NO. 100159

IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

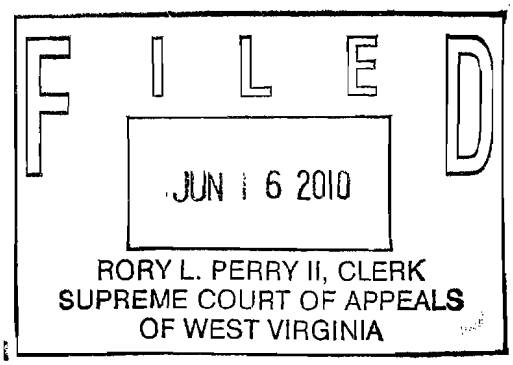
DIANA MAE SAVILLA,

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 and
Intervenor Below.

BRIEF FOR THE APPELLANT, EUGENIA MOSCHGAT

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY

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Defendants Below

AND

EUGENIA MOSCHGAT,

Appellant
Intervenor Below.

APPELLANT BRIEF[1]

Comes now the Appellant and Intervenor Below, Eugenia Moschgat and states that she is aggrieved by an *Ex parte* Second Revised Order Awarding Attorney Fees and Costs entered by the Circuit Court of Kanawha County, West Virginia on September 14, 2009 and from an Ex parte Final Order entered by the Circuit Court of

1 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.

Kanawha County, West Virginia on October 29, 2009. It was from these Orders that the Appellant brought her Petition for Appeal praying that this Honorable Court accept her appeal and vacate the Orders of the lower Court, with specific direction that the lower court conduct a remand hearing and fully develop the record below as it relates to whether the Administratrix should recover attorney fees and expenses from Eugenia Moschgat deliberate intention settlement proceeds, and, if so, in what amount.[2]

On February 11, 2010, the Appellant presented her Petition for Appeal to this Honorable Court for consideration. Thereafter, on April 28, 2010, the Appellant presented her Amended Petition for Appeal to this Honorable Court for consideration. By Order dated 14th day of May, 2010, Appellant's Petition for Appeal was granted by this Honorable Court. The Order granting the Petition for Appeal was received by Appellant's counsel on May 19, 2010.

[2] An Amended Petition for Appeal was filed in response to this Court's Order dated April 21, 2010 refusing the Appellant's Motion to exceed the fifty-page limit. The original Petition for Appeal exceeded the requisite page limit by eight pages.

I. THE KIND OF PROCEEDINGS AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

This case began with the tragic death of Linda Kannaird. On February 18, 2000 in Kanawha County, West Virginia, Linda Kannaird, age 54, drowned when a rescue boat operated by the City of Charleston overturned in flood waters. Ms. Kannaird was being evacuated from a convenience store where she worked; the store was operated by Speedway Superamerica. At the time of her death, Ms. Kannaird was unmarried, with no person dependent on her for financial support and had one adult child, Eugenia Moschgat.

On **February 28, 2000**, Eugenia Moschgat qualified and was appointed Administratrix of her mother's estate. At the same time, Ms. Moschgat retained the law firm of Ranson Law Offices to represent her as Administratrix and to represent the interests of her mother's estate. On **April 11, 2000**, Ms. Moschgat, as Administratrix of her mother's estate filed suit in the Circuit Court of Kanawha County, West Virginia against various parties including the City of Charleston and Speedway Superamerica. The lawsuit alleged that Ms. Kannaird's death was caused by the negligence of the City of Charleston employees and by conduct by Speedway Superamerica, Ms. Kannaird's employer and that the conduct of Speedway rose to the level of *"deliberate intention misconduct"*, so as to remove from Speedway, the immunity from suit that is conferred by West Virginia worker's compensation laws.

Subsequently, on **June 28, 2000**, a number of Linda Kannaird's siblings (who were also Eugenia Moschgat's aunts and uncles), alleging that they were potential

recipients of damages in the suit filed by Ms. Moschgat, filed pleadings in connection with the suit seeking to remove and replace Ms. Moschgat as the personal representative of Linda Kannaird's estate and as the plaintiff in the lawsuit. The pleadings were filed by Margaret Workman on behalf of Linda Kannaird's ten (10) brothers and sisters.

On **January 8, 2001**, and after several contentious hearings, the Circuit Court of Kanawha Court found that there was hostility between Ms. Moschgat and her late mother's siblings and that Ms. Moschgat had been estranged from her mother for a number of years.[3] The Circuit Court *ordered* Eugenia Moschgat be removed as the Administratrix and personal representative of her mother's estate and that she be replaced as the Administratrix and plaintiff by her aunt, Dianna Mae Savilla.[4] Ms. Moschgat's Petition for Appeal regarding her removal was refused by this Court in 2001.

On **May 1, 2001,** the Circuit Court of Kanawha County entered an Order removing Ranson Law Offices as counsel of record for the Estate of Linda Kannaird and substituted Margaret Workman as counsel of record.

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[3] Eugenia Moschgat was removed from her mother's legal custody at a very young age due to alleged misconduct by her mother's male suitors. Custody was granted to Eugenia's father, Eugene Summers. Eugenia was raised by her father. When Eugenia graduated from Sissonville High School she joined the armed forces and was later stationed overseas and then in the Carolinas. Eugenia never returned to live in West Virginia after joining the United States Military.

[4] In ***Footnote 3*** of Justice Albright's concurring opinion in **Savilla v. Speedway**, he recognized that "with the benefit of hindsight, it appears that this Court made a mistake in allowing the lower court's substitution of the personal representative **Id**. at 639 S.E.2d 850, 866 and 219 W.Va. 758, 774.

On **September 28, 2001**, Margaret Workman sought confirmation from Ms. Moschgat as to whether the Ranson firm would continue to represent her in connection with her claim. Specifically, Ms. Workman requested written verification from Ms. Moschgat as to her desires. (See, Margaret Workman letter dated 9.28.01, attached as Exhibit A to **Intervenor's Motion to Release Funds**)

On **October 6, 2001**, Ms. Moschgat provided Ms. Workman a letter confirming her desire for Ranson Law Offices to continue to represent her interest in the matter of her mother's estate as well as her interests in the wrongful death case filed on behalf of her mother's estate. Ms. Moschgat also advised Ms. Workman that she "expected to receive the entire proceeds from the settlement of the wrongful death suit and/or the entire proceeds from any verdict in the case." (See, Eugenia Moschgat letter to Margaret Workman dated 10.8.01 attached as Exhibit B to **Intervenor's Motion to Release Funds**)

On **June 5, 2002,** Joseph S. Beeson, counsel for Speedway Superamerica advised Margaret Workman that it was his client's position that the ten (10) non-dependent siblings of Linda Kannaird had no claim against his client, Speedway Superamerica. (See, Joseph Beeson letter to Margaret Workman dated 6.5.02 attached as Exhibit C **to Intervenor's Motion to Release Funds**)

On **July 1, 2002**, a *Motion for Stay and Judgment on Pleadings* was filed by Speedway Superamerica wherein Speedway Superamerica advanced its position that

the ten (10) brothers and sisters of Linda Kannaird had no claim for damages against Speedway Superamerica.

On **February 5, 2003**, Eugenia Moschgat by means of her legal counsel, Ranson Law Offices advised Ms. Workman that it was clear pursuant to ***West Virginia Code 23-4-2(c)*** that Eugenia Moschgat was the only person eligible to recover damages as she was the only surviving child of Linda Kannaird. Confirmation was sought from Margaret Workman and from the Administratrix, Dianna Mae Savilla that they were aware of ***West Virginia Code 23-4-2(c)*** and Eugenia Moschgat's claim that she was the only person eligible to recover damages as she was the only surviving child of Linda Kannaird. No response was received by Ms. Moschgat to her February 5, 2003 request. [5]

On **July 21, 2003**, Eugenia Moschgat acting independently of Ms. Savilla and with the assistance of her legal counsel, Ranson Law Offices settled her claim for damages against Speedway Superamerica. The Administratrix and Ms. Workman were made aware of a settlement but the specific terms of the agreement were entered into under seal and were eventually disclosed four (4) years later pursuant to Court order on February 23, 2007.

[5] Prior to settling her claim with Speedway Superamerica, 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 Dianna Mae Savilla although requests for filings were made by Ms. Moschgat.

Then, on **April 8, 2005**, the lower Court granted Speedway Superamerica's *Motion to Dismiss*, with prejudice, holding that pursuant to ***W.Va. Code 23-4-2*** the brothers and sisters of Linda Kannaird were not within the class of persons who may recover workers' compensation benefits or "*deliberate intent*" damages for the death of Linda Kannaird. Additionally, the lower Court denied Diana Mae Savilla's *Petition to Certify Questions as to Speedway Superamerica*. Finally, the Court entered a final judgment in favor of Speedway Superamerica and against Administratrix, Diana Mae Savilla.

On or about **September 9, 2005**, Diana Mae Savilla filed a *Petition for Appeal* with the West Virginia Supreme Court of Appeals seeking among other things reinstatement of her and her brothers and sisters' claims against Speedway Superamerica filed pursuant to ***West Virginia Code 23-4-2(b).*** This Court accepted Dianna Savilla Administratrix's Petition for Appeal. No claim was advanced on behalf of Eugenia Moschgat.

On **November 15, 2006**, this Court determined that pursuant to ***West Virginia Code 23-4-2(b) only*** **Eugenia Moschgat**, the child of Linda Kannaird, could recover damages for her death. See, **Savilla v. Speedway Superamerica, LLC and Moschgat, Intervenor,** 219 W.Va. 758, 639 S.E.2d 850 (2006) and that the brothers and sisters of Linda Kannaird **were not within** the class of persons who may recover worker's compensation benefits or damages. Finally, this Court also held that the Administratrix/personal representative had standing to bring the suit on behalf of the

Estate and that the lower Court must provide for compensation to the personal representative for her expenses in connection with the litigation, including appropriate attorney fees but **without creating unfairness to Ms. Moschgat** and her separate counsel. **Id**. at Pg. 858. In its remand directions, this Court directed the "development of a full record and a careful weighing of all the applicable law and equity by the court" were necessary.

On **January 29, 2007** Speedway Superamerica filed a *Motion to Approve the Settlement* entered into with Eugenia Moschgat on **July 21, 2003** and to *Dismiss the Action* against it. On **February 15, 2007**, Dianna Mae Savilla filed a *Response to Motion of Speedway Superamerica to Approve Settlement and Dismiss Action*. In that Response, Dianna Mae Savilla moved the lower Court for "costs and fees **against** Speedway, **not against** Ms. Moschgat." Dianna Mae Savilla's filings expressly stated that costs and fees were being sought **against** Speedway Superamerica and **not against** Ms. Moschgat because "the Supreme Court of Appeals directed that attorney's fees and costs be ordered by this court without creating unfairness to Ms. Moschgat and her separate counsel".

On **February 22, 2007**, Dianna Mae Savilla filed an *Attorneys Charging & Expense Lien & Motion for Hearing on Attorneys Fee & Expenses*. In her filings, Dianna Mae Savilla argued quite mightily as to why Speedway Superamerica should be responsible for the attorney fees and costs associated with pursuing the "deliberate intent claim of the estate against Speedway Superamerica". In that filing, Savilla again

reminded the lower Court she was seeking attorney fees and costs **from** Speedway Superamerica and **not** Eugenia Moschgat and reiterated that fees and costs should be awarded **without creating unfairness to Ms. Moschgat and her separate counsel**." *(Bold print provided by Ms. Workman in her filings presumably to add emphasis to her point)*

By order of **March 1, 2007**, the lower Court found **no basis for attorney fees** and costs to be assessed against Speedway Superamerica and entered an Order accordingly. In that Order, the lower court directed that it would "hold a hearing on ***April 23, 2007***, on Plaintiff's Attorneys Charging & Expense Lien & Motion for Attorney Fees and Expenses at which time it will consider whether plaintiff should recover attorney fees and expenses from the [***Moschgat***] settlement proceeds, and, if so, in what amount."

On **April 19, 2007**, Margaret Workman on behalf of the Administratrix filed a "Notice of Hearing" **continuing** the April 23, 2007 hearing to June 19, 2007. An *Objection* to the hearing being continued without a motion or asserted basis was filed on behalf of Ms. Moschgat as she was already in route from her home in Lebanon, Missouri and was traveling to West Virginia to attend the hearing. (See **Affidavit** of Eugenia Moschgat attached as Exhibit F to Writ of Prohibition). Over Ms. Moschgat's objections, the April 23, 2007 hearing was cancelled by the Court and rescheduled for June 19, 2007.

On **June 19, 2007**, Eugenia Moschgat and her legal counsel J. Michael and Cynthia Ranson appeared before the lower Court for the "hearing" on the issue of the *Administratrix's Attorneys Charging & Expense Lien*. The Administratrix, Diana Savilla did not appear in person. Instead, Margaret Workman and her legal counsel, Edward Rebrook appeared. At the outset of the "hearing", Ms. Workman and Mr. Rebrook advised the Court that before going forward they wished to secure the deposition of James Bordas, the Administratrix's designated expert on the "Attorney Charging Lien" **and** to cross examine Joseph Beeson, Speedway Superamerica's lawyer, a fact witness identified by the Intervenor. The lower Court ***took no evidence and did not rule*** on the Attorneys Charging & Expense Lien as it related to Eugenia Moschgat. In fact, the lower Court directed the parties to obtain a "new hearing date from Melody" and to submit findings of facts and conclusions of law along with exhibits two weeks **after** the discovery by Ms. Workman and Mr. Rebrook was completed.[6] (See Page 43 of Transcript of Hearing 6.19.07) Finally, the lower court directed the Ranson Firm to hold in escrow $75,000.00 for attorney fees being claimed by the Workman Firm and $18,192.69 in expenses until the Court could consider the plaintiff's entitlement to attorney fees and expenses and the amount, if any, at a full hearing. (See Page 40 of Transcript of Hearing 6.19.07)

Eventually, a new hearing date of **December 19, 2007** was secured from Judge Zakaib's office by Mr. Rebrook's office and communicated by telephone to Ranson Law

[6] James Bordas' deposition was subsequently taken and concluded on October 3, 2007. To date, Ms. Workman and Mr. Rebrook have not cross examined attorney, Joseph Beeson.

Offices. On December 19, 2007, Eugenia Moschgat, her counsel, J. Michael Ranson and Cynthia Ranson and Joseph Beeson, Esquire appeared in person prepared to present evidence and testimony to the lower court regarding Moschgat's position on the *Administratrix's Attorney's Charging & Expense Lien*. However, upon arrival at Judge Zakaib's courtroom, counsel for Ms. Moschgat was advised that the hearing had been "cancelled because a Notice of Hearing was not filed with the Court." A Notice of Hearing is traditionally prepared and filed by the party securing the hearing date which in this instance was Mr. Rebrook. Neither Mr. Rebrook, Ms. Workman nor Diana Savilla Administratrix appeared on December 19, 2007 for the hearing arranged by Mr. Rebrook. To the knowledge of Eugenia Moschgat and her counsel, there was no other action by Administratrix until entry of an *Ex parte* order on August 26, 2008.[7]

Thereafter, and without any notice whatsoever to Ms. Moschgat or her legal counsel, a Certified Copy of an "Order Awarding Attorney Fees" was received via United States Mail in the office of Ranson Law Offices. The *Ex parte* Order was filed stamped by the Circuit Clerk of Kanawha County on August 27, 2008 and was certified by the Circuit Clerk of Kanawha County as a "true copy of the records of the Court" on September 2, 2008. A Certified Copy of the *Ex parte* order was received by Ranson Law Offices on the **3rd day of September, 2008** via United States Mail i.e. eight (8) days after its entry by the Court.

[7] Coincidently, on August 28, 2008, and due to the extraordinary passage of time with no action by the Administratrix, Ms. Moschgat filed a Motion to Release the Funds being held in escrow since February 23, 2007. The Motion to Release Funds would not have been filed had a hearing on the Attorney Charging Lien been conducted by the lower court.

The *Ex parte* Order Awarding Attorney Fees was apparently signed by Judge Zakaib on August 26, 2008 awarding attorney fees in the amount of $76,500.00 to the Workman Firm, $3,500.00 to the "Ranson Law Firm"[8] and the sum of $18,192.69 representing "reimbursement of expenses" advanced by the Workman Firm in the deliberate intent claim. (See, *Ex parte* Order Awarding Attorney Fees, August 26, 2008)

Upon receipt of the *Ex parte* Order, Eugenia Moschgat, by her counsel, immediately filed, pursuant to **Rule 24.01 (b) of the West Virginia Trial Court Rules,** an "*Objection To Entry Of Order Awarding Attorney Fees*" and a "*Request For Stay Of Enforcement Of Order Awarding Attorney Fees Pending Hearing On Motion For Reconsideration and/or Intervenor's Motion To Release Funds*". The Objection to the Entry of the Order was filed on **September 5, 2008** and incorporated by reference the Intervenor's Motion to Release Funds previously filed on August 28, 2008. A hearing date for the Objection to Entry of the Order Awarding Attorney Fees was requested by the Intervenor and was set and noticed for **November 12, 2008**. However, shortly before November 12, 2008, counsel for the parties were informed by the Judge's secretary that the Honorable Judge Zakaib was in the hospital and unavailable to preside over the hearing. **The hearing was cancelled. The hearing could not be rescheduled as the Judge's return date to the bench unknown.**

[8] Ranson Law Offices has no claim for attorney fees from the monies held in escrow. Contrary to the Administratrix's contention, this matter does not arise out of an "attorney fee dispute." The dispute lies solely between the Administratrix and Eugenia Moschgat and the Administratrix' claim of entitlement to fees and expenses from Eugenia Moschgat's settlement proceeds from Speedway.

The basis for the Intervenor's objection to the entry of the *Ex parte* Order Awarding Attorney Fees was multi-faceted and incorporated by reference the arguments set forth in Ms. Moschgat's *Motion to Release Funds* filed on August 28, 2008. In addition to the arguments set forth therein, the *Ex parte* order **did not** bear the signature of counsel for the Intervenor **nor did it bear** an "unsigned signature line" for counsel for the Intervenor. Simply put, the *Ex parte* Order Awarding Attorney Fees was never presented to the Intervenor nor her counsel and was apparently presented *Ex parte* and unilaterally by Mr. Rebrook to Judge Zakaib. Importantly, and upon investigation, the Circuit Clerk of Kanawha County's file was void of any transmittal letter from Edward Rebrook to the Court, the Clerk or the Judge presenting the Order for consideration or entry. It is unknown at this time as to what form or how the *Ex parte* order was presented to the lower court.

Finally, and significantly, the lower's Court's August 26, 2008, *Ex parte* order reflects that it relied on the videotaped evidentiary depositions of Joseph Beeson and James Bordas in awarding attorney fees. However, the deposition of Joseph Beeson was not filed with the Court prior to the entry of the *Ex parte* order. Significantly, the Certified Copy of the Kanawha County Circuit Clerk's Docket Sheet does not indicate that the deposition of Joseph Beeson was filed with the Court. (See, Certified Copy of the Kanawha County Circuit Clerk's Docket Sheet)

On **November 19, 2008**, Edward Rebrook, designated as counsel for the Administratrix and Margaret Workman, filed a ***Response to Intervenor's Objection to***

Entry of Order and offered a "***Revised Order Awarding Attorney Fees***". Apparently speaking and writing on behalf of the Court, Mr. Rebrook stated that reference to the depositions of Beeson and Bordas was the result of a clerical error noting that the depositions of Bordas and Beeson "were not relevant to the findings and conclusions made by the court, or to the substance of the court's reasoning in making its ruling." Mr. Rebrook then moved the Court to "re-enter the order as previously determined to reflect the court's findings of facts and conclusion of law with all references to the depositions of Mr. Beeson and Mr. Bordas removed from such revised proposed order". To date, the "Revised Order" was not been entered by the lower court. (See, Response to Intervenor's Objection to Entry of Order)

On **November 20, 2008**, Ms. Moschgat again filed an ***Objection*** this time to the entry of the "***Revised Order Awarding Attorney Fees***" submitted by Mr. Rebrook based on the same reasoning set forth in the Intervenor's Objection to the Entry of the original Order awarding attorney fees and filed with the lower court on September 5, 2008.

Finally, on **November 24, 2008**, Eugenia Moschgat filed a ***Reply to the Response of the Administratrix and Margaret Workman*** and strongly disputed the characterization of this matter as an **"attorney fee dispute"**, as no dispute exists between Ranson Law Offices and the Workman Law Firm as to the entitlement of attorney fees from Eugenia Moschgat. Instead, the dispute emanates from Diana Savilla's claim of entitlement to attorney fees from Eugenia Moschgat's settlement with

Speedway Superamerica, the former employer of Linda Sue Kannaird. As noted in the *Intervenor's Response,* no one can seriously suggest that the Administratrix and her siblings are entitled to attorney fees and expenses from Eugenia Moschgat. The Administratrix and her siblings have been completely adverse and hostile to Eugenia Moschgat and have worked overtime to eliminate her claims.

On **December 22, 2008**, Eugenia Moschgat filed a timely Petition for Appeal with the Circuit Court of Kanawha County, West Virginia. Thereafter, counsel for Diana Savilla filed a written response to the Petition for Appeal and proclaimed that the issues set forth in the Intervener's Petition for Appeal were "*still pending and in ongoing litigation before the Circuit Court of Kanawha County, Honorable Paul Zakaib presiding.*" On **March 12, 2009**, this Court entered an Order denying the Petition for Appeal holding that the Petition was "*premature*".

Over the ensuing months following the entry of this Court's March 12, 2009 order denying the Intervenor's Petition for Appeal due to "prematurity", counsel for the Intervenor made multiple requests by telephone and in person seeking a hearing on the issues "still pending and in ongoing litigation before the Circuit Court of Kanawha County, Honorable Paul Zakaib presiding" as defined by Edward Rebrook. Counsel for Ms. Moschgat multiple requests for a hearing were first ignored by Judge Zakaib's staff as multiple phone calls and messages were not returned. Thereafter, Ranson Law Office staff appeared ***in person*** in Judge Zakaib's office requesting a hearing and were denied a hearing based upon a representation that "it would be necessary for Mr.

Rebrook to request and arrange any hearing" on the issues still pending.

Thereafter, and again without any notice whatsoever to Ms. Moschgat or her legal counsel, a ***Second "REVISED" Order Awarding Attorney Fees*** was entered by Judge Zakaib on September 14, 2009, certified by the Circuit Court Clerk on September 17, 2009 and received in the law offices of Ranson Law Offices on September 22, 2009. Neither the Intervenor nor her counsel received any notice whatsoever of the presentment of the September 14, 2009 order and were again denied any opportunity **under Rule 24 of the West Virginia Trial Court Rules** to object to the Order prior to entry.

Upon receipt of the September 14, 2009 *Ex parte* Order, Eugenia Moschgat, by her counsel, immediately filed, pursuant to **Rule 24.01 (b) of the West Virginia Trial Court Rules,** an "*Objection To Entry Of Second Revised Order Awarding Attorney Fees*" and a "*Request For Stay Of Enforcement Of Order Awarding Attorney Fees Pending Hearing On Motion For Reconsideration and/or Intervenor's Motion To Release Funds*". The Objection to the Entry of the Order was filed **on September 28, 2009** and incorporated by reference the ***Intervenor's Motion to Release Funds*** previously filed on August 28, 2008.

On **October 29, 2009**, and apparently following the receipt of the Intervenor's "*Objection To Entry Of Second Revised Order Awarding Attorney Fees*" and a "*Request For Stay Of Enforcement Of Order Awarding Attorney Fees Pending Hearing On Motion*

For Reconsideration and/or Intervenor's Motion To Release Funds, the Circuit Court of Kanawha County entered a "Final Order", addressing "conflicts" between the August 27, 2008 Order Awarding Attorney Fees and the September 14, 2009 Second Revised Order Awarding Attorney Fee's.[9] It is from this Order the Appellant appeals.

II. STATEMENT OF FACTS

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. On April 11, 2000, suit was instituted by Eugenia Moschgat against the parties potentially responsible for her mother's death i.e. the City of Charleston and Speedway Superamerica.

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. By way of illustration, over the course of the last ten years this case has been to the West Virginia Supreme Court three times, and between that time was removed to the United States District Court for the Southern

[9] The Intervenor has never been afforded a remand hearing to fully develop the record below as it relates to whether the Administratrix should recover attorney fees and expenses from the Eugenia Moschgat deliberate intent settlement proceeds.

District of West Virginia and then remanded back to the Circuit Court of Kanawha County where it remains still pending today.[10]

It was only after this Court decision in *Savilla v. Speedway Superamerica and Moschgat, Intervenor* on November 16, 2006 that Savilla and her siblings acknowledged Eugenia Moschgat as the ***real party*** in interest. However, since November 2006 Savilla and her legal counsel have spent an extraordinary amount of time and effort attempting to collect "attorney's fees and expenses" associated with the "deliberate intent claim" against Speedway Superamerica even though none of the siblings were entitled to a penny from those proceeds. When Savilla and her counsel failed in persuading the Court that Superamerica should pay them attorney fees and costs, Savilla then turned her attention and efforts back to Eugenia Moschgat. Now, Savilla and her legal counsel proclaim that Ms. Moschgat is responsible to pay attorney fees and costs to the Administratrix from the proceeds she received from the "deliberate intent claim".

First, it must be pointed out that Eugenia Moschgat does not have and has never had an attorney client relationship with anyone other than Ranson Law Offices. Specifically, Ms. Moschgat made it clear from the beginning and then over and over again that Ranson Law Offices represented her and that she had no desire for any other attorney to represent her or her interests. (See, Eugenia Moschgat letter to Margaret Workman dated October 8, 2001 attached to **Intervenor's Motion to Release Funds**)

[10] It should be noted that all other death and injury claims arising out of the tragic boating accident were settled within a year following the institution of suit.

More importantly, Margaret Workman counsel for the Administratrix has openly admitted on multiple occasions that she does not represent Eugenia Moschgat. In fact, Margaret Workman made the following express statements which clearly indicate 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:

- "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 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 **<u>would not expect</u>** Ms. Moschgat to accept me as her lawyer." (See, Letter of

Margaret Workman to Judge Paul Zakaib dated October 5, 2000)

Over the course of the last ten years, Ms. Savilla and her counsel made many concerted attempts to defeat Eugenia Moschgat's claim. The following is just a smattering of the types of defamatory and damaging 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)

- "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)
- "Jeanie refused to have a relationship with her mother". She cried a lot. It hurt her deeply that she didn't have no relationship with Jeanie. (See, Diana Mae Savilla Testimony at Pages 28 and 89 of Transcript of Hearing 7.31.00 solicited and presented by Workman)
- "Because I promised, and this one of the promises I broke, that if the woman showed up at the funeral, I'd make sure she wasn't allowed in. Her feelings were so hurt, because this woman absolutely turned her back. For her to be a mother and still treat

her mother that way, I thought it was horrible" (See, Linda Plemons Testimony at Page 76 of Transcript of Hearing 7.31.00 solicited and presented by Workman)

- "And what was Ms. Moschgat's reaction after she saw her mother's dead body? Just like it was a stranger. She didn't cry or nothing" (See, Denise K. Harrison Testimony at Page 114 of Transcript of Hearing 9.8.00 solicited and presented by Workman)
- "Do you know whether she had any relationship at all with Ms. Moschgat? Absolutely not." (See, John Good Testimony at Page 7 of Transcript of Hearing 10.4.00 solicited and presented by Workman)

According to Joseph Beeson, counsel for Speedway Superamerica, Margaret Workman "never backed off her position that the brothers and sisters were entitled to recover." (See, Joseph Beeson Deposition Transcript Page 13) and continued to be adverse to the position of Eugenia Moschgat 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, Joseph Beeson Deposition Transcript Page 20)

There is instance, after instance, after instance where Workman made it perfectly clear that "her petitioners' claims" were adverse to those of Eugenia Moschgat and that Eugenia Moschgat was not **someone worthy** to recover anything. The 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)

At every opportunity, Savilla and Workman reiterated Ms. Moschgat's unworthiness and even emphasized it in the "demand letter" sent to counsel for Speedway Superamerica dated April 17, 2004[11]. In that letter Ms. Workman described Ms. Moschgat as "*an additional survivor, Ms. Eugenia Moschgat, continues to remain in the beneficiary pool. She is the daughter of Ms. Kannaird, who unfortunately did not*

[11] The Court should be reminded that the Savilla "demand" was made almost a year after Eugenia Moschgat settled her claim with Speedway Superamerica on 7/21/03.

have a close relationship with her mother. In fact, they had not spoken in 20 years." (See, Margaret Workman letter to Joseph Beeson dated 4.17.04 attached as **Exhibit D** to Intervenor's Motion to Release Funds) Clearly, these are not the words of an attorney representing her "client", her "client's interests" or the interests of the recipient of **W.Va. Code 23-4-2** damages.

Under no circumstances has the Administratrix or her legal counsel ever represented Eugenia Moschgat's interests or claims. Multiple filings, presumably approved by the Administratrix and authored by her counsel and filed with the Circuit Court of Kanawha County and the West Virginia Supreme Court, contain statements publicly denouncing Ms. Moschgat and making disparaging remarks about her personally, as Administratrix of her mother's estate and as a potential beneficiary. Clearly, it is ludicrous for anyone to even suggest that the Administratrix or her legal counsel represented or promoted Eugenia Moschgat or her interests in any form whatsoever. For this Court to hold otherwise would be a tragic and serious miscarriage of justice and would undoubtedly create unfairness to Eugenia Moschgat[12] – an unfairness strictly prohibited by this Court's own directive and the law of the case.

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

[12] While the West Virginia Supreme Court indicates that fees and costs should be awarded to Margaret Workman the Court also emphasized that the award **should not** create unfairness to Eugenia Moschgat. It should be noted that Ms. Workman did, in fact, recover attorney fees of $63,333.00 and expenses of $10,529.64 from the settlement of the "wrongful death" action against the City of Charleston and arising out of Linda Kannaird's death..

her potential recovery and in fact **diminished the value** of her claim. Obviously, the relentless warfare waged against Eugenia Moschgat by Savilla, her nine brothers and sisters and their legal counsel had a very profound effect on the value of Ms. Moschgat's claim. To illustrate this point, the Administratrix's own damage expert, James G. Bordas, Esquire, strongly "disagreed" with Margaret Workman's assessment that "Ms. Moschgat had no loss of relationship claim". To the contrary, Mr. Bordas swore under oath in his deposition that he "estimated that Ms. Moschgat damages could have been as much at 10 million dollars". Mr. Bordas based his value on Ms. Moschgat's permanent loss of opportunity to have a relationship in the future with her mother. (See Bordas Deposition Transcript at Pages 8 and Page 21)

III. ASSIGNMENTS OF ERROR

Whether a fundamental violation of state and federal due process guarantees occurs when a trial court awards attorney fees and expenses to an Administratrix, over the objections of the sole beneficiary, and without development of a full record and a careful weighing of all the applicable law and equity?

Whether an openly hostile Administratrix is prohibited from charging the sole beneficiary attorney's fees and expenses incurred pursuing interests in direct conflict with those of the sole beneficiary?

Whether an openly hostile Administratrix must make a showing of legal representation and expenses inuring to the benefit of the sole beneficiary before collecting legal fees and expenses from that sole beneficiary?

IV. POINTS AND AUTHORITIES RELIED ON

STANDARD OF REVIEW

On November 15, 2006, this Court issued an opinion, ***Savilla v. Speedway et al.*** 219 W.Va. 758, 639 S.E. 2d 850 (2006) which contained ***remand directives to the lower court***. In its remand directives, 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." When a full development of the record and a careful weighing of all applicable law and equity by the Court did not occur, the Appellant herein sought a Writ of Mandamus from this Court. This Court denied the Appellant's Writ of Mandamus as being "premature." Presumably, this Court's finding of "prematurity" was based upon the Administratrix's and her counsel's contention that the issue raised in the Appellant's Writ was "still pending before the Circuit Court of Kanawha County" and the Appellant's plea that the "Circuit Court of Kanawha County be permitted to continue to perform its duties pursuant to the remand order." (See, ***Response of Diana Savilla, Administratrix to Petition for Prohibition & Mandamus and to Petition for Appeal***)

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. ***A truly extraordinary situation now exists.*** Consequently, this Court should now step in and

consider the propriety of awarding attorney fees and expenses to an openly hostile Administratrix and her counsel without affording a hearing to the party who may potentially pay those fees and expenses. The courts which have considered the propriety ... of awarding attorney's fees from the trust estate in actions between co-trustees have considered such factors as who ultimately benefitted from the action, which party was successful in the action, the necessity of resolving the dispute through litigation, and the fault, if any, of the party seeking to have fees paid from the trust estate, with the ultimate decision being primarily left to the discretion of the trial judge. Lee R. Russ, J.D., ***Award of Attorneys' Fees Out of Trust Estate in Action by Trustee Against Co-Trustee***, 24 A.L.R.4th 624 § 2 (1983). The Appellant, Eugenia Moschgat seeks this Court's directive and moves this Court to consider and rule upon the propriety of the attorney fees and expenses awarded to the Administratrix, Diana Savilla and her legal counsel or at a minimum afford her an opportunity to respond to the lower court's basis for assessing fees and costs.

V. DISCUSSION

Shortly after her mother's death, Eugenia Moschgat was appointed Administratrix of her late mother's estate. As Administratrix of her mother estate, on **April 11, 2000** and pursuant to ***West Virginia Code § 23-4-2,*** Eugenia Moschgat filed a wrongful death cause of action which included a deliberate intent claim against her mother's employer, Speedway Superamerica. The suit also asserted various claims against the City of Charleston and some of its employees. Pursuant to ***West Virginia Code § 23-4-2***, Eugenia Moschgat, the only child of Linda Kannaird, was the only beneficiary who could

recover damages. Thereafter, Dianna Mae Savilla, Eugenia's aunt, filed a motion to remove Eugenia Moschgat, as Administratrix. The purpose of the removal was to posture Savilla and her ten (10) brothers and sisters as primary claimants to any recovery for the death of Linda Kannaird and eventually eliminate any claim Eugenia Moschgat may have as the only child of Linda Kannaird.

On **January 8, 2001,** Dianna Mae Savilla was appointed Administratrix. Ms. Savilla employed Margaret Workman as legal counsel to continue the cause of action Eugenia Moschgat initiated. During the pendency of the action, Ms. Savilla took the position that Eugenia Moschgat was not entitled to any recovery and that any recovery belonged ***only to her and her brother and sisters***. Although Linda Kannaird's employer expeditiously settled the cases with other parties who also lost loved ones in the flood that took Linda Kannaird's life, Administratrix Savilla refused to enter into a resolution of Eugenia Moschgat's claims. In fact, Savilla continued for years to deny that Eugenia Moschgat was entitled to any damages and openly disavowed Eugenia's claim.

After being removed as Administratrix of her mother's estate, Eugenia Moschgat (the sole beneficiary) employed her own private counsel. On **July 21, 2003,** Ms. Moschgat settled her claims with her mother's employer. The settlement contained a provision that the pending case had to be dismissed before Ms. Moschgat could receive the proceeds of the settlement.[13] Despite the sole beneficiary's claim being resolved, Administratrix, Savilla proceeded with the already settled cause of action in an effort to

[13] According to Joseph Beeson, counsel for Speedway Superamerica, the Administratrix nor her legal counsel ever did anything positive to advance Moschgat's position (See, Beeson Transcript pps. 23 – 25)

benefit only herself and her siblings, all of which delayed the ultimate resolution of the case for the only true beneficiary. On **April 8, 2005,** almost two years after Eugenia Moschgat (the sole beneficiary) agreed on a settlement amount with the employer, the lower Court dismissed the claims of Administratrix Savilla and her siblings for ***West Virginia Code § 23-4-2*** damages against Speedway Superamerica.

On **November 15, 2006**, this Court affirmed that, pursuant to ***West Virginia Code 23-4-2(b), only*** Eugenia Moschgat, the one surviving child of Linda Kannaird, could recover damages for her death. In addressing 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. Finally, in ***Footnote 3*** of Justice Albright's concurring opinion, he recognized that, "[w]ith the benefit of hindsight, it appears that this Court made a mistake in allowing the lower court's substitution of personal representatives." Id., 639 S.E.2d 850, 866, 219 W.Va. 758, 774.

A. A fundamental violation of state and federal due process guarantees occurs when a trial court awards attorney fees and expenses to an Administratrix, over the objections of the sole beneficiary, and without development of a full record and a careful weighing of all the applicable law and equity

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 did not hold a hearing to afford Eugenia Moschgat an opportunity to challenge the appropriateness of Administratrix Savilla's claim for attorney fees and costs. The record is void of any such 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.

On numerous occasions, this Court has determined that a circuit court has erred by failing to afford a party notice and the opportunity to be heard prior to awarding attorney's fees. In **Czaja v. Czaja**, 208 W.Va. 62, 537 S.E.2d 908 (2000), this Court recognized the lower court error in awarding attorney's fees without providing Appellant's counsel an opportunity to address either Appellee's entitlement to fees or the reasonableness of the fee award itself and the circuit court approved an order prepared by Appellee's counsel, which directed that $6,080.50 in cumulative fees and costs were to be paid by Appellant's counsel within seven days. In failing to accord Appellant's counsel an opportunity to respond to the lower court's basis for assessing fees and costs, this Court found that ***the most basic of all protections*** inherent to our judicial system had been violated. **Id**. at 208 W.Va. 62, 75-76, 537 S.E.2d 908, 921-22 (2000).

Similarly, in **Daily Gazette Co. v. Canady**, 175 W.Va. 249, 251, 332 S.E.2d 262, 264 (1985) (emphasis added) (quoting **Roadway Express, Inc. v. Piper**, 447 U.S. 752, 766-67, 100 S.Ct. 2455, 2464, 65 L.Ed.2d 488, 501-02 (1980)) this Court observed that " '[l]ike other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." This basic axiom of law clearly requires that Eugenia Moschgat be given notice and an opportunity to be heard before awarding attorney's fees and expenses to Administratrix Savilla.

Interestingly, the lower court instructed counsel for the parties that a hearing would be held on April 23, 2007 to give Moschgat an opportunity to challenge the appropriateness of Administratrix Savilla's claim for attorney fees and costs. However, that hearing and two others scheduled thereafter were continued and/or cancelled at the request of the Administratrix and/or the Court. Simply put, Eugenia Moschgat has not been afforded any opportunity to contest the attorney fees and expenses claimed by the Administratrix. It is well established that a trial court having the right to determine counsel fees, cannot do so arbitrarily. ***City Bank of Wheeling v. Bryan***, 76 W.Va. 481, 485, 86 S.E. 8, 10 (1915). See also ***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) wherein the following can be found: "[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.

B. The Administratrix of an estate, who is openly hostile to sole beneficiary, must make a showing of legal representation and expenses inuring to the benefit of the sole beneficiary before collecting legal fees and expenses from that beneficiary

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.

This Court has consistently held that the "fiduciary duty" *is the highest standard of duty implied by law.* In **Napier v. Compton**, 210 W.Va. 594, 558 S.E.2d 593 (2001) the West Virginia Supreme 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. **Tavenner 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. Instead, 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.

The record clearly indicates and this Court previously recognized that Savilla was nothing but hostile towards Ms. Moschgat and did not want her to have a single penny. 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), wherein Justice Davis astutely noted that "the record clearly demonstrates that Ms. Savilla is hostile toward Ms.

Moschgat." Poignantly, Justice Davis 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." **Savilla v. Speedway Superamerica, LLC and Moschgat, Intervenor**, 639 S.E..2d 850, 864, 219 W.Va. 758, 772. (W.Va. 206).

Under the law it is well established that Ms. Moschgat was entitled to the best efforts of Administratrix Savilla. The personal representative of an estate of deceased acting 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. Instead, Ms. Moschgat received just the opposite. Savilla and her legal counsel made public disparaging and defamatory statements in numbers too great to count and worked overtime to defeat her claim. Now, and in spite of their destructive actions, the Administratrix and her legal counsel are now seeking 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.

C. The Administratrix of an estate, who is openly hostile to the sole beneficiary, is prohibited from charging the sole beneficiary attorney's fees and expenses incurred by the Administratrix pursuing interests in direct conflict with those of the sole beneficiary

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. The record is full of instances where Administratrix Savilla used her fiduciary position to further her and her brothers and sisters' personal interests far beyond that of Ms. Moschgat's.

For example, in relying on Ms. Savilla's representations, the lower court entered at least two *Ex parte* orders directing that Savilla receive expenses of $18,192.69 from the funds now on deposit with the Circuit Clerk. 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). However, in obtaining the *Ex parte* orders, Administratrix, Dianna Mae Savilla, 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).

In other words, Eugenia Moschgat, (and the other beneficiaries) already reimbursed counsel for the Administratrix 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 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 awarded the costs – clearly duplicate payment to the detriment of 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.[14] 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**

[14] 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)

v. City of Charleston"[15] 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, 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. Importantly, Margaret Workman'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

[15] 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.

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.

It has been well established by this Court that the fiduciary duty owed by an executor or administrator to the beneficiaries of the estate is paramount to any moral obligation that may exist between the personal representative and some third party. Loyalty to a beneficiary is an **essential element** in an Administratrix's relationship to a beneficiary. Dianna Mae Savilla breached her fiduciary duty to Eugenia Moschgat when she immediately set out to destroy and belittle the damages of Eugenia Moschgat while at the same time working to obtain monetary gain for herself and her siblings. Administratrix Savilla's actions are clearly contrary to her duty to fulfill a special relationship of trust, confidence and responsibility to Ms. Moschgat, her sister's only child. Clearly, Savilla had a conflict of interest regarding those persons in the "beneficiary pool" as Savilla's legal counsel openly admitted the conflict and her inability to be loyal to "all" in the beneficiary pool, specifically Eugenia Moschgat. (See, Various Transcripts of Hearing 7.5.00, 7.31.00 and 8.21.00)

It is well established that an Administratrix cannot act adversary and contrary to a beneficiary to whom a fiduciary duty is owed. Loyalty is impaired when a personal representative cannot consider, recommend or carry out an appropriate course of action for a beneficiary because of the personal representative owns interests. Clearly, the

interests of the Linda Kannaird's ten brothers and sisters including Administratrix Diana Savilla were and remain adverse to the interests of Eugenia Moschgat. Consequently, Administratrix Savilla had no ability to be loyal to Eugenia Moschgat and was indeed hostile to Eugenia. Obviously, Administratrix Savilla's hostility impaired her judgment and severely compromised her ability to carry out her responsibilities as fiduciary for Eugenia Moschgat. To award attorney fees and costs to an Administratrix who was openly hostile and whose actions had a profound effect on the value of Eugenia Moschgat's claim would a gross miscarriage of justice.

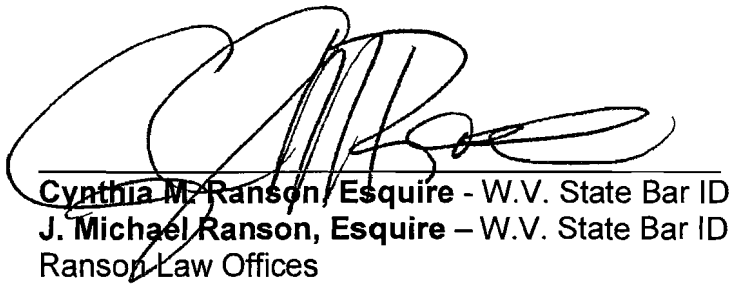
VI. CONCLUSION

The Administratrix, Ms. Savilla, with the assistance of her legal counsel, has spent over ten (10) years trying to defeat Eugenia Moschgat's claim. As Justice Davis pointed out in her dissent, "the record clearly demonstrates that Ms. Savilla is hostile toward Ms. Moschgat." Poignantly, Justice Davis 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." **Savilla v. Speedway Superamerica, LLC and Moschgat, Intervenor**, 639 S.E..2d 850, 864, 219 W.Va. 758, 772. (W.Va. 2066). The record clearly illustrates that Administratrix Savilla was 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 farce and surely cannot be supported or condoned by this Court.

Most important, 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. Based on the record in this case, the trial court's multiple *Ex parte* orders awarding attorney fees and costs should be vacated and/or reversed. This Court previously directed upon remand that a hearing occur to fully develop the record as to whether the Administratrix should recover attorney fees and expenses from the Eugenia Moschgat deliberate intent settlement proceeds, and, if so, in what amount. The hearing simply has not occurred although four years have passed and multiple attempts have been made by Ms. Moschgat to secure a hearing. The lower court has failed to afford Eugenia Moschgat the requisite hearing leaving Ms. Moschgat with no recourse other than to seek a ruling from this Court as to the entitlement of attorney fees and costs to an openly hostile Administratrix.

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.



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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

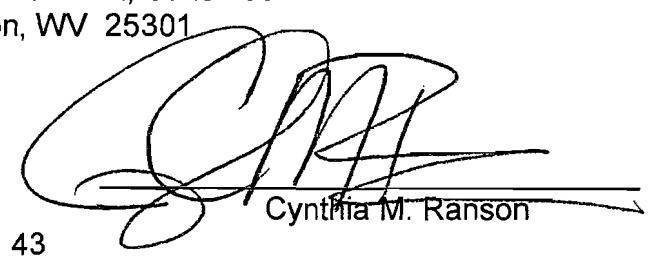
EUGENIA MOSCHGAT,

Appellant,
Intervenor Below.

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 BRIEF** on the defendants' counsel of record via United States Postal Service, on **June 16, 2010** as follows:

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



Cynthia M. Ranson