

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2006 Term

No. 33053

FILED
November 16, 2006
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

DIANA MAE SAVILLA, Administratrix of the Estate
of Linda Sue Good Kannaird,
Plaintiff Below, Appellant

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, Appellees

AND

EUGENIA MOSCHGAT, Intervenor

Appeal from the Circuit Court of Kanawha County
Hon. Paul Zakaib, Jr.
Case No. 00-C-974

REVERSED AND REMANDED

Submitted: October 3, 2006
Filed: November 15, 2006

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JUSTICE STARCHER delivered the Opinion of the Court.

CHIEF JUSTICE DAVIS dissents and reserves the right to file a dissenting opinion.

JUSTICE MAYNARD dissents and reserves the right to file a dissenting opinion.

JUSTICE ALBRIGHT concurs and reserves the right to file a concurring opinion.

JUSTICE BENJAMIN, deeming himself disqualified, did not participate in the decision of this case.

JUDGE THOMAS C. EVANS, III, sitting by temporary assignment.

SYLLABUS BY THE COURT

1. “Administratrix could maintain action to recover for servant’s death in consequence of master’s deliberate intent to produce death (Code 1931, 23-4-2, 55-7-6).” Syllabus Point 3, *Collins v. Dravo Contracting Co.*, 114 W.Va. 229, 171 S.E. 757 (1933).
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].
3. Pursuant to *W.Va. Code, 23-4-2(c)* [2005] and *W.Va. Code, 55-7-6* [1992], the persons who can potentially recover “deliberate intention” damages from a decedent’s employer are the persons specified in *W.Va. Code, 23-4-2(c)* [2005]: the employee’s widow, widower, child, or dependent of the employee.

Starcher, J.:

In this case we reverse a circuit court’s decision to dismiss a defendant in a wrongful death case, and we remand the case for further proceedings.

I.
Facts & Background

The instant case began with a tragic event. 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 the appellee Speedway SuperAmerica (“Speedway”). Ms. Kannaird was not married at the time of her death and had only one child – an adult daughter, Eugenia Moschgat, a resident of North Carolina.

On February 28, 2000, Ms. Moschgat qualified as administratrix of her mother’s estate before the Kanawha County Commission. On April 11, 2000, in her capacity as personal representative and administratrix of Ms. Kannaird’s estate, Ms. Moschgat filed a lawsuit in the Circuit Court of Kanawha County against the City of Charleston¹ and

¹The suit against the City and Speedway as a result of Ms. Kannaird’s death also names the City of Charleston’s Fire Department and two of the Department’s employees as defendants; we will include them in the term “the City.” Several other individuals were injured or died in the same accident; other suits were filed against the City and Speedway as a result, and these other cases were consolidated with the case filed by Ms. Moschgat. There
(continued...)

Speedway. The lawsuit alleged that Ms. Kannaird's death was caused by (1) the negligence of City employees; and (2) by conduct by Speedway, Ms. Kannaird's employer, that rose to the level of "deliberate intention" misconduct, so as to remove from Speedway the immunity from suit that is conferred by our workers' compensation laws.²

Subsequently, on or about June 8, 2000, a number of Linda Kannaird's siblings, alleging that they were potential recipients of damages in the suit filed by Ms. Moschgat filed pleadings in connection with that suit seeking to remove (and replace) Ms. Moschgat as the personal representative of Linda Kannaird's estate and as the plaintiff in the

¹(...continued)

have been cross-claims made among the defendants in the consolidated cases, and there also has apparently been settlement of some claims and/or cases. Those matters are not pertinent to the instant appeal.

²*W.Va. Code*, 23-2-6 [2003] provides that the immunity from a common-law damages suit arising out of the injury or death of an employee that is afforded to an employer participating in the workers' compensation system may be removed if the employer's conduct meets the "deliberate intention" standard codified at *W.Va. Code*, 23-4-2(d)(2) [2005]. Whether such conduct occurred is not an issue in the instant appeal. *W.Va. Code*, 23-4-2(c) [2005] states:

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

(Emphasis added.) We note that the statute numbers and effective dates cited and quoted in this opinion are those of the most current version of the statute, unless noted as otherwise. In some instances, previous enactments of the statutory language were applicable to the facts of the instant case, but any differences in the statutory versions is of no consequence, so we use the current version for simplicity's sake.

lawsuit.³ Siblings are potential beneficiaries under our wrongful death statute, *W.Va. Code*,

³Our wrongful death statute, *W.Va. Code*, 55-7-6 [1992], states:

(a) *Every such 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, or in any other state, territory or district of the United States, or in any foreign country, and the amount recovered in every such action shall be recovered by said personal representative and be distributed in accordance herewith. If the personal representative was duly appointed in another state, territory or district of the United States, or in any foreign country, such personal representative shall, at the time of filing of the complaint, post bond with a corporate surety thereon authorized to do business in this state, in the sum of one hundred dollars, conditioned that such personal representative shall pay all costs adjudged against him or her and that he or she shall comply with the provisions of this section. The circuit court may increase or decrease the amount of said bond, for good cause.*

(b) *In every such action for wrongful death, the jury, or in a case tried without a jury, the court, may award such damages as to it may seem fair and just, and, may direct in what proportions the damages shall be distributed to the surviving spouse and children, including adopted children and stepchildren, brothers, sisters, parents and any persons who were financially dependent upon the decedent at the time of his or her death or would otherwise be equitably entitled to share in such distribution after making provision for those expenditures, if any, specified in subdivision (2), subsection (c) of this section. If there are no such survivors, then the damages shall be distributed in accordance with the decedent's will or, if there is no will, in accordance with the laws of descent and distribution as set forth in chapter forty-two of this code. If the jury renders only a general verdict on damages and does not provide for the distribution thereof, the court shall distribute the damages in accordance with the provisions of this subsection.*

(c)(1) *The verdict of the jury shall include, but may not be limited to, damages for the following: (A) Sorrow, mental anguish, and solace which may include society, companionship,*

(continued...)

55-7-6 [1992].

On January 8, 2001, following several hearings, the circuit 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. The circuit court ordered that Ms. Moschgat be removed as administratrix and personal representative of Ms. Kannaird's estate and as the named plaintiff in the case against the City and Speedway, and

³(...continued)

comfort, guidance, kindly offices and advice of the decedent; (B) compensation for reasonably expected loss of (i) income of the decedent, and (ii) services, protection, care and assistance provided by the decedent; (C) expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death; and (D) reasonable funeral expenses.

(2) In its verdict the jury shall set forth separately the amount of damages, if any, awarded by it for reasonable funeral, hospital, medical and said other expenses incurred as a result of the wrongful act, neglect or default of the defendant or defendants which resulted in death, and any such amount recovered for such expenses shall be so expended by the personal representative.

(d) Every such action shall be commenced within two years after the death of such deceased person, subject to the provisions of section eighteen, article two, chapter fifty-five. The provisions of this section shall not apply to actions brought for the death of any person occurring prior to the first day of July, one thousand nine hundred eighty-eight.

(Emphasis added.) As to siblings, *W.Va. Code*, 23-4-10(d) [2005] defines "dependent" as including only an "invalid brother or sister wholly dependent for his or her support upon the earnings of the employee. . . ."

that she be replaced as the administratrix and plaintiff by the appellant, Diana Savilla, Linda Kannaird's sister.⁴

The case then proceeded with discovery; however, it was sidetracked into federal court for nearly two years due to a removal petition filed by Speedway; ultimately the case was returned to the circuit court in August of 2004. There were also amendments to pleadings, cross-claims among defendants, and various dispositive motions – none of which are germane to the issues in the instant appeal.

Meanwhile, apparently in July of 2003, Speedway and Ms. Moschgat, acting independently of Ms. Savilla, entered into an agreement (neither the date nor the text of the agreement are in the record) in which Speedway promised to pay Ms. Moschgat a sum of money for a release of all of Ms. Moschgat's personal claims against Speedway, contingent upon Speedway's being dismissed from the lawsuit.

Speedway thereafter filed and brought on for hearing a motion to dismiss before the circuit court, raising two arguments.

First, Speedway argued that Ms. Savilla, as the personal representative of Linda Kannaird's estate, had no standing to assert any "deliberate intention" claims arising from

⁴Following Ms. Moschgat's removal as personal representative and named plaintiff, she unsuccessfully petitioned this Court, asking that we review and reverse the circuit court's order. Ms. Savilla argues in the instant appeal that this Court's refusal to hear Ms. Kannaird's challenge to the circuit court's order established the "law of the case," and bars Speedway from asserting the arguments that are discussed in the instant opinion. We cannot agree with Ms. Savilla's contention. The issues in the instant appeal were not raised in Ms. Moschgat's petition to this Court.

Ms. Kannaird's death because Ms. Savilla was not one of the specific persons who are named in *W.Va. Code, 23-4-2(c)* [2005] ("the widow, widower, child or dependent of the employee . . .") *see note 2 supra* for full text) as potentially having a "deliberate intention" cause of action against a participating employer in the event of an employee's death.

In the alternative, Speedway argued that its agreement with Ms. Moschgat fully satisfied all possible deliberate intention claims against Speedway arising from the death of Ms. Kannaird, because Ms. Moschgat is the only one who could have such a claim under *W.Va. Code, 23-4-2(c)* [2005], and that Speedway's dismissal was required based on the settlement agreement.

On April 8, 2005, the circuit court dismissed Speedway as a defendant in the lawsuit. The circuit court agreed with Speedway's first argument, concluding that deliberate intention claims on behalf of the persons listed in *W.Va. Code, 23-4-2(c)* [2005] may not be asserted by the personal representative of a decedent in a wrongful death suit brought by the personal representative, but may be asserted only by those statutorily-named persons themselves.

The circuit court did not address Speedway's alternative argument – that even if Ms. Savilla was a proper party to assert a deliberate intention claim on behalf of another party against Speedway, the contingent settlement by Ms. Moschgat of her claim against Speedway mandated the dismissal of Speedway as a defendant, because none of the other potential beneficiaries of the suit could recover "deliberate intention" damages against Speedway. Ms. Savilla, the named plaintiff and administratrix of Ms. Kannaird's estate, filed

the instant appeal, asserting that the circuit court erred in dismissing Speedway as a defendant.

II. *Standard of Review*

A trial court's ruling on a motion to dismiss is reviewed *de novo*. *Kopelman & Associates v. Collins*, 196 W.Va. 489, 492, 473 S.E.2d 910, 913 (1996).

III. *Discussion* A.

The first issue that we must address is whether anyone other than Ms. Moschgat had or has a potential cause of action against Speedway, Ms. Kannaird's employer, as a result of her death.

As previously noted, *W.Va. Code*, 23-4-2(c) [2005] specifically provides that the "widow, widower, child or dependent" of an employee has a cause of action against an employer as a result of an employee's death arising from an employer's alleged "deliberate intention" misconduct. Ms. Moschgat, as Ms. Kannaird's daughter, is the only person identified by either party who fits within this definition.

"[T]he familiar maxim *expressio unius est exclusio alterius* [means] the express mention of one thing implies the exclusion of another [.]" Syllabus Point 3, in part, *Manchin v. Dunfee*, 174 W.Va. 532, 327 S.E.2d 710 (1984). Applying this principle in the instant case,

W.Va. Code, 23-4-2(c)'s express mention of certain persons who have a cause of action against an employer for deliberate intention wrongful death damages implies the exclusion of other persons who are not mentioned in the statute.

Despite this language, Ms. Savilla argues that siblings like herself, who are not identified specifically in 23-4-2(c) [2005] (and who were not financially dependent on the decedent),⁵ also have a potential cause of action against an employer for deliberate intention wrongful death damages; because an award of damages to such persons is authorized by the wrongful death statute, *W.Va. Code*, 55-7-6 [1992]:

the damages shall be distributed to the surviving spouse and children, including adopted children and stepchildren, *brothers, sisters, parents and any persons who were financially dependent upon the decedent at the time of his or her death or would otherwise be equitably entitled to share in such distribution* after making provision for those expenditures, if any, specified in subdivision (2), subsection (c) of this section. [emphasis added].⁶

It is axiomatic that these two statutes must be read in a fashion to give effect to all of their terms, if possible. “[N]o part of a statute is to be treated as meaningless and we must give significance and effect to every section, clause, word or part of a statute” *Mitchell v. City of Wheeling*, 202 W.Va. 85, 88, 502 S.E.2d 182, 185 (1998) (citing *State v.*

⁵See last sentence, n.3.

⁶See *Mackey v. Irisari*, 191 W.Va. 355, 445 S.E.2d 742 (1994) (financial dependency is not required for potential beneficiaries identified in *W.Va. Code*, 55-7-6 [1992]).

General Daniel Morgan Post No. 548, 144 W.Va. 137, 107 S.E.2d 353 (1959); *Wilson v. Hix*, 136 W.Va. 59, 65 S.E.2d 717 (1951)).

To adopt Ms. Savilla’s reasoning – to expand the list of persons (“widow, widower, child or dependent”) who “have a [deliberate intent] cause of action” against an employer beyond those persons set forth in *W.Va. Code*, 23-4-2(c) [2005] would be to make the words of limitation in *W.Va. Code*, 23-4-2(c) [2005] into a nullity. Whereas, to adopt the reading suggested by *Speedway* – that *W.Va. Code*, 23-4-2(c) [2005] sets forth certain persons from whom an employer does not have immunity for deliberate intention causes of action; and that *W.Va. Code*, 55-7-6 [1992] sets forth the persons who may recover wrongful death damages under *non*-deliberate intention causes of action – will harmonize and give effect to all of the language in both statutes.

Our reading of the statutes is not unprecedented. We directly addressed this question in *Collins v. Dravo Contracting Co.*, 114 W.Va. 229, 171 S.E. 757 (1933). In *Collins*, an employer challenged the right of a personal representative to assert a deliberate intention claim in a wrongful death lawsuit under *W.Va. Code*, 55-7-6 [1992], because the personal representative was not one of the persons named in *W.Va. Code*, 23-4-2(b) [1923] as having a cause of action for “deliberate intention” damages. This Court ruled against the employer’s challenge, stating that:

The statute in question [23-4-2(b)] gives the right of action “as if this chapter had not been enacted.”⁷ If it had not been enacted, then for death by wrongful act the personal representative sues under Code, 55-7-6, and that section, including its limitation of recovery, would apply to the extent not inconsistent with Code, 23-4-2. *Since Code, 23-4-2, names the beneficiaries who take, the recovery under its terms would be distributed to “the widow, widower, child or dependent” and not in accordance with Code, 55-7-6.* But it is the personal representative who sues *subject to the difference in distribution of any recovery.*

114 W.Va. at 235-236, 171 S.E. at 759 (emphasis added). *Collins* is thus in accord with the reading of the statutes that Speedway advocates – that potential damages recovery under a cause of action authorized by *W.Va. Code, 23-4-2(c)* [2005] is limited to a smaller class of beneficiaries than those persons who are set forth in *W.Va. Code, 55-7-6* [1992].

Based on the foregoing reasoning, we hold that pursuant to *W.Va. Code, 23-4-2(c)* [2005] and *W.Va. Code, 55-7-6* [1992], the persons who can potentially recover “deliberate intention” damages from a decedent’s employer are the persons specified in *W.Va. Code, 23-4-2(c)* [2005]: the employee’s widow, widower, child, or dependent of the employee.

The next issue that we must address is whether deliberate intention claims on behalf of the potential beneficiaries of such claims may be asserted by a personal representative who is not such a beneficiary in a wrongful death action filed pursuant to *W.Va. Code, 55-7-6* [1992].

⁷The phrase “as if this chapter had not been enacted” can be most sensibly read in most instances to mean “as if [the immunity created by] this chapter had not been enacted.”

W.Va. Code, 55-7-6 [1992] 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 added). 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.

We also addressed this issue *Collins, supra*. Syllabus Point 3 of *Collins v. Dravo Contracting Co., supra*, states:

Administratrix could maintain action to recover for servant’s death in consequence of master’s deliberate intent to produce death (Code 1931, 23-4-2, 55-7-6).

As previously discussed, the *Collins* opinion stated that:

The statute in question [23-4-2(b)] gives the right of action “as if this chapter had not been enacted.” If it had not been enacted, then for death by wrongful act *the personal representative sues* under Code, 55-7-6, and that section, including its limitation of recovery, would apply to the extent not inconsistent with Code, 23-4-2. Since Code, 23-4-2, names the beneficiaries who take, the recovery under its terms would be distributed to “the widow, widower, child or dependent” and not in accordance with Code, 55-7-6. *But it is the personal representative who sues* subject to the difference in distribution of any recovery.

114 W.Va. at 235-236, 171 S.E. at 759 (emphasis added).

Thus, *Collins* clearly states, and we hold, 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].⁸

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 appellant Ms. Savilla, as personal representative of the estate of Linda Kannaird, and not Ms. Moschgat.

B.

⁸Allowing 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, ___ 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).

In addition to arguing that the plaintiff and administratrix of the Kannaird estate that Ms. Savilla had no standing, Speedway also argues that because Ms. Moschgat has settled (contingently) her claim against Speedway, there are no more claims against Speedway to be pursued in the lawsuit – and that Speedway is therefore entitled to be dismissed as a defendant.

However, this argument ignores the issues that can and do arise when one potential beneficiary and/or one defendant in a wrongful death case would like to simply settle a claim, and “go home.” Some of these issues, and the various circumstances in which they can arise, have been addressed in West Virginia case law.

In Syllabus Point 4 of *McClure v. McClure*, 184 W.Va. 649, 403 S.E.2d 197 (1991) we held:

Under W.Va.Code, 55-7-6 (1985), our wrongful death statute, the personal representative has a fiduciary obligation to the beneficiaries of the deceased because the personal representative is merely a nominal party and any recovery passes to the beneficiaries designated in the wrongful death statute and not to the decedent’s estate.

We said in *McClure*: “We have been sensitive to problems that may occur between the beneficiaries of a wrongful death suit and the personal representative” 184 W.Va. at 654, 403 S.E.2d at 202.

In *Thompson & Lively v. Mann*, 65 W.Va. 648, 64 S.E. 920 (1909), this Court held that wrongful death suit proceeds recovered by a personal representative plaintiff are not general assets of the estate; that the personal representative is a trustee for the benefit of

the beneficiaries of the wrongful death action; and that the administrator has the right to be reimbursed for reasonable attorney's fees in the prosecution of a wrongful death suit. In *Swope v. Keystone Coal & Coke Co.*, 78 W.Va. 517, 89 S.E. 284 [1916] we held that a compromise of a wrongful death case by less than all beneficiaries and without the consent of the decedent's personal representative was invalid.

In *Jordan v. Allstate*, 184 W.Va. 678, 403 S.E.2d 421 (1991), we held that under *W.Va. Code, 55-7-7* [1982] a personal representative could settle and distribute wrongful death claim proceeds only with the consent of all beneficiaries, or with court approval after a hearing. In *White v. Gosiene*, 187 W.Va. 576, 420 S.E.2d 567 (1992), we held that all beneficiaries of a wrongful death claim may by written agreement compromise the claim and allocate the share to be paid to each.

In *Miller v. Lambert*, 195 W.Va. 63, 464 S.E.2d 582 (1995), we held that an administrator was required to obtain court approval for settlement of a wrongful death claim where all beneficiaries who might receive potential damages from the claim did not, or could not, agree to the settlement. And in *Estate of Postlewait v. Ohio Valley Medical Center, Inc.*, 214 W.Va. 668, 591 S.E.2d 226 (2003), we held that all compromises of wrongful death claims must be approved by the court. *See also, Stone v. CSX Transportation, Inc.*, 10 F. Supp. 2d 602 (S.D. W.Va. 1998) (court approval of settlement necessary to bind non-consenting adult beneficiaries of wrongful death claim; public policy strongly favors

protecting the interests of all beneficiaries).⁹ *See generally* “Effect of Settlement with and Acceptance of Release from One Wrongful Death Beneficiary upon Liability of Tortfeasor to other Beneficiaries or Decedent’s Personal Representative.” 21 A.L.R. 4th 275.

In *City of Louisville v. Hart’s Adm’r.*, 143 Ky. 171, ___, 136 S.W. 212, 214 (1911), the court observed that the settlement “recovery [was] charged with certain expenses that the personal representative would be obliged to discharge, but that the beneficiary might not be inclined to pay and could not be held responsible for.” *See also, Estate of White*, 41 Or. App. 439, 599 P.2d 1147 (1979) (attorney fees of personal representative should be paid from settlement over objection of other beneficiaries in wrongful death case).

From the foregoing review of case law from this and other jurisdictions, it can be gleaned that resolving the issues that arise when one beneficiary in a wrongful death case wishes to settle their claim against a defendant requires a complex balancing act by the court. The development of a full record and a careful weighing of all of the applicable law and equity by the court is a necessity.

⁹An attorney for a personal representative has been held to have a duty to a beneficiary of a wrongful death action, regardless of privity. *Cf. Lebya v. Whitley*, 120 N.M. 768, 907 P.2d 172 (1995). The *Lebya* decision is criticized by Marianne B. Hill at “Trend in New Mexico Law: 1994-95”, 26 N.M.L.Rev. 643, 650 (1996): “The potential for an existing or future adversarial relationship amongst statutory beneficiaries [of a wrongful death claim] is likely.” *See also*, 4 *West’s Pennsylvania Practice, Torts: Law and Advocacy Sec. 14.18*, “Distribution in wrongful death and survival actions” (“The potential for conflicts between beneficiaries to a wrongful death action presents a challenge to both the trial court and the attorney representing the plaintiff.”).

In the instant appeal, we have no such record, nor do we have a decision by the trial court addressing the various issues as the parties see them, with appropriate findings and conclusions. We therefore have no basis to even attempt to decide whether and/or to what degree and upon what conditions Speedway and Ms. Moschgat may be permitted to resolve the cause of action that Ms. Moschgat has against Speedway in the context of the overall lawsuit in which Ms. Savilla is the court-denominated personal representative and named plaintiff.

These are matters that must be addressed on remand by the trial court. The foregoing-cited authorities suggest that any such settlement or dismissal must be determined by the court to not unfairly prejudice the other potential beneficiaries of the lawsuit,¹⁰ 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 Ms. Moschgat and her separate counsel.¹¹

IV. *Conclusion*

¹⁰See notes 1 and 3, *supra*. The decedent's siblings, for example, and Ms. Moschgat are potential beneficiaries of the claims against the City.

¹¹At the present moment, Ms. Savilla and Ms. Moschgat, both of whom have been personal representatives and plaintiffs in the instant case, appear to be in adversarial positions. Reliance on the generally applicable fiduciary duty that a personal representative has toward the potential beneficiaries in a wrongful death case will therefore have little utility in resolving the issues before the trial court.

The dismissal of the appellee Speedway is reversed and this case is remanded to the circuit court for further proceedings consistent with this opinion.

Reversed and Remanded.