

No. 33053 – *Diana Mae Savilla, Administratrix of the Estate of Linda Sue Good Kannaird v. Speedway SuperAmerica, LLC dba Rich Oil Company, a Delaware Corporation, City of Charleston, a municipality; Charleston Fire Department; Bruce Gentry; and Rob Warner*

FILED

December 27, 2006

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RORY L. PERRY II, CLERK

SUPREME COURT OF APPEALS

OF WEST VIRGINIA

Albright, J., concurring:

I concur with this Court's opinion, and I write separately only to address matters raised by the dissent. The dissent concludes its first section with the statement that this Court's holding in *Collins v. Dravo Contracting Co.*, 114 W.Va. 229, 171 S.E. 757 (1933), was flatly wrong.¹ The dissent asserts, contrary to the holding in *Collins*, that a representative of the estate of a decedent is not authorized to bring a cause of action for a widow/widower, child, or dependent of that decedent.

The authority of a decedent's personal representative to assert a deliberate intention claim on behalf of the decedent's widow/widower, child, or dependent has been settled law in this State for over eighty years.² It is therefore disingenuous for the dissent to

¹The dissent erroneously suggests that the holding of *Collins*, as quoted in the majority opinion, is dicta. In *Collins*, however, the defendant contended that "no recovery can be had in this action by the administratrix" because the administratrix was neither the "widow, widower, child or dependent of the employee." 114 W.Va. at 235, 171 S.E. at 759. If such contention had been correct, this Court would have agreed with the defendant in *Collins*. However, this Court stated that the defendant's contention was erroneous and required the defendant to proceed to trial. Thus, the statement in *Collins* upon which the majority relies is not strictly dicta.

²As evidence of such practice and understanding, a cursory search of this
(continued...)

accuse the majority of distorting the law when the majority is actually applying settled West Virginia law.

The dissent also suggests that the statutory provision for recovery by an employee in a deliberate intention case permits the recovery by the estate of that employee. The dissent suggests that the majority opinion has destroyed this right, but cites no instance in which such right has actually been recognized in West Virginia. The infirmity in the dissent's reading of the statute is illustrated by the following example: if an employee leaves his or her estate to a church, under the dissent's clearly expressed view, the church could collect deliberate intention damages.

That dissent also chastises the majority for permitting Ms. Savilla, as an intervenor, to oust Ms. Mosghat, the only party who had a claim for damages against

²(...continued)

Court's opinions finds the following instances wherein personal representatives are named plaintiffs in deliberate intention actions resulting from the death of an employee: *Keesee v. General Refuse Service, Inc.*, 216 W.Va. 199, 604 S.E.2d 449 (2004); *Zelenka v. City of Weirton*, 208 W.Va. 243, 539 S.E.2d 750 (2000); *Mumaw v. U.S. Silica Co.*, 204 W.Va. 6, 511 S.E.2d 117 (1998); *Costilow v. Elkay Min. Co.*, 200 W.Va. 131, 488 S.E.2d 406 (1997); *Michael v. Marion County Bd. of Educ.*, 198 W.Va. 523, 482 S.E.2d 140 (1996); *Powroznik v. C. & W. Coal Co.*, 191 W.Va. 293, 445 S.E.2d 234 (1994); *Sias v. W-P Coal Co.*, 185 W.Va. 569, 408 S.E.2d 321 (1991); *Dunn v. Consolidation Coal Co.*, 180 W.Va. 681, 379 S.E.2d 485 (1989); *Cline v. Jumacris Min. Co.*, 177 W.Va. 589, 355 S.E.2d 378 (1987); *Duty v. Walker*, 180 W.Va. 149, 375 S.E.2d 781 (1988); *Mooney v. Eastern Associated Coal Corp.*, 174 W.Va. 350, 326 S.E.2d 427 (1984); *Chambers v. Sovereign Coal Corp.*, 170 W.Va. 537, 295 S.E.2d 28 (1982); *Maynard v. Island Creek Coal Co.*, 115 W.Va. 249, 175 S.E. 70 (1934).

Speedway. It is somewhat ironic to note, however, that the dissenting justices voted to refuse Ms. Mosghat's petition to appeal the circuit court's ouster of Ms. Mosghat.³ Moreover, despite the dissent's utterances to the contrary, nothing in this Court's majority opinion has precluded Ms. Mosghat from separately compromising her particular claim against Speedway. This Court simply affirms West Virginia law that any such compromise must occur in the broader context of the ongoing litigation, with due regard to the governing settled law.

³With the benefit of hindsight, it appears that this Court made a mistake in allowing the lower court's substitution of personal representatives. One error by this Court, however, certainly does not justify another error, the improper tampering with settled law governing personal representatives and their management of wrongful death litigation that the dissent would propose.