Natural Resources*, 198 W. Va. 378, 480 S.E.2d 817 (1996) (administrative proceeding had no preclusive effect where proceeding was conducted without delay and formality involved in court proceedings).

The decision rendered by an adjuster for Brickstreet Insurance Company to determine that Evelyn L. "Peach" Murphy was not dependent upon her adult son cannot be binding upon the lower court. The adjuster did not issue the decision after any adjudicatory procedure and the procedure that was used, a cursory review of an application and a review of Andrew John Murphy's wages for the years immediately preceding his death, are not the procedures the lower court would employ. The adjuster did not conduct any witness interviews, did not

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<sup>4</sup> It has even been held that the deceased need not be living with the dependent parent at the time of death for the dependent parent to be determined a partial dependent. See *Hudson v. State Compensation Comm'r*, 121 W. Va. 461, 5 S.E.2d 108 (1939).

present any witnesses to any adjudicatory body, and was not subject to cross-examination. Therefore, the decision by the adjuster for Workers' Compensation to deny Evelyn L. "Peach" Murphy death benefits is not binding upon the lower court.

The question of whether Evelyn L. "Peach" Murphy was a dependent of Andrew John Murphy can only be answered by a jury. "The question of dependency \* \* \* under Workmen's Compensation Law, is one of fact and not of law, to be determined by the evidence in each particular case." *Wills v. State Compensation Com'r*, 114 W.Va. 822, 174 S.E. 323 (1934) citing *Poccardi v. Commissioner*, 79 W. Va. 684, 91 S.E. 663. Therefore, the lower court further erred by finding that MS. Murphy was not a dependent of A.J. Murphy as a matter of law.

Should this Court determine *Savilla* to be good precedent, this Court should hold that a non-judicial decision issued by a Brickstreet insurance adjuster, without the benefit of the adversary system or cross-examination, is not binding in circuit court. Further, such a determination is a question of fact to be presented to a jury, and this matter should be remanded to the lower court to proceed to trial.

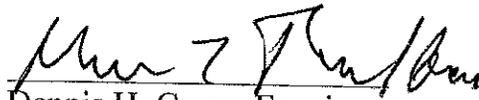
VI.  
PRAYER FOR RELIEF

WHEREFORE, based upon the above stated, the Petitioner Prays this Court to overturn the lower court's entry of Summary Judgment in favor of S. W. Jack Drilling Company and remand this matter to the lower court to proceed to trial, along with all other and further relief this Honorable Court deems just and proper.

**EVELYN L. "PEACH" MURPHY**, as  
Administratrix of the Estate of  
ANDREW JOHN MURPHY, deceased,  
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

EVELYN L. "PEACH" MURPHY,  
Administratrix of the Estate of  
Andrew John Murphy,

Appellant/Plaintiff Below,

v.

APPEAL NO.: 33811

S. W. JACK DRILLING COMPANY,

Appellee/ Defendant Below.

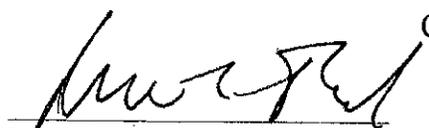
**CERTIFICATE OF SERVICE**

I, Mark L. French, Esquire, counsel for Appellant, Evelyn L. "Peach" Murphy, hereby certify that on this 9th day of January, 2009, I served a true copy of the foregoing "*Appellant's Supplemental Brief*" upon counsel of record as indicated below by mailing a true copy thereof via the United States mail, in a postage paid envelope:

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