

No. 35563

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

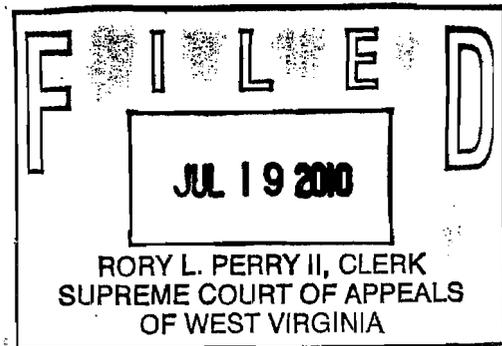
Appellee,

vs.

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

AND

EUGENIA MOSCHGAT,  
Appellant and Intervenor Below.



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BRIEF FOR THE APPELLEE

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ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY  
Civil Action No:00-C-974 (Consolidated) The Honorable Judge Zakaib

Edward ReBrook II, Esquire, WVSB # 3030  
Counsel for Margaret Workman, L.C.  
723 Kanawha Boulevard East, suite 1200  
Charleston, West Virginia 25301

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*Bond v. Bond*, 144 W.Va. 478, 109 S.E.2d 16 (1959)

*Cummings v. Cummings*, 170 W.Va. 712, 296 S.E.2d 542 (1982)

*Daily Gazette Co., Inc. v. West Virginia Development Office*, 206 W.Va. 51, 521 S.E.2d 543 (1999)

*Erie Insurance Property and Casualty Co. v. Stage Show Pizza*, 210 W.Va. 63, 73, 553 S.E.2d 257, 267 (2001)

*Kopelman and Associates, L.C. v. Collins*, 196 W.Va. 489, 473 S.E.2d 910 (1996)

*Mooney v. Eastern Assoc. Coal Co.*, 174 W.Va. 350, 353, 326 S.E.2d 427, 430 (1984)

*Morris v. Crown Equipment*, 219 W.Va. 347, 355 n. 8, 633 S.E.2d 292, 300 n. 8 (2006)

*Mullins v. Green*, 145 W.Va. 469, 115 S.E.2d 320 (1960)

*Murphy v. Eastern American Energy Corp.*, 224 W.Va. 95, 680 S.E.2d 110 (2009)

*Pauley v. Gilbert*, 206 W. Va. 114, 522 S.E.2d 208 (1999)

*Powroznik v. C & W Coal Co.*, 191 W.Va. 293, 295, 445 S.E.2d 234, 236 (1994)

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

*State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W.Va. 802, 808, 591 S.E.2d 728, 734 (2003)

*Sydenstricker v. Unipunch*, 169 W.Va. 440, 288 S.E.2d 511 (1982)

West Virginia Statutes

West Virginia Code 23-4-2(c)

West Virginia Code 55-7-6

Federal Law

*United States v. Rivera-Martinez*, 931 F.2d 148, 151 (1st Cir.1991)

Other

5 Am.Jur.2d Appellate Review § 605 at 300 (1995)

## I.

### INTRODUCTION

In this petition, the Appellant attempts to re-shape reality by means of a factual recitation that does not pass the truth test and is filled with mischaracterizations and outright lies. Further, the appellant seeks to re-litigate legal issues already resolved by this Court. Both of these strategies are not only disingenuous, but lack support in fact or law and fail to demonstrate that the lower court abused its discretion.

It is important at the outset to cast this dispute in a truthful framework. It is not a dispute between Eugenia Moschgat and Dianna Mae Savilla. The lower court previously directed that the proceeds of the deliberate intent settlement be paid to Eugenia Moschgat, and that only the disputed attorney's fees and expenses be held in escrow.<sup>1</sup> This is an attorney fee dispute between Margaret Workman Law, L.C. (the Workman Firm), who represented the administratrix of the Estate of Linda Kannaird for eight years, and J. Michael Ranson (the Ranson Firm), which served as counsel of record for the estate for a very brief time, and who engaged in almost none of the litigation activity conducted on behalf of the estate. This attorney fee dispute was resolved by the Honorable Paul Zakaib, the trial court judge who presided over all the relevant proceedings, who had the opportunity to witness the work performed by both firms, who had all the court records before him, who had held

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<sup>1</sup>If the Ranson Firm has not given Ms. Moschgat her proceeds from the settlement, it is in violation of the lower court's order.

numerous hearings over many years in this matter, and who after holding hearings upon remand on the issue of attorney's fees, including entertaining argument of counsel and any evidentiary depositions which either party chose to place in the record, made extensive and detailed findings of fact and conclusions of law. Based on an immense record and after years of presiding over the case, Judge Zakaib found that the Workman Firm, representing the administratrix of the estate of Linda Kannaird, had performed virtually all the work associated with the litigation of the deliberate intent claim, had retained and paid all the experts, and had otherwise expended all the work and money that it took to prepare this litigation for trial. The lower court found that the only consequential work done by the Ranson Firm was the filing of the initial complaint, and awarded them \$3500 for doing so. (See August 26, 2008, circuit court order, and September 14, 2009, revised circuit court order.).

## II.

### STANDARD OF REVIEW

This Court applies an abuse of discretion standard when reviewing a circuit court's award of attorney's fees. As this Court said in *Beto v. Stewart*, 213 W.Va. 355, 359, 582 S.E.2d 802, 806 (2003), "[t]he decision to award or not to award attorney's fees rests in the sound discretion of the circuit court, and the exercise of that discretion will not be disturbed on appeal except in cases of abuse." Moreover, this Court has held:

“““The trial [court] ... is vested with a wide discretion in determining the amount of ... court costs and counsel fees, [sic] and the trial [court’s] ... determination of such matters will not be disturbed upon appeal to this Court unless it clearly appears that [it] has abused [its] discretion.’ Syllabus point 3, [in part,] *Bond v. Bond*, 144 W.Va. 478, 109 S.E.2d 16 (1959).” Syl. Pt. 2, [in part,] *Cummings v. Cummings*, 170 W.Va. 712, 296 S.E.2d 542 (1982) [(per curiam)].’ Syllabus point 4, in part, *Ball v. Wills*, 190 W.Va. 517, 438 S.E.2d 860 (1993).” Syllabus point 2, *Daily Gazette Co., Inc. v. West Virginia Development Office*, 206 W.Va. 51, 521 S.E.2d 543 (1999).

Syllabus Point 3, *Pauley v. Gilbert*, 206 W. Va. 114, 522 S.E.2d 208 (1999).

### III.

#### STATEMENT OF FACTS

On February 18, 2000, Linda Sue Good Kannaird, the decedent in the underlying deliberate intent case, died as the result of drowning in Sissonville, Kanawha County, West Virginia. Thereafter, her daughter, Eugenia Moschgat, the appellant herein, was duly appointed as administratrix of the decedent’s estate. On April 11, 2000, a suit was filed in the Circuit Court of Kanawha County against Speedway SuperAmerica, dba Rich Oil Company, a Delaware Corporation (hereinafter called Speedway); City of Charleston, a Municipality; Charleston Fire Department; Bruce Gentry; and Rob Warner, Defendants. The complaint sounded in both wrongful death and deliberate intent.<sup>2</sup>

On June 28, 2000, the siblings of the decedent (hereinafter called “the siblings”) filed

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<sup>2</sup>The wrongful death case has been settled and resolved and is not part of the issue now before this Court.

a Motion to Intervene for purposes of having their Petition for Declaratory Relief (which sought to remove the appellant as the administratrix of the estate and consequently the person in charge of conducting the wrongful death/deliberate intent litigation) heard. The issue regarding who should act as administratrix arose as a result of what the lower court determined to be hostility of Ms. Moschgat, a North Carolina resident, towards not only her estranged mother, but also towards the other beneficiaries, the siblings.<sup>3</sup> On August 24, 2000, the appellant filed a Petition for a Writ of Prohibition with this Court challenging the standing of the Petitioners. On August 30, 2000, the appellant also filed a response to the Petition for Declaratory Relief, which raised the issue of the petitioners' standing and of the lower court's jurisdiction. On September 7, 2000, this Court denied the appellant's Petition for Writ of Prohibition. Thereafter, on January 8, 2001, after holding extensive hearings on this issue, the circuit court entered a detailed and well-reasoned order removing the appellant as administratrix of the estate and replacing her with Dianna Mae Savilla, the appellee herein. Thereafter, Appellant filed a petition for appeal of that order, and on September 6, 2001, the Supreme Court refused to accept the Petition for Appeal. As will be fully be set forth herein, the Supreme Court yet again in *Savilla v. Speedway Superamerica, LLC*, 219 W.Va. 758, 639 S.E.2d 850 (2006), held that Ms. Savilla was the proper administratrix of the estate and

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<sup>3</sup>Early on, counsel for the Appellee made an offer to work together on the litigation, but counsel for Ms. Moschgat refused. Similarly, the Honorable Paul Zakaib, presiding circuit court judge, met with counsel for each side before ruling on the administratrix issue and urged that they come to an agreement to work together. Counsel for the Appellee, Ms. Savilla, agreed; but counsel for Ms. Moschgat refused.

was the proper party to conduct the deliberate intent litigation. Thus, despite the fact that the West Virginia Supreme Court has now on at least three occasions upheld that ruling, and reiterated the propriety of Ms. Savilla being in charge of the litigation, the Ranson Firm continues to seek to re-litigate that issue.

After this Court declined to accept Appellant's petition for appeal, the Ranson Firm disappeared from sight with respect to the conduct of the litigation. They were no longer a counsel of record, they were no longer served with any notices, filings or pleadings, and they no longer participated in any manner in the litigation process until almost two years later. During this period of time, the Workman Firm was actively working the case, participating in discovery, retaining expert witnesses, filing and responding to numerous motions, participating in mediations, and otherwise preparing the case for trial. The Workman Firm even litigated this case in federal court where the case was removed and wherein it remained for approximately two years before the Workman Firm was successful in getting the case remanded back to the circuit court.

The old adage that if you repeat a lie enough times, someone will believe it is applicable to the Ranson Firm's constant assertions that the Workman Firm did not treat Ms. Moschgat's rights as a beneficiary with full respect or otherwise failed to live up to its fiduciary obligation.<sup>4</sup> During the course of the litigation, both the administratrix and counsel

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<sup>4</sup>Full information was consistently provided by the Workman firm to Ms. Moschgat, and her interests were vigorously protected. She received a fair share of the proceeds of the wrongful death settlement.

for the estate Workman, treated the rights of every beneficiary, including Ms. Moschgat, with the utmost in fiduciary responsibility. Almost two years into the litigation, after Speedway fully recognized that the Workman Firm would not accept a low-ball settlement on behalf of the estate, they seized on a new argument. On July 1, 2002, Speedway filed a Motion for Judgment on the Pleadings, reiterating the issue of standing and jurisdiction, but identifying for the first time the issue of whether the statutory language of W.Va. Code 23-4-2(c) [2005] precluded the siblings from pursuing a deliberate intent claim. West Virginia Code 23-4-2(c), in pertinent part provides:

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

Thereafter, the Ranson Firm re-surfaced, piggy-backing onto Speedway's new arguments, even cutting and pasting large portions of Speedway's briefs verbatim into their legal memoranda. The Ranson Firm then did an end-run around the duly appointed administratrix by entering into a secret settlement in an amount far less than the value of the case. Except for \$40,000 which Speedway paid up front, obviously as a means of sealing the deal, receipt of the remainder of the settlement (later identified to be in the amount of

\$225,000)<sup>5</sup> was contingent upon the success of Speedway's argument that the Appellee had no standing.

On April 8, 2005, the circuit court entered an order granting Speedway's Motion to Dismiss, interpreting W.Va. Code 23-4-2(c) to preclude siblings from being eligible to seek damages. Thereafter, the appellee filed a Petition for Appeal to the W. Va. Supreme Court of Appeals, seeking the reversal of this court's order granting the Motion to Dismiss. On November 15, 2006, this Court filed an opinion herein, reversing the lower court's order granting dismissal and remanding the case for further proceedings. Importantly to the instant case, the Court in its opinion, *Savilla v. Speedway Superamerica, LLC*, 219 W.Va. 758, 639 S.E.2d 850 (2006), stated in an original new syllabus point as follows:

2. A personal representative who is not one of the statutorily-named beneficiaries of a deliberate intention cause of action authorized by W.Va. Code, 23-4-2(c) [2005] has standing to assert a deliberate intention claim against a decedent's employer on behalf of a person who has such a cause of action in a wrongful death suit filed pursuant to W.Va. Code, 55-7-6 [1992].

While the Court went on to hold that siblings were not in the category of persons who could receive damages in a deliberate intent cause of action, it made abundantly clear that it was perfectly proper for a sibling such as the Appellee to serve as administratrix of the estate for

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<sup>5</sup>It remains unclear whether the total settlement was \$225,000 or \$265,000, as inconsistent statements from the Ranson Firm appear in various transcripts, and the lower court ordered the terms of the settlement sealed. The lower court held in escrow only one-third of the \$225,000 amount.

purpose of conducting the deliberate intent litigation.<sup>6</sup>

In upholding the Appellee as the rightful administratrix, the Court directed that, upon remand, the lower court “**shall provide** for compensation to the personal representative for her expenses in connection with the litigation, including appropriate attorney fees....” (Emphasis added).

### The Lower Court Hearings

Contrary to the assertions of the Appellant, the lower court did upon remand hold hearings on the issue of the settlement proceeds, attorney’s fees, and expenses, as directed by the Supreme Court. On January 30, 2007, Speedway filed a Motion to Approve the secret settlement and to dismiss the action. On February 22, 2007, counsel for the appellee filed a Motion to Award Attorneys Fees & Expenses and an Attorneys Charging Lien, setting forth with specificity the amount of out-of-pocket monies expended. At the initial remand hearing on February 23, 2007, the court heard argument as to the adequacy of the secret settlement, with the Workman Firm as counsel for the estate making a record that it was a grossly insufficient amount under all the circumstances<sup>7</sup> and not in Ms. Maschgot’s best interests,

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<sup>6</sup>In 2009, in the case of *Murphy v. Eastern American Energy Corp.*, 224 W.Va. 95, 680 S.E.2d 110 (2009), this Court reversed its position on this issue, holding that siblings are within the class of persons eligible to receive damages when an employee dies as a result of deliberate intent conduct.

<sup>7</sup>This was an egregious case wherein Speedway SuperAmerica called the decedent out to work on her day off as floodwaters were rising around the store, directing that she bring her pick-up truck to rescue their beer, cigarettes, and other merchandise. Although photographs reflect the truck absolutely full of that “saved” merchandise, the decedent lost her life in the floodwaters as a result. Expert testimony valued the case as being worth at a

and the Ranson Firm urging the court's approval. Because Ms. Moschgat wanted to accept the settlement, the court approved the settlement<sup>8</sup> and directed that an amount equal to 33 - 1/3 per cent of the proceeds plus \$18,192.69 monies actually expended by the Workman Firm be placed into escrow by the Ranson Firm.

Counsel for the appellee further argued that she had performed all the work in the case except for filing the complaint, and therefore should receive the attorneys fee. As the circuit court specifically stated in its September 14, 2009, order, the Ranson Firm made no claim for reimbursement of expenses, nor did it assert any claim for attorney's fees based on having performed any work whatsoever. Rather, the appellant's counsel relied strictly on their contingency fee agreement with Ms. Moschgat as basis for entitlement to the attorney's fees. (See page 7, transcript of June 19, 2007, hearing before the Honorable Paul Zakaib). The lower court further directed that Ms. Moschgat receive her proceeds of the settlement immediately, and that the portion of such settlement attributable to attorney's fees and expenses be preserved in escrow until resolution of the fee and expense issue.

On June 19, 2007, the lower court held a second remand hearing and, despite having previously directed that the portion of the proceeds of the settlement to which the appellee was entitled should be paid over to her immediately, the Ranson Firm indicated that it still

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minimum \$500,000, but up to a potential of \$10 million.

<sup>8</sup>Even to this day, it is unclear whether the settlement was for \$225,000 or for \$265,000, since \$40,000 was paid upfront, the court placed the settlement underseal, and Mr. Ranson and Mr. Beeson made inconsistent statements as to the total amount.

had not paid the settlement proceeds to her.

Although there was some mention of a further hearing, it is clear from the transcript of the proceedings held on June 19, 2007, that the court permitted the parties to take the evidentiary depositions requested and **directed that, at the conclusion of the taking of the depositions requested, each party was to submit a proposed order with findings of fact and conclusions of law.** Thereafter, counsel for the Workman Firm placed the Bordas Deposition in the record and submitted a proposed order, as directed by the court. The Ranson Firm neither placed the Beeson deposition into evidence, as it could have, nor did it submit a proposed order with proposed findings of fact and conclusions of law, as directed by the court. Moreover, in spite of the Ranson Firm's now clamoring for a further hearing, curiously, at the first remand hearing of February 23, 2007, J. Michael Ranson stated with regard to the issue of attorney fees: "***But in this case, the record is clear – I don't think we need additional hearings. . . .***" (See Record at 2275, page 27). Thereafter, when the circuit court awarded the division of attorney's fees and expenses in a manner not to Mr. Ranson's liking, he suddenly wants another hearing.

Following those hearings, the circuit court reviewed the record then before it, gave consideration to its experience in presiding over the case for seven years, and on August 27, 2008, entered an order awarding attorney's fees. That order is detailed in nature, replete with extensive findings of fact and conclusions of law. On September 14, 2009, the circuit court entered a revised order, the only revision being the removal of a reference to a deposition

taken by the appellant's counsel of Joseph Beeson, an attorney for Speedway SuperAmerica, because the Ranson Firm had never placed the Beeson deposition into the record.<sup>9</sup> The September 14, 2009, order did not change with regard to its division of fees and expenses to the respective counsel below, and the remainder of the order was the same. The current appeal is from the circuit court order awarding attorney's fees and reimbursement of expenses.

#### IV.

#### ARGUMENT

The Ranson Firm uses mountains of ink filled with incredible hyperbole and blatant inaccuracies in an attempt to re-litigate issues already decided by this Court in *Savilla v. Speedway Superamerica, LLC*, 219 W.Va. 758, 639 S.E.2d 850 (2006). Unfortunately for the Ranson Firm, it cannot unring that bell. In this brief, instead of traveling down that same ill-advised road of exaggeration and revisionist history, the appellee will instead address the three issues actually placed before this Court by the appellant and will do so with accuracy and brevity.

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<sup>9</sup>Any opinion or fact testimony by Mr. Beeson likely would not have been a proper consideration for the court anyway, as Mr. Beeson was counsel for Speedway and worked closely with the Ranson Firm in achieving the low-ball settlement achieved by Speedway. He could not then be considered a neutral expert, and any factual recitation would obviously be colored by the Ranson firm's close cooperation with Speedway.

**A. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEY’S FEES AND COSTS TO THE APPELLEE.**

The appellant first argues that the circuit court erred by ordering attorney’s fees and expenses to the appellant over the objection of the appellant and without development of a full record below. This Court applies an abuse of discretion standard when reviewing a circuit court’s award of such fees. As this Court said in *Beto v. Stewart*, 213 W.Va. 355, 359, 582 S.E.2d 802, 806 (2003), “[t]he decision to award or not to award attorney’s fees rests in the sound discretion of the circuit court, and the exercise of that discretion will not be disturbed on appeal except in cases of abuse.” Moreover, this Court has held:

“““The trial [court] ... is vested with a wide discretion in determining the amount of ... court costs and counsel fees, [sic] and the trial [court’s] ... determination of such matters will not be disturbed upon appeal to this Court unless it clearly appears that [it] has abused [its] discretion.’ Syllabus point 3, [in part,] *Bond v. Bond*, 144 W.Va. 478, 109 S.E.2d 16 (1959).” Syl. Pt. 2, [in part,] *Cummings v. Cummings*, 170 W.Va. 712, 296 S.E.2d 542 (1982) [(per curiam)].’ Syllabus point 4, in part, *Ball v. Wills*, 190 W.Va. 517, 438 S.E.2d 860 (1993).” Syllabus point 2, *Daily Gazette Co., Inc. v. West Virginia Development Office*, 206 W.Va. 51, 521 S.E.2d 543 (1999).

Syllabus Point 3, *Pauley v. Gilbert*, 206 W. Va. 114, 522 S.E.2d 208 (1999). In this case there is no evidence whatsoever to indicate an abuse of discretion by the circuit court in its award of attorney’s fees to the appellant. To the contrary, there is a huge record and the circuit court’s well-reasoned and detailed order firmly establishes that no abuse of discretion occurred.

Curiously, the appellant fails to make a single citation to the circuit court’s very detailed September 14, 2009, order, which set out the detailed reasoning for the underlying

award of attorney's fees and expenses. In that order, the circuit court painstakingly outlined the very limited amount of work performed by the Ranson Firm, as well as the many years of work performed by the Workman Firm. The circuit court, through its well-reasoned and thorough order, also outlined a review of the official docket sheet of the Circuit Clerk of Kanawha County reflecting that the amount of legal work performed by each of the subject firms in the deliberate intent portion of the claim

An examination of that order reflects the following findings:

Work Performed by the Ranson Firm.

4-11-00 Complaint filed

6-1-00, 10-03 Plaintiff's Requests for Production to Speedway filed  
(see docket entries 21,133)

The circuit court's order goes on:

After the entry of the order by this court dated January 8, 2001, removing the appellant as administratrix, the appellant's counsel performed no further legal work on the litigation of the underlying case except to continue to participate in discovery depositions until such time as the order of the Supreme Court that declined to accept the appellant's Petition for Appeal was entered, at which time the appellant's counsel ceased involvement in the case. Four such depositions taken during this period and were attended by both the appellant's counsel and the appellee's counsel.

That was the extent of the involvement by the Ransom Firm.

Conversely, the circuit court detailed some of the Workman Firm's involvement as follows:

Work performed by the Workman Firm.

7-11-01 Plaintiff's Answers to Speedway's 2nd set of Interrogatories and Requests for Production filed (See Docket Entry 272)

8-1-01 Plaintiff's Motion to Amend filed (See Docket Entry 275)

8-14-01 Plaintiff's Expert Witness Disclosure filed (See Docket Entry 289)

8-16-01 Plaintiff's Supplemental Expert Witness Disclosure filed (See Docket Entry 290)

8-22-01 Plaintiff's Second Supplemental Expert Witness Disclosure filed (See Docket Entry 292)

8-29-01 Plaintiff's Response to Speedway's Motion to Exclude Expert Witness filed (See Docket Entry 319)

8-29-01 Response to Speedway Motion to Compel filed (See Docket Entry 321)

8-29-01 Plaintiff's Answers to Speedway's First Set of Interrogatories and Requests for Production filed (See Docket Entry 323)

8-29-01 Plaintiff's Supplemental Answers to Defendant's Second Set of Interrogatories and Requests for Production filed (See Docket Entry 325)

9-18-01 Plaintiff's Fourth Supplemental Expert Witness Disclosure filed (See Docket Entry 338)

9-20-01 Plaintiff's Motion to Disclose Settlement filed (See Docket Entry 345)

10-26-01 Plaintiff's Supplemental Answers to Speedway's Interrogatories and Requests for Production filed (See Docket Entry 372)

11-5-01 Plaintiff's Motion to Reconsider or Vacate Order re: Time Frame filed (See Docket Entry 374)

11-26-01 Certificate of Service to Plaintiff's Response to Speedway's Second Set of Requests for Production of Documents filed (See Docket Entry 379)

11-26-01 Plaintiff's Supplemental Response to Defendant's Second Request for Production of Documents filed (See Docket Entry 380)

11-26-01 Certificate of Service to Plaintiff's Supplemental Response to Speedway filed (See Docket Entry 381)

12-3-01 Certificate of Service to Plaintiff's First Set of Interrogatories and Requests for Production filed (See Docket Entries 385 & 386)

12-3-01 Supplemental response to Speedway's Second Request for Production filed (See Docket Entry 387)

12-7-01 Speedway's Memorandum in Opposition to Plaintiff's Motion to Reconsider Time Frame filed (See Docket Entry 389)

5/2/02 Plaintiff's Supplemental Disclosure of Fact Witnesses filed (See

Docket Entry 404)

5-2-02 Certificate of Service of Fifth Supplemental Responses to Speedway Requests for Production and Interrogatories filed (See Docket Entry 405)

6/14/02 Certificate of Service to Plaintiff's Supplemental Response to Speedway's First Request for Production filed (See Docket Entry 417)

7/11/02 Certificate of Service to Plaintiff's Sixth Supplemental Answers to Speedway's First Set of Interrogatories filed (See Docket Entry 425)

7/31/02 Plaintiff's Motion to Amend Complaint filed (See Docket Entry 428)

8/7/02 Notice of Removal to Federal Court filed (See Docket Entry 432) filed by City

8/7/02 Plaintiff's Response to Speedway's Motion for Judgment filed (See Docket Entry 433)

8/7/02 Plaintiff's Response to Speedway's Motion to Exclude Fact Witnesses filed (See Docket Entry 435)

11/12/02 Order of Remand filed (See Docket Entry 439)

12/2/02 Filed Petition to Certify Questions (See Docket Entry 442)

11/21/02 Filed Notice of Scheduling Conference (See Docket Entry 441)

The appellee's counsel, the Workman Firm, was properly retained and spent an enormous amount of time and money representing the interests of all of the potential beneficiaries. Generally speaking, it is the law of West Virginia that the attorney who does the legal work is entitled to the attorney's fees. Not once in any of these proceedings, neither in the lower court nor in this Court, has the Ranson Firm asserted that it did the work that would justify an award of attorney's fees. Instead, the vast majority of the Ranson Firm's brief is comprised of misstatements, mischaracterizations, and outright lies, including matters completely outside the record, splattered like red paint on a wall, hoping something will stick.

In an effort to get **something** for themselves out of the case (after not performing any of the work of litigating the case), the Ranson Firm did an end-run around the duly-appointed administratrix appointed by the circuit court by improperly entering into a secret settlement with Speedway on behalf of Ms. Moschgat for an amount so facially insufficient under the circumstances of this case and the strength of this claim as to constitute legal malpractice per se. Furthermore, the Supreme Court in *Savilla* made clear that it is the administratrix of the estate who is in charge of the litigation. The lower court therefore found in its remand order that any such settlement should have been paid to the duly-appointed administratrix on behalf of the estate, rather than secretly directed to the Ranson Firm. By use of this end-run strategy, Speedway SuperAmerica was able to “settle cheap” through the cooperation of the Ranson Firm.

All of the allegations made by the Appellant that the Workman Firm (or their client, Dianna Savilla) did harm to Eugenia Moschgat’s claim are patently absurd. It is clear that the appellee was acting in a responsible and aggressive manner in pursuing the claims of all potential beneficiaries. Furthermore, the Supreme Court in the *Savilla* opinion, *supra*, made crystal clear in an original syllabus point that administratrix Savilla was the proper person to bring the deliberate intent cause of action and she selected the Workman Firm as counsel for the estate. Specifically, the Court enunciated in new syllabus point two that:

A personal representative who is not one of the statutorily-named beneficiaries of a deliberate intention cause of action authorized by W.Va.Code, 23-4-2(c) [2005] has standing to assert a deliberate intention claim against a decedent’s employer on behalf of a person who has such a

cause of action in a wrongful death suit filed pursuant to W.Va.Code, 55-7-6 [1992].

As this Court in *Savilla* explained, W.Va. Code, 55-7-6 states that: “**Every** such [wrongful death] action shall be brought by and in the name of the personal representative of such deceased person who has been duly appointed in this state . . . .” (emphasis in original). 219 W.Va. at 763, 764, 639 S.E.2d at 855, 856. This Court in *Savilla* explained further provided: “We believe that the statute’s use of the word ‘every’ in itself gives support to the conclusion that a lawsuit alleging wrongful death as a result of an employer’s deliberate intent should be brought by the personal representative of the deceased employee.”

*Id.* The Court in *Savilla* further explained that:

Allowing a decedent’s personal representative to assert “deliberate intention” wrongful death claims on behalf of the potential beneficiaries of those claims allows all possible claims and claimants to be joined and managed in one lawsuit. This is consistent with our rules on joinder, *see Morris v. Crown Equipment*, 219 W.Va. 347, 355 n. 8, 633 S.E.2d 292, 300 n. 8 (2006). Moreover, such a practice is consistent with the jurisprudence of this court governing claims arising from alleged “deliberate intention” misconduct. We recognized in *Erie Insurance Property and Casualty Co. v. Stage Show Pizza*, 210 W.Va. 63, 73, 553 S.E.2d 257, 267 (2001) that a plaintiff’s civil negligence claim for damages authorized by workers’ compensation law does not create an employer’s obligation under workers’ compensation law to an employee, but rather creates a potential general civil obligation to pay damages, so that “deliberate intention” lawsuit damages are not workers’ compensation benefits. In *Powroznik v. C & W Coal Co.*, 191 W.Va. 293, 295, 445 S.E.2d 234, 236 (1994) we stated that “W.Va.Code, 23-4-2 allows a traditional tort action to be filed against an employer where the damages [not the potential beneficiaries] are not limited by any workers’ compensation statute.” (emphasis added). “A deliberate intent suit is a civil action governed by the West Virginia Rules of Civil Procedure and attorney’s fees are controlled the same as attorney’s fees in any other civil action for personal injuries or wrongful death.” *Id.*, 191 W.Va. at 296, 445 S.E.2d at 237. *See*

*also Sydenstricker v. Unipunch*, 169 W.Va. 440, 288 S.E.2d 511 (1982) (non-employer defendant may implead an employer defendant under common-law contribution theory, asserting deliberate intention, because immunity of employer is removed by W.Va.Code, 23-4-2). *See also Mooney v. Eastern Assoc. Coal Co.*, 174 W.Va. 350, 353, 326 S.E.2d 427, 430 (1984) (damages in a W.Va.Code, 23-4-2 deliberate intention suit are “for excess damages ...” but “[t]he statute is silent, however, about how this intent is implemented mechanically at trial;” supreme court determines method of calculating proper offset of benefits paid under compensation system).

219 W.Va. at 774 n. 8, 639 S.E.2d at 866 n.8.

In reversing the circuit court in *Savilla*, this Court held that: “Therefore, based on the foregoing reasoning, we conclude that the circuit court erred in dismissing Speedway on the grounds that the named plaintiff in the lawsuit against Speedway was the [appellee], as personal representative of the estate of [the decedent], and not [the appellant].” 219 W.Va. at 764, 639 S.E.2d at 856. On remand to the circuit court, this Court made it abundantly clear that “any such settlement or dismissal must be determined by the court to not unfairly prejudice the other potential beneficiaries of the lawsuit, ***and must provide for compensation to the personal representative for her expenses in connection with the litigation, including appropriate attorney fees***, without creating unfairness to [the appellant] and her separate counsel.” 219 W.Va. at 766, 639 S.E.2d at 858. (Emphasis added).

While this Court’s directive seems abundantly clear, the appellant argues that the phrase: “without creating unfairness to [the appellant] and her separate counsel” would stand for the proposition that the appellee’s counsel should not recover any attorney’s fees and expenses. Such an argument is illogical and completely contradictory to this Court’s holding.

A reasonable and clear interpretation of this Court's mandate to award attorney's fees and expenses was for the circuit court to do so in such a manner consistent with the amount of time and money spent by the respective attorneys below.

In reviewing the circuit court's order, it is clear that the lower court considered all of the underlying factors and awarded the appropriate fees and expenses to all relevant parties. The circuit court noted that "the work performed by the Workman Firm on behalf of [the appellee] occupies eight and one-half pages of the official docket while the work performed by the Ranson Firm for [the appellant] occupies less than one-half page of the official docket sheet." The circuit court further stated that: "In addition to these specific docket entries, the appellee's counsel, as counsel for the Estate, reviewed and responded with legal memoranda to all filings by all of the Defendants and the other Plaintiffs while they were in the case, including but not limited to Motions to Exclude Witnesses, a Motion to Compel, and Motion for Consolidation, and participated in all hearings thereon." Next, the circuit court pointed out that the Workman Firm asserted that it also participated in extensive meetings, correspondence with co-counsel, parties, witnesses and experts, and that a mediation was conducted, and the Ranson Firm offered no evidence or argument to refute such contention. Thereafter, the circuit court explained that a summary of the depositions taken in the underlying deliberate intent case reflects that the Workman Firm participated in twenty-five depositions and the Ranson Firm participated jointly with the Workman Firm in four depositions. The circuit court also listed a summary of experts obtained by the appellee's

counsel on behalf of the decedent's estate and stated that the appellant's counsel neither retained, interviewed, nor paid any of these experts or any other expert. As such, the circuit court found that the Workman Firm retained and paid all of the underlying plaintiff's experts, and found the other expenses fair and reasonable.

Finally, the circuit court found that the Ranson Firm made no claim to fees based on work they performed in the underlying litigation, but relied solely on their contingency fee agreement (with just one beneficiary) in support of its claim. Nor did the Ranson Firm set forth any expenditures by them on the litigation, while the Workman Firm provided the summary of claimed expenses set forth with specificity. The circuit court also found that the case was properly prepared for trial by the Workman Firm.

While the gravamen of this appeal is that the Ranson Firm was entitled to a further hearing, in its prayer for relief from in this Court, the Ranson Firm asks this Court to: "vacate the Orders of the lower court and respectfully moves this Court to determine whether the [appellant] should recover attorney fees and expenses from her deliberate intent settlement proceeds, and if so, in what amount[.]" Incredibly, the Ranson Firm apparently believes the record is more than adequate if they prevail, but inadequate if they do not. Similarly, at the first remand hearing regarding the division of attorney's fees, Mr. Ranson stated: "***But in this case, the record is clear – I don't think we need additional hearings. . . .***" (See Record at 2275). While the record is clear that there were in fact hearings below on the issue of attorney's fees, nonetheless, it is incredulous that the Ranson Firm is now asking this Court

to *sua sponte* make a determination of attorney's fees and expenses different from that of the circuit court. It is not this Court's job to determine the appropriate division of attorney's fees. The trial court judge who was involved in the underlying litigation for many years held two hearings specifically on the attorney's fee and expenses issue, reviewed an extensive record, and made a detailed well-reasoned determination regarding a division of fees. The only task for this Court is to now determine whether in so doing, the lower court abused its discretion. The appellant's prayer for relief is contradictory to her entire argument herein and below. Clearly, the circuit court did not abuse its discretion below.

**B. THE CIRCUIT COURT DID ABUSE ITS DISCRETION IN AWARDING ATTORNEY'S FEES AND COSTS TO THE APPELLEE AND THE APPELLEE'S COUNSEL DID MAKE A SHOWING OF LEGAL REPRESENTATION AND EXPENSES.**

The appellant next argues that the appellee's counsel "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." The appellant is once again trying to re-litigate issues decisively decided by this Court in *Savilla v. Speedway Superamerica, LLC*, *supra*. In Syllabus Point 2 of *Savilla*, this Court held that:

A personal representative who is not one of the statutorily-named beneficiaries of a deliberate intention cause of action authorized by W.Va.Code, 23-4-2(c) [2005] has standing to assert a deliberate intention claim against a decedent's employer on behalf of a person who has such a cause of action in a wrongful death suit filed pursuant to W.Va.Code, 55-7-6 [1992].

Moreover, as has been recognized by this Court, “[t]he general rule is that when a question has been definitely determined by this Court its decision is conclusive on parties, privies and courts, including this Court, upon a second appeal or writ of error and it is regarded as the law of the case.” Syllabus Point 1, *Mullins v. Green*, 145 W.Va. 469, 115 S.E.2d 320 (1960).

The law of the case doctrine has been further explained as follows:

The law of the case doctrine “generally prohibits reconsideration of issues which have been decided in a prior appeal in the same case, provided that there has been no material changes in the facts since the prior appeal, such issues may not be relitigated in the trial court or re-examined in a second appeal.” 5 Am.Jur.2d Appellate Review § 605 at 300 (1995) (footnotes omitted). “[T]he doctrine is a salutary rule of policy and practice, grounded in important considerations related to stability in the decision making process, predictability of results, proper working relationships between trial and appellate courts, and judicial economy.” *United States v. Rivera-Martinez*, 931 F.2d 148, 151 (1st Cir.1991).

*State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W.Va. 802, 808, 591 S.E.2d 728, 734 (2003).

The record demonstrates that counsel for the appellee’s estate did a thorough and highly competent job of representing the interests of all the beneficiaries. According to the evidence of record, if counsel for the duly appointed Administratrix had been able to continue with the suit, instead of entering into the aforementioned settlement, the proceeds would have been far more substantial than the small settlement she accepted. The appellant even points out in her brief that the Workman Firm’s expert, James G. Bordas, Esq., “estimated that [the appellant’s] damages could have been as much as 10 million dollars.” Stated another way, the appellee has presented credible evidence (which the appellant

actually cites) for the proposition that the premature secret settlement that he negotiated could have been worth many times more than the paltry amount Ms. Moschgat actually settled for. The only manner in which Ms. Moschgat was short-changed is by virtue of the Ranson Firm's entry into a low-ball settlement with Speedway. To that end, Mr. Bordas opined that the Workman Firm had the underlying case well-prepared and ready to litigate, and, as previously discussed, had the Ranson Firm not entered the secret settlement worth far less than the value of the case, a substantially larger amount of damages would have been obtained.

Given the reference by the Ranson Firm to the Bordas deposition, a further examination of that evidence is also helpful. On October 3, 2007, the evidentiary deposition of Wheeling attorney James Bordas was taken. Mr. Bordas was first qualified as an expert witness on the subject of civil litigation. It was established that he has had numerous multi-million dollar verdicts in civil cases, some of the largest in the state's history, and that in connection with his success in civil litigation, his cases had been featured in *The Wall Street Journal*, *Trial* magazine, and on "Sixty Minutes" and "Inside Edition" with Connie Chung. In the deposition, Mr. Bordas rendered expert opinions as to the quantity and quality of legal services performed by the Workman firm and the Ranson firm.

Mr. Bordas characterized Workman's legal work as very good, and said that one of the most "exemplary" things she did was to obtain excellent experts from across the country. He opined that, as the attorney retained by the administrator of the estate, it was Workman's

duty, responsibility and obligation to pursue the litigation, and that she should be entitled to fees for the work she did for the estate.

The Bordas testimony not only made clear that the work done by Workman was thorough and effective, but opined that, had the Ranson Firm not entered into the “end run settlement” by going around the court-appointed administratrix, a far more substantial amount of damages would have been recovered by the Workman Firm:

In assessing the value of the case, I think the trial verdict value range with I think the worst case scenario would have probably been somewhere in the neighborhood of \$500,000. I think the upper end of the verdict scale would be somewhere in the neighborhood of \$5 million to \$10 million, and I think the midpoint range is somewhere between \$5 million and probably \$1 million. So I think, at the very least, Margaret would have gotten \$500,000. At the most, she would have gotten five or ten. And this is just on compensatory. You’ve still got the punitive aspect, and I think the jury would have likely returned a very significant verdict with respect to the punitive damage aspects, and I concluded that would be anywhere from a low of one million on the punitives, to 10 to 25 million on the punitives at the upper end, with a likely midpoint range being somewhere in the neighborhood of five million.

Bordas also agreed with Circuit Court Judge Zakaib in his holding that any monies paid in settlement of this claim by Speedway should have been paid to the duly appointed administratrix of the estate, not to one beneficiary:

- Q: Do you have an opinion as to whom Speedway should have paid the settlement, regardless of the amount?
- A: Well, I think they should have paid it to Margaret and the administrator of the estate. That was the appropriate representative of the estate. The money should have been paid by Speedway and their attorneys to the representative of the estate...

Contrary to the arguments made by the Ranson Firm, it was the opinion of Mr. Bordas

that it was the actions of the Ranson firm which de-valued the case for Ms. Moschgat and all the beneficiaries:

Q. So, then, based upon what you've just told us in that response, what is your opinion of the accepting of a settlement of \$225,000?

A. I thought it was extremely low.

Q. And there was a lot more to be had?

A. I think there was. And I think that -- it appeared to me that the attorney for Speedway, Beeson, was very eager to do an end-around and to seek another way to knock down the settlement dollars. Margaret was seeking a much larger settlement, and it was obvious to Beeson that he was not going to be able to accomplish what he wanted to accomplish through Margaret Workman. He found another way to do it and got the beneficiary to agree to accept a sum that I think was substantially less than the value of the case.

The Ranson Firm's brief constantly accuses counsel for the estate of "destructive actions" that allegedly were not in the best interest of the appellant. There is absolutely nothing in the record, however, to support the contention that Ms. Moschgat was hurt in any way by the work done by the administratrix or by counsel for the estate. The action that did de-value and decimate the amount of damages to Ms. Moschgat was taken by the Ranson Firm in entering and then persuading Ms. Moschgat to accept a grossly inadequate amount of damages, and facilitating the very crafty manner in which Speedway found an inexpensive way out. Had the Ranson Firm just stayed out of this litigation and let the administratrix and counsel for the estate do their job, Ms. Moschgot would have received a significantly more favorable settlement. Speedway saw one major obstacle in the way of a cheap settlement. That obstacle was the duly-appointed administratrix and her counsel. With regard to this issue, the circuit court did not abuse its discretion below.

**C. THE CIRCUIT COURT DID ABUSE ITS DISCRETION IN AWARDING ATTORNEY'S FEES AND COSTS TO THE APPELLEE AND THE APPELLEE'S COUNSEL DID NOT PURSUE INTEREST IN CONFLICT WITH THOSE OF THE APPELLANT.**

In her final argument the appellant maintains that the appellee was not eligible to receive attorney's fees and expenses incurred while the appellee allegedly pursued interests in conflict with those of the appellant. This argument is simply a rehashing of her prior two arguments and is unsupported in both fact and law. While the Ranson Firm argues that permitting the Workman Firm to recover attorney's fees and expenses "would be a farce and surely cannot be supported or condoned by this Court," the fact is that an award of such fees was *mandated* by the Supreme Court.

This Court made abundantly clear in *Savilla, supra*, that the appellee was an appropriate and proper person to serve as administratrix of the estate for purposes of conducting the deliberate intent litigation. As such, and as the circuit court stated in its September 14, 2009, order, "[p]ursuant to the Supreme Court opinion, any settlement entered into with the Estate of Linda Sue Good Kannaird by Speedway SuperAmerica should have been entered into by and through the Administratrix [appellee]."

The circuit court further explained in that same order that: "With respect to the division of attorney's fees and reimbursement of expenses, pursuant to the opinion of the W. Va. Supreme Court, the Administratrix [appellee] is entitled to reimbursement for all reasonable expenses advanced by her or the attorney for the estate in connection with the

deliberate intent claim.” The circuit court then found that the requested expenses submitted by the appellee were fair and reasonable. The circuit court based its finding upon the numerous records, briefs, and arguments submitted by the counsel from both parties.

The circuit court then explained that: “Because the Supreme Court held that [the appellee] was properly in charge of conducting the deliberate intent litigation, and because the [appellee’s counsel] acted as the attorney for the estate from January 8, 2001, until the present, the settlement, once accepted by [the appellant], should have been paid over to the administratrix of the estate for distribution.”

The circuit court explained that in determining the division of attorney’s fees in a contingency fee case, the amount of time expended by each attorney is an important consideration. In making its determination regarding its award of attorney’s fees and expenses to the Ranson Firm as well as to the Workman Firm, the circuit court applied the factors set forth in Syllabus Point 2 of *Kopelman and Associates, L.C. v. Collins*, 196 W.Va. 489, 473 S.E.2d 910 (1996), which provides that:

a circuit court also must consider retrospectively upon the conclusion of the case: (1) the relative risks assumed by each firm; (2) the frequency and complexity of any difficulties encountered by each firm; (3) the proportion of funds invested and other contributions made by each firm; (4) the quality of representation; (5) the degree of skill needed to achieve success; (6) the result of each firm’s efforts; (7) the reason the client changed firms; (8) the viability of the claim at transfer; and (9) the amount of recovery realized. This list is not exhaustive, and a circuit court may consider other factors as warranted by the circumstances in addition to awarding out-of-pocket expenses. In making its determination, however,

a circuit court must make clear on the record its reasons for awarding a certain amount. Such a determination rests in the sound discretion of the circuit court, and it will not be disturbed unless the circuit court abused its discretion.

The circuit court, in applying *Kopelman*, ascertained what portion of the settlement was to be distributed as attorney's fees and what portion of such total sum each firm should receive. It specifically found that: "It is undisputed that the Workman Firm did the vast majority of the work on the litigation of the deliberate intent claim. Further, the Ranson Firm made no claim for attorney's fees based on performance of legal work, but strictly relied on its contingency fee agreement with Ms. Moschgat." The circuit court provided adequate compensation to the Ranson Firm for the extremely brief and limited time it represented the estate.

As previously discussed, and as recognized by the circuit court, the Ranson Firm's reliance on its contingency fee contract with Ms. Moschgat as the basis for entitlement to the attorney's fees is misplaced. The appellee, as the Administratrix, was properly in charge of the conduct of the deliberate intent litigation. As such, the settlement by the appellant had to be examined in the context of the contingency fee agreement entered into by the estate with the appellee's counsel. The circuit court did so and then properly split the amount of attorney's fees between the appellant's counsel and the appellee's counsel according to the amount of work each side actually performed in its representation with the underlying deliberate intent litigation. The circuit court then explained that its final determination regarding the attorney's fees and expenses was based "[u]pon a review of the entire record

in this matter[.]” As such, the Ranson Firm has no entitlement to any fees separate and apart from the portion of the contingency fee awarded to it by the lower court.

The appellant also attempts for the first time in this case to confuse this Court with unsupported and false accusations regarding the fees and expenses requested by the appellee’s counsel. These arguments are frivolous and were not raised below in any way in spite of the fact that the appellant had every opportunity to make such arguments. Moreover, the appellant argues time and time again that counsel for the appellee submitted an ex parte order; however, in her own brief she admits that both parties were ordered “to submit findings of facts and conclusions of law along with exhibits after the discovery [by appellee’s counsel] was completed.” That is exactly what happened below, i.e., the appellee completed its discovery and submitted its findings of fact and conclusions of law to the circuit court. The fact that the appellant chose not to comply with the circuit court’s directive should not be held against the appellee in any manner. With regard to this issue, the circuit court did not abuse its discretion below.

V.

**CONCLUSION**

There was full notice and opportunity to be heard, the circuit court did its job thoroughly, and the appellee therefore respectfully asks this Court to affirm the circuit court below.

Dianna Mae Saville, Administratrix  
& Counsel Margaret L. Workman  
Respectfully submitted by Counsel,



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No. 35563

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Appellee,

vs.

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

Defendants Below.

AND

EUGENIA MOSCHGAT,

Appellant and Intervenor Below.

**CERTIFICATE OF SERVICE**

I, Edward ReBrook II, counsel for appellee, hereby certify that I have served a true and exact copy of the foregoing Appellee's Brief on the Appellant's Counsel of record via United States Postal Service on July 19, 2010, as follows:

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Edward ReBrook II

**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**