

**State of West Virginia
Supreme Court of Appeals**

**Lawrence McElhinny and
Beatrice McElhinny, Plaintiffs
Below, Petitioners**

FILED
May 2, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) No. 101541 (Kanawha County 09-C-80)

**The Kanawha County Public Library and
The Dunbar Public Library, Defendants
Below, Respondents**

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Kanawha County's order granting Respondent's The Kanawha County Public Library and The Dunbar Public Library, motion to dismiss Petitioner Beatrice McElhinny's loss of consortium claim. The appeal was timely filed by the petitioners, with designated portions of the record accompanying the petitioners' brief. A timely response was filed by the respondents. The petitioners seek a reversal of the circuit court's decision.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioners instituted this action alleging injury to Petitioner Lawrence McElhinny from a fall at The Dunbar Public Library, and alleging loss of consortium on behalf of Petitioner Beatrice McElhinny, Lawrence's wife. Petitioner Lawrence McElhinny died during the pendency of this action, and no party was substituted upon Respondents' filing of a Suggestion of Death. Petitioner Lawrence McElhinny's claims were dismissed after Respondents filed a Motion to Dismiss. Respondents also moved to dismiss the claims of Petitioner Beatrice McElhinny, and after the

issue was briefed and argued, the circuit court dismissed the claims of Mrs. McElhinny, finding that Mrs. McElhinny's loss of consortium claim is "purely derivative of the underlying tort claim of her deceased husband which was voluntarily dismissed by the Plaintiff following a failure to file a motion for substitution of parties pursuant to Rule 25."

Having reviewed the circuit court's well-reasoned Order Granting Defendants' Motion to Dismiss and finding no error, this Court fully incorporates and adopts said order, dated August 3, 2010, and attaches the same hereto.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 2, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**LAWRENCE MCELHINNY and
BEATRICE MCELHINNY,**

Plaintiffs,

v.

**CIVIL ACTION NO.: 09-C-80
HONORABLE JAMES C. STUCKY**

**THE KANAWHA COUNTY PUBLIC
LIBRARY and THE DUNBAR PUBLIC
LIBRARY,**

Defendants.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

On the 24th day of November, 2009 and the 12th day of May, 2010 came the Plaintiffs, Lawrence and Beatrice McElhinny, by counsel, H.H. Roberts; and the Defendant, the Kanawha County Public Library Board, by counsel, Cy A. Hill, Jr.; for hearings on the Defendant's *Motion to Dismiss*. After careful consideration of the aforesaid motion, briefs filed in support thereof, responsive briefs filed by the Plaintiff, and oral arguments of counsel, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On or about January 16, 2009, the plaintiffs filed a lawsuit against the Kanawha County Public Library Board (improperly named in the Complaint as the Kanawha County Public Library and the Dunbar Public Library) based upon a fall sustained by Lawrence McElhinny at the Dunbar Library on May 29, 2007. Generally, it is alleged that Mr. McElhinny tripped and fell over a book rack at the library and sustained a broken hip. Mr. McElhinny brought the instant lawsuit seeking compensation

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for his personal injury and his wife, Beatrice McElhinny, alleged a loss of consortium claim stemming from her husband's personal injury. Ms. McElhinny has not alleged any other theories of liability against the Defendant other than a loss of consortium claim.

2. On or about May 25, 2009, Mr. McElhinny died at the age of 92. Subsequently, on June 8, 2009, the Defendant filed a Suggestion of Death upon the record and properly served the same upon counsel for the Plaintiffs. Following the filing of the Suggestion of Death upon the record, surviving Plaintiff, Beatrice McElhinny, failed to file a motion for substitution within ninety (90) days as required by Rule 25(a)(1) of the West Virginia Rules of Civil Procedure. At this time, no party has filed a motion for substitution in this case.

3. On or about September 24, 2009, the Defendant filed a *Motion to Dismiss* pursuant to Rule 25(a)(1). On November 24, 2009, the parties came before this Court for hearing on the Defendant's motion. The Plaintiff filed no brief in opposition to the dismissal of the claims of Lawrence McElhinny. In fact, at the November 24, 2009 hearing, Plaintiff's counsel conceded upon the record that the claims of Lawrence McElhinny should be dismissed and acknowledged as such in open court. Accordingly, the Court **FINDS** that the claims of Plaintiff Lawrence McElhinny were voluntarily abandoned by the failure to file a motion for substitution as required by Rule 25 of the West Virginia Rules of Civil Procedure and were voluntarily dismissed by counsel for the Plaintiff at the November 24, 2009 hearing. **WHEREFORE**, the Court hereby **ORDERS** that the claims of Plaintiff Lawrence McElhinny are hereby **DISMISSED**, with prejudice.

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4. At the November 24, 2009 hearing, the parties provided oral arguments on the issue of whether the derivative loss of consortium claim of Plaintiff Beatrice McElhinny should survive the voluntary dismissal of her deceased husband's underlying tort claim. After considering oral arguments of counsel, the Court asked the parties to submit additional briefs by January 15, 2010 on the issue of whether Beatrice McElhinny's loss of consortium claim can survive as a stand-alone cause of action despite the voluntary dismissal of her husband's underlying tort claim which forms the basis of her loss of consortium claim.

5. On May 12, 2010, the parties came before the Court for further oral arguments on the Defendant's *Motion to Dismiss* and supplemental briefs filed by the parties as to Plaintiff Beatrice McElhinny's loss of consortium claim. After careful consideration of the parties' briefs, pleadings filed herein, and oral arguments of counsel, the Court makes the following conclusions of law as to the loss of consortium claim of Plaintiff Beatrice McElhinny.

CONCLUSIONS OF LAW

1. The Plaintiff cites W.Va. Code § 48-29-302 which recognizes a married woman's right to pursue a loss of consortium claim to the same extent and in all cases as a married man for the proposition that Ms. McElhinny has an independent cause of action for loss of consortium even though the underlying claim of her husband was voluntarily dismissed. However, this statute merely recognizes that a woman can sue for the loss of consortium of her husband to the same extent as a man can sue for the loss of consortium of his wife. W.Va. Code § 48-29-302 does not in and of itself create a stand-alone cause of action for loss of consortium where the underlying tort claim has been dismissed.

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2. There are coverage cases in West Virginia which contain specific language as to whether a loss of consortium claim survives the dismissal of the underlying tort action. For instance, in the case of West Virginia Fire and Casualty Company v. Cass-Sandra Marko Gene Stanley, 216 W.Va. 40, 602 S.E.2d 483 (2004), the underlying cause of action was a wrongful death action. The court found that there was no coverage in that suit under the West Virginia Fire and Casualty Company policy under the intentional acts exclusion of that policy. Addressing the remaining loss of consortium claim, the West Virginia Supreme Court of Appeals stated:

The final count in the complaint is Sandra Stanley's claim for loss of services, comfort and society against all of the defendants. This is a derivative claim that fails along with the primary claims in the complaint. 'It is inherent in the nature of a derivative claim that the scope of the claim is defined by the injury done to the principal.' Jacoby v. Brinckerhoff, 250 Conn. 86, 93, 735 A.2d 347, 351 (1999). Also, 'the derivative cause of action for loss of consortium cannot provide greater relief than the relief permitted for the primary cause of action.' Lynn v. Allied Corp., 41 Ohio App.3d 392, 402, 536 N.E.2d 25, 36 (Ohio Ct.App.1987).

Also see Donna Davis v. William Foley, 193 W.Va. 595, 598, 457 S.E.2d 532, 535(1995)

(Holding that a loss of consortium claim arises out of a claim for damages of the bodily-injured person.)

3. The West Virginia Supreme Court of Appeals has reached a similar holding in other contexts as well. For instance the case of Marlin v. Bill Rich Construction, Inc., 198 W.Va. 635, 482 S.E.2d 620 (1996), the Court was presented with a personal injury case where appellant construction workers and their families brought a lawsuit as a result of the construction workers' alleged exposure to asbestos during the construction of Hundred High School in Wetzel County, West Virginia. The household members made claims not only for their own fear of contracting asbestosis, but also

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derivative claims for loss of love, society, comfort, companionship, and services. Pertinent to the issues in the instant case, the Court stated in relevant part, "We note only that the derivative claims for loss of love, society, comfort, companionship, and services stand or fall with the appellants' [workers] claims." In other words, the Court recognized that the household members' claims for loss of love, society, comfort, companionship, and services were purely derivative and did not constitute stand-alone causes of action which would survive a dismissal of the underlying personal injury claims of the workers.

4. The West Virginia case law cited about which stands for the proposition that a loss of consortium claim "stands or falls" with the underlying tort claim is further supported by case law from across the country. *See e.g. McCoy v. Colonial Baking Company, Inc.*, 572 So.2d 850 (Miss. 1990) (adopting the Restatement (Second) of Judgments position that a person's loss of consortium claim "should stand or fall with the injured person's claim"); *Hopson v. St. Mary's Hosp.*, 408 A.2d 260, 264 (Conn. 1979) ("Because a consortium action is derivative of the injured spouse's cause of action, the consortium claim would be barred when the suit brought by the injured spouse has been terminated by settlement or by an adverse judgment."); *Nicholson v. Hugh Chatham Memorial Hosp., Inc.*, 266 S.E.2d 818 (N.C. 1980) ("Plaintiff[s] . . . consortium action is derivative [and] . . . 'a claim for consortium is non-existent in the absence of a valid claim by the injured spouse.'").

5. Based upon the case law cited hereinabove, the Court **FINDS** that Plaintiff Beatrice McElhinny's loss of consortium claim is purely derivative of the underlying tort claim of her deceased husband which was voluntarily dismissed by the Plaintiff following a failure to file a motion for substitution of parties pursuant to Rule 25. The Court is

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aware of no case law or statutory law in West Virginia which recognizes an independent, stand-alone, cause of action for spousal loss of consortium when the underlying tort claim has been voluntarily dismissed. In fact, the weight of the case law in West Virginia and other jurisdictions suggests that no such stand-alone cause of action exists when the underlying cause of action has been dismissed. **WHEREFORE**, the Court does hereby **ORDER** that the loss of consortium claim of Plaintiff Beatrice McElhinny is also hereby **DISMISSED**, with prejudice. There being no further matters to take up in this case, it is hereby **ORDERED** that this civil action be removed from the Court's docket.

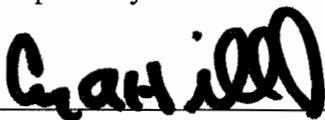
The objections and exceptions of counsel are hereby noted and preserved.

The Clerk of this Court is hereby instructed to send certified copies of this Order to counsel of record for all parties.

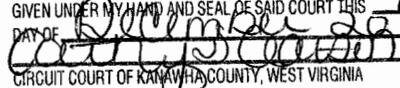
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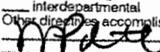

HONORABLE JAMES C. STUCKY

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RECORDED

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 1st
DAY OF December 2010
 CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Date: 8/16/10
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