

No.: 100159 35563

IN THE  
SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA

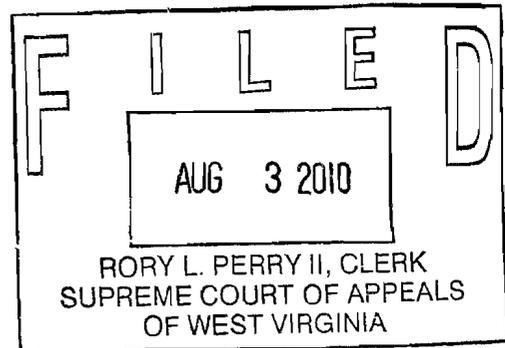
DIANA MAE SAVILLA,

Appellee,

v.

SPEEDWAY SUPERAMERICA, LLC dba  
Rich Oil Company, a Delaware Corporation,  
CITY OF CHARLESTON, a municipality;  
CHARLESTON FIRE DEPARTMENT,  
BRUCE GENTRY and ROB WARNER,

Defendants Below



AND

EUGENIA MOSCHGAT,

Appellant  
Intervenor Below.

**APPELLANT'S REPLY BRIEF<sup>1</sup>**

Although this matter has been well and fully briefed by the parties, the Appellant, Eugenia Moschgat, Intervenor below, files this short Reply for the purpose of clarifying several critical facts and reiterating the appropriate and applicable law.

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<sup>1</sup> This arises out of the case of Savilla v. Speedway Superamerica, LLC and Moschgat, Intervenor, 219 W.Va. 758, 639 S.E.2d 850 (2006). The Appellant is aware of the Murphy v. Eastern American Energy Corporation, 224 W.Va 95, 680 S.E.2d 110 (2009) decision. However, the issues presented in this Appeal were not addressed by this Court in the Murphy case.

**I. AN ATTORNEY FEE DISPUTE DOES NOT EXIST BETWEEN RANSON LAW OFFICES AND THE WORKMAN LAW FIRM AND RANSON LAW OFFICES HAS NO PRESENT CLAIM FOR ATTORNEY FEES**

Ranson Law Offices has no claim for attorney fees from the monies currently on deposit with the Kanawha County Circuit Clerk. Ranson Law Offices does not seek nor has it made any claim whatsoever for attorney fees from the monies currently on deposit. It is Ranson Law Offices position that Eugenia Moschgat is entitled to every penny of the money on deposit. The dispute regarding entitlement to attorney fees, if any, lies solely between the Administratrix, Diana Savilla's legal counsel, the Workman Firm and Eugenia Moschgat.

Linda Kannaird drowned on February 18, 2000. Ten days later, Eugenia Moschgat, Linda Kannaird's only child, was appointed Administratrix of her mother's estate on February 28, 2000. Two months after her mother's death, on June 28, 2000, Eugenia Moschgat's aunts and uncles undertook affirmative action to have her removed as Administratrix of her mother's estate and to defeat any potential claim she may have to recover damages resulting from her mother's death. Since that time, Dianna Mae Savilla, as Administratrix of the Estate, her nine brothers and sisters and their legal counsel have worked non-stop to defeat Eugenia Moschgat's claim. The Administratrix and her counsel's endeavors have spanned over a decade.

I. **NO RELATIONSHIP EXISTS BETWEEN EUGENIA MOSCHGAT AND THE WORKMAN LAW FIRM**

Eugenia Moschgat does not have and has never had any relationship with the Workman Law Firm, including an attorney-client relationship. **THIS FACT IS NOT IN DISPUTE.** Specifically, Margaret Workman counsel for the Administratrix has openly stated and affirmed on multiple occasions that she did not and could not represent Eugenia Moschgat, that she had no ability to represent Eugenia Moschgat and had no expectation that she represented Eugenia Moschgat.<sup>2</sup>

Margaret Workman made the following express statements which clearly indicate that she did not and could not represent Eugenia Moschgat:

- “I don’t stand here and say after all the things that have occurred in this case thus far that **Ms. Moschgat ought to look at me** and say, “I want you to be **my lawyer.**” Because she probably has a legitimate question in her mind, now, whether I could be as loyal to her interests as I have been to my petitioners.” (See, Page 20 of Transcript of Hearing on 7.31.00)
- “as I’ve stated here previously, under all the circumstances, I **do not think that Ms. Moschgat should expect for me** to be able to meet what I consider is my very strong fiduciary obligation if I’m the lawyer for the administrator of the estate. I think **Ms. Moschgat would be entitled to get other**

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<sup>2</sup> Ms. Moschgat was never provided with a single filing or single piece of paper related to the claims arising out of her mother’s estate from Ms. Workman or from Dianna Mae Savilla although requests for filings were made by Ms. Moschgat.

**separate counsel.** If Mr. Ranson wants to continue to participate, then each would have their counsel going to trial. That would be his decision on conferring with her". (See, Page 227 of Transcript of Hearing 8.21.00)

- "however, if they are appointed as the administrator and I represent them, I will commit, Your Honor, that I **would, certainly, not object to Ms. Moschgat being able to get her own counsel** as one of the beneficiaries, so that she could present whatever claim she felt she had." (See, Page 230 of Transcript of Hearing 8.21.00)
- "She would, certainly have the right to go and get her own counsel. And, frankly, I **don't have any objection** if Your Honor chooses to do that . . ." (See, Page 231 of Transcript of Hearing 8.21.00)
- "And in my opinion, I **don't think Ms. Moschgat should now have to accept me as her lawyer** after all these proceedings, and I think that she would **have a right to choose the Ranson firm** or whoever she wanted to represent her" (See, Page 235 of Transcript of Hearing 8.21.00)
- Finally, and in fact, by letter dated October 5, 2000 to the lower Court, Margaret Workman advised Judge Zakaib as follows: "Lastly, Petitioner pleads the record demonstrates a **true, meaningful conflict** and that in such a situation, the Rules of Professional Conduct prohibit Mr. Ranson from representing the Petitioners. Similarly, I **would not expect Ms. Moschgat to accept me as her lawyer.**" (See, Letter of Margaret Workman to Judge Paul Zakaib dated October 5, 2000)

## II. THE RECORD CLEARLY DEMONSTRATES THAT MS. SAVILLA AND HER COUNSEL WERE HOSTILE TOWARDS MS. MOSCHGAT<sup>3</sup>

It is indisputable that over the course of the last ten years, the Workman Law Firm and their client, Ms. Savilla, made many concerted attempts to defeat Eugenia Moschgat's claim. The following is just an example of the context of many statements made in an effort to defeat Eugenia Moschgat's claim:

- "the true parties in interest are the brothers and sisters because they had a relationship with the decedent" and "they are the true owners of the estate". (See, **Workman statements to Court, Page 12 of Transcript of Hearing 7.5.00 and Page 9 Transcript of Hearing 7.31.00**)
- "My clients all had a relationship with the decedent. The evidence will show when you receive all the evidence on July 31st that **Ms. Moschgat, through her own choice had no relationship whatsoever with her biological mother**". (See, **Workman statements to Court, Page 11 of Transcript of Hearing 7.5.00**)
- "And it's very clear that this individual was totally estranged from her mother, **had no relationship with her mother**. And, indeed, has hostility to her mother, and has demonstrated open hostility to these other beneficiaries". (See, **Workman Statements to Court, Page 11 of Transcript of Hearing 7.5.00**)

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<sup>3</sup> See, Justice Davis, dissent to a separate issue, where Justice pointed out that "the record clearly demonstrates that Ms. Savilla is hostile towards Ms. Moschgat." **Savilla v. Speedway Superamerica, LLC**, 639 S.E.2d 850, 864, 219 W.Va. 758, 772 (W.Va. 2006)

- “The one set relates to hostility, not to the beneficiaries, but to the decedent. That **Ms. Moschgat** would not speak to her mother, indeed, **had hostility to her mother**; had no relationship of her own choosing.” (See, **Workman Statements to the Court, Page 15 of Transcript of Hearing 7.5.00 attached**)
- “And that was that it was **Ms. Moschgat’s** choice to reject her mother, to have **no contact** with her, nor to permit her to have any relationship with her grandson, not even a photograph.” (See, **Workman Statements to the Court Page 10 of Transcript of Hearing 7.31.00**)
- “As such, they are the ones who will have damages in the wrongful death litigation. **She, by her own admission, had no relationship**, and that was also by her own choice.” (See, **Workman Statements to the Court, Page 13 of Transcript of Hearing 7.31.00**)

Margaret Workman never backed off her and her client's adverse position to Eugenia Moschgat and continued to advance the position during her argument to the West Virginia Supreme Court in the case of **Savilla v. Speedway Superamerica**, 219 W.Va. 758, 639 S.E.2d 850 (2006), See, Davis dissent, **supra**.

There is instance, after instance, after instance where Margaret Workman made it perfectly clear that “her petitioners’ claims” were adverse to those of Eugenia Moschgat. The lower court record is replete with statements such as:

- “I am still at a loss to understand what Ms. Moschgat is going to contend her damages were as **she has no loss of relationship claim**”. (See, Page 13 of Transcript of Hearing 7.31.00)
- “I don’t even understand how Ms. Moschgat is going to be able to prove any damages since she had no relationship by her own desire with her mother during lifetime” (See, Page 33 of Transcript of Hearing 8.4.00) and
- “**these individuals of mine** are the ones that own the estate claim in wrongful death because they are the ones who lost someone they loved and who ought to be compensated and hopefully will be compensated in damages. **Whereas Ms. Moschgat is the person who lost someone with whom she had no relationship** and had no desire to have a relationship during lifetime.” (See, Page 34 of Transcript of Hearing 8.4.00)

Under no circumstances has the Administratrix or her legal counsel ever represented Eugenia Moschgat’s interests or claims. In reality, the extensive record in this case clearly supports a finding that Savilla and her legal counsel consistently acted adverse to Eugenia Moschgat’s interest and her potential recovery. In her dissent to a separate issue, **Justice Davis** pointed out that “the record clearly demonstrates that Ms. Savilla is hostile towards Ms. Moschgat.” **Savilla v. Speedway Superamerica, LLC**, 639 S.E.2d 850, 864, 219 W.Va. 758, 772 (W.Va. 2006). **Justice Davis** also noted her concern that “Ms. Moschgat’s potential recovery now rests in the hands of a plaintiff who does not want her to have a single penny.” *Id.*

This Court has consistently held that the "fiduciary duty" is the highest standard of duty implied by law. Furthermore, *West Virginia Code § 44-1-15* states "It shall be the duty of every personal representative to administer well and truly the whole personal estate of his decedent." (*Emphasis added*) This high standard is demanded of fiduciaries and is quite rigid. In **Napier v. Compton**, 210 W.Va. 594, 558 S.E.2d 593 (2001), this Court stated that the "fiduciary duty" is a duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person; *it is the highest standard of duty implied by law*. The personal representative of an estate of deceased acts in a fiduciary capacity has a duty to manage the estate under his control to the advantage of those interested in it and to act on their behalf. **Claymore v. Wallace**, 146 W.Va. 379, 120 S.E.2d 241 (1961); **Lapinsky's Estate v. Sparacino**, 148 W.Va. 38, 132 S.E.2d 765 (1963).

In the discharge of this duty, the executor or administrator of a deceased's estate is held to the highest degree of good faith and is required to exercise the ordinary care and reasonable diligence which prudent persons ordinarily exercise, under like circumstances, in their own personal affairs. **Tavener v. Baughman**, 129 W.Va. 783, 41 S.E.2d 703 (1947); **Harris v. Orr**, 46 W.Va. 261, 33 S.E. 257 (1899).

The record clearly demonstrates that Administratrix Savilla did not act for Eugenia Moschgat's benefit, while subordinating her own personal interests. Nor did Administratrix Savilla manage the Eugenia's mother estate which was under her control to the advantage of Eugenia. The record is replete with examples of Administratrix

Savilla failure to discharge her duties as Administratrix in good faith and her failure to pursue a claim on behalf of Ms. Moschgat. The record overwhelmingly supports a stellar attempt by Administratrix Savilla to pursue the claim solely on her behalf and that of her brothers and sisters all to the exclusion of Ms. Moschgat.

Under the law it is well established that Ms. Moschgat was entitled to the best efforts of Administratrix Savilla. Instead, Ms. Moschgat received just the opposite. Now, and in spite of their destructive and damning words and actions, the Administratrix and her legal counsel seek attorney fees and costs from Ms. Moschgat. Unquestionably, the Administratrix Savilla breached her fiduciary duty to act for Eugenia Moschgat's benefit, the highest standard of duty implied by law, and cannot now reap any benefit or gain from that breach.

**III. DESPITE THE EXPRESS DIRECTIVE OF THIS COURT THAT A REMAND HEARING ON THE ISSUE OF ATTORNEY FEES AND COSTS BE CONDUCTED NO SUCH HEARING HAS OCCURRED**

On November 15, 2006, this Court issued an opinion, *Savilla v. Speedway et al.* 219 W.Va. 758, 639 S.E. 2d 850 (2006) with **remand directives to the lower court**, wherein this Court directed the "development of a full record and a careful weighing of all applicable law and equity by the court, as well as the issue attorney fees and expenses." Since November 16, 2006, the lower court has failed to follow the remand directives of this Court and as a direct result the Appellant has been wholly denied any opportunity to be heard on the issue of attorney fees and expenses. Yet, an Order has

been entered directing Ms. Moschgat to pay attorney fees and costs to the Workman Firm.

It is well established that a trial "court having the right to determine counsel fees **cannot** do so arbitrarily." Anytime there is a failure to accord a party "an opportunity to respond to the lower court's basis for assessing fees and costs, the most basic of all protections inherent to our judicial system has been violated". *Harris v. Allstate* 208 W.Va. 359, 540 S.E.2d 576 (2000) and City *Bank of Wheeling v. Bryan*, 76 W.Va. 481, 485, 86 S.E. 8, 10 (1915). In the instant case, and with respect to the lower court's *Ex parte and/or sua sponte* awards of attorney fees to Administratrix Savilla, the lower court denied Eugenia Moschgat an opportunity to challenge the appropriateness of Administratrix Savilla's claim for attorney fees and costs. The record is void of any hearing and there was no judicial inquiry into the reasonableness of the fees or the costs. Clearly, Eugenia Moschgat has been denied the most basic of all protections inherent to our judicial system.

The arbitrary award of attorney fees is not an issue novel for this Court. In *Maikotter v. University of West Virginia Bd. of Trustees/West Virginia Univ.*, 206 W.Va. 691, 527 S.E.2d 802, 808 (1999) (*Davis, J.*, concurring in part and dissenting in part) stated that: "[W]hen neither notice nor opportunity to be heard was afforded [on an attorney fee] issue, [it] is a fundamental violation of state and federal due process guarantees." Clearly, it was not proper to pass upon the allowance of attorney fees without giving the parties interested ... notice and an opportunity to be heard.

Because Eugenia Moschgat has been denied an opportunity to address entitlement to fees or the reasonableness of the fee award, her most basic of all protections inherent to our judicial system has been violated. Clearly, the circuit court erred by failing to afford Eugenia Moschgat notice and the opportunity to be heard prior to awarding attorney's fees. Thus, the trial court's *Ex parte* order awarding attorney fees and costs must be vacated.

#### **IV. DOUBLE RECOVERY OF ATTORNEY FEES AND COSTS IS NOT PERMITTED**

Fiduciary duties and beneficiary rights are essentially two sides of the same coin. These include the duty of loyalty where the fiduciary has the duty to refrain from **engaging in self-dealing** or otherwise not use her fiduciary position to further personal interests rather than those of the beneficiary. Also included is the duty of impartiality, where the fiduciary has the duty to treat beneficiaries equally and **fairly and to divide and distribute assets appropriately**. None of these duties was carried out by Administratrix Savilla.

A clear example of the prohibited "self-dealing" and a "failure to equally and fairly divide assets appropriately" can be found in Ms. Savilla's claim for expenses of \$18,192.69 from the Ms. Moschgat funds. The payment was to purportedly reimburse the Administratrix (Ms. Savilla) for expenses that she incurred in the course of the "deliberate intent" litigation. (See, Summary of Expenses Submitted for Payment by

Administratrix on 9.11.07). In obtaining the *Ex parte* orders, Administratrix, Dianna Mae Savilla, obviously did not inform the lower Court that **she had already recovered and received \$10,529.64** of the \$18,192.06 in "costs" from the settlement proceeds of the case against the City of Charleston (of which Ms. Moschgat was one of 11 recipients). (See, Order Distributing Funds Paid by Co-Defendant 09.11.07).

A simple review of the Summary of Expenses reveals that the Administratrix/Counsel for the Administratrix have already been reimbursed a significant portion of the total costs -- leaving outstanding and unreimbursed costs to the Administratrix and/or her legal counsel of \$7,663.05. Yet, Savilla through her counsel asked the lower court for the full amount of expenses of \$18,192.69 (\$10,529.64 of which has already been reimbursed) and the lower court has now apparently awarded the costs. This double recovery is at a minimum an example of self-dealing and is clearly inappropriate, impermissible and detrimental to Eugenia Moschgat.

Additionally, and in advancing her and her brothers and sisters' personal interests far beyond that of Ms. Moschgat, Savilla seeks reimbursement from Ms. Moschgat for expenses which are not remotely related to the deliberate intent claim or to any claim of Ms. Moschgat. Specifically, Administratrix Savilla reportedly employed an "expert" grief counselor to interview the brothers and sisters and to provide an opinion about the impact of their Sister's death on them. However, Ms. Moschgat had no knowledge that a grief counselor was employed on behalf of the estate or on her behalf. Ms. Moschgat never spoke to the grief counselor. No mental or medical

records of Ms. Moschgat's were ever provided to the grief counselor and no claim for Ms. Moschgat's grief was made by the Administratrix or the legal counsel employed by the Administratrix.<sup>4</sup> Yet, the Administratrix seeks payment by Ms. Moschgat for the grief counselor's entire bill of \$2,500.00. The overriding duty of a fiduciary is the obligation of undivided loyalty. Clearly, the action of the Administratrix in attempting to duplicate recovery of costs and attempting to unfairly assess costs against Eugenia Moschgat does not reveal undivided loyalty.

Finally, when the Administratrix settled the case of "*Estate of Kannaird v. City of Charleston*" she tendered a copy of the "**Summary of Expenses – Estate of Kannaird v. City of Charleston**"<sup>5</sup> with a "**KEY**" which designated to which claim each expense was attributable i.e. City of Charleston v. Superamerica.

The Summary of Expenses begins with the date of **December 14, 2000** and ends with the date of **September 9, 2007**. Without waiving any claim that Eugenia Moschgat does not owe attorney fees or expenses to the Administratrix, the expenses incurred before Margaret Workman was substituted as counsel for the Administratrix cannot possibly be assessed against Eugenia Moschgat. The Order substituting Margaret Workman as legal counsel for Administratrix Savilla was entered on **May 1,**

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<sup>4</sup> Larry A. Platt was purportedly the grief expert retained to testify about the impact of the death on the brothers and sisters. If he prepared a report it was not produced in the underlying litigation and he did not give deposition or trial testimony (**See**, Beeson Deposition Transcript at pps 26 and 27)

<sup>5</sup> It should be noted that Margaret Workman received the entire attorney fee on the City of Charleston case without objection by Ms. Moschgat or her legal counsel. This was in spite of the fact that Ms. Moschgat's counsel did a great deal of work related to the City of Charleston's legal responsibility to the Estate before being removed as counsel for the Estate.

**2001** yet expenses dating back to December 14, 2000 are being sought from Eugenia Moschgat. Again, these expenses predate Margaret Workman's substitution as counsel for the Estate. Clearly, any costs expended **before May 1, 2001** cannot possibly be Eugenia Moschgat's responsibility.

Furthermore, and logically, any costs expended **after** Moschgat settled her case with Speedway Superamerica cannot be attributable to Moschgat. Specifically, Moschgat settled her case with Speedway Superamerica on **July 21, 2003**. Thus, any costs expended thereafter cannot possibly be the responsibility of Ms. Moschgat nor could the expenses have been incurred for the benefit of Ms. Moschgat. Importantly, the Administratrix's own "damage expert", James G. Bordas confirmed that once Eugenia Moschgat settled her case with Speedway Superamerica there was "**no one to negotiate for**". (See, Bordas Deposition Transcript at Page 34) Yet, the Administratrix submitted expenses through September 2007 – which is four (4) years after Ms. Moschgat, settled her case with Speedway Superamerica. Clearly, any costs expended by the Administratrix after July 21, 2003, cannot be Eugenia Moschgat's responsibility and assessing such costs against Ms. Moschgat would be inappropriate and improper.

## VI. CONCLUSION

The Administratrix, Ms. Savilla, with the assistance of her legal counsel, has spent over ten (10) years trying to defeat Eugenia Moschgat's claim. The record clearly illustrates that Administratrix Savilla has been nothing but hostile towards Ms. Moschgat. See, ***Davis*** dissent to a separate issue **Savilla v. Speedway Superamerica, LLC**, 639 S.E.2d 850, 864, 219 W.Va. 758, 772 (W.Va. 2006). Permitting Savilla to recover attorney fees and expenses from the Moschgat settlement proceeds would be a gross miscarriage of justice.

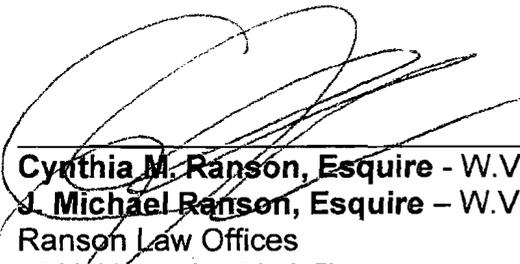
Perhaps most important is that Ms. Moschgat was denied notice and an opportunity to be heard regarding the award of attorney fees and costs which is a fundamental violation of her state and federal due process guarantees. Clearly, the trial court's multiple *Ex parte* orders awarding attorney fees and costs should be vacated and/or reversed. The lower court's failure to afford Eugenia Moschgat the requisite hearing leaves Ms. Moschgat with no recourse other than to seek a ruling from this Court as to the entitlement of attorney fees and costs, if any, to an openly hostile Administratrix and/or her counsel

**VII. RELIEF REQUESTED**

The Appellant and Intervenor, Eugenia Moschgat, seeks to vacate the Orders of the lower Court and respectfully moves this Court to determine whether the Administratrix should recover attorney fees and expenses from her deliberate intent settlement proceeds, and if so, in what amount and for such and other relief as this Court may deem just and proper.

**EUGENIA MOSCHGAT**

By Counsel



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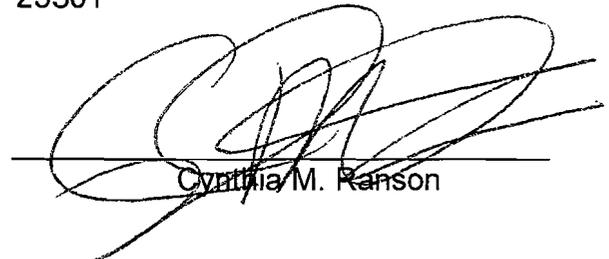
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CERTIFICATE OF SERVICE

I, Cynthia M. Ranson, counsel for plaintiff, hereby certify that I have served a true and exact copy of the foregoing APPELLANT'S REPLY BRIEF on the Appellee's counsel of record via United States Postal Service, on **August 3, 2010** as follows:

**Edward Rebrook, III, Esquire**  
723 Kanawha Blvd. East, Suite 300  
Charleston, WV 25301



Cynthia M. Ranson