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

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OF WEST VIRGINIA

Davis, C.J. , dissenting:

In this case, Diana Savilla, as administratrix for the estate of Linda Kannaird, filed a workers' compensation deliberate intent cause of action against Speedway SuperAmerica under a theory that would permit damages to be distributed according to our wrongful death statute. The circuit court dismissed the action on the grounds that the workers' compensation statute did not authorize the cause of action brought by Ms. Savilla. The majority opinion, relying upon dicta from a 1933 decision, reversed the circuit court's decision. For the reasons set out below, I respectfully dissent.

A. The Majority Opinion was Legally Wrong in Relying upon Dicta from the Case of Collins v. Dravo Contracting Company

The facts of this case show that Ms. Savilla was the sister of the decedent. She brought this action as the administratrix for the estate of the decedent. Ms. Savilla filed the cause of action against Speedway, the employer of the decedent, based upon W. Va. Code § 23-4-2(c) (2005) (Repl. Vol. 2005), which provides that "[i]f injury or death result to any employee from the deliberate intention of his or her employer . . ., the employee, the widow, widower, child or dependent of the employee . . . has a cause of action against an

employer[.]" Ms. Savilla sought damages under W. Va. Code § 55-7-6(b) (1992) (Repl. Vol. 2000), which allows a jury to award damages to a decedent's "spouse and children . . . brothers, sisters, parents and any persons who were financially dependent upon the decedent[.]" Insofar as Ms. Savilla did not qualify as the widow, child or dependent of Ms. Kannaird, the circuit court found that she could not maintain a deliberate intent cause of action against Speedway.

The majority opinion has agreed with the circuit court that Ms. Savilla cannot personally recover any money from a deliberate intent cause of action against Speedway under our wrongful death statute. Even so, the majority opinion has determined that Ms. Savilla *can* maintain her lawsuit on behalf of Ms. Kannaird's adult daughter, Eugenia Moschgat.[1] In order to keep Ms. Savilla in this case as a nominal plaintiff, the majority decision relied upon dicta in the 1933 decision of *Collins v. Dravo Contracting Co.*, 114 W. Va. 229, 171 S.E. 757 (1933). As I will demonstrate below, the dicta asserted in *Collins* was legally incorrect.

Collins involved an appeal by the administratrix of the estate of a decedent who

[1]In order to reach this result, the majority opinion disregarded Ms. Moschgat's intervenor brief in this appeal wherein she informed this Court that she had reached a settlement with Speedway and that Ms. Savilla does not represent her interests. In fact, Ms. Savilla is adverse to the interests of Ms. Moschgat and does not want Ms. Moschgat to recover anything.

was killed during the course of his employment with the defendant.[2] The plaintiff brought a cause of action against the employer alleging negligence and deliberate intent as theories of liability. A jury returned a defense verdict, and the plaintiff appealed. The *only* issue raised by the plaintiff in the appeal was that the trial court erred in ruling that compliance with the workers' compensation statute, by the employer, was a complete defense to both of her theories of liability. In *Collins*, this Court held that compliance with the workers' compensation statute was a defense to a negligence action, but not to a deliberate intent cause of action. This holding was set out in the sole syllabus point created by the opinion.[3] In passing, the opinion in *Collins* commented upon the authority of the plaintiff to bring a cause

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[2]The opinion in *Collins* does not expressly identify the plaintiff as the widow, child or dependent of the decedent. The opinion did note that the plaintiff recovered workers' compensation death benefits as a result of the decedent's death. Under the statute in existence when *Collins* arose, workers' compensation death benefits were recoverable by a spouse, child, or dependent parents or grandparents. *See* W. Va. Code § 23-4-10(g) (1923) (Main Vol. 1932).

[3]I will note that in the official reporter for this Court, West Virginia Reports, only one syllabus point was created in *Collins*. *See* W. Va. Code § 5A-3-23 (1990) (Repl. Vol. 2006) ("[T]he official reporter of the supreme court of appeals shall have charge and supervision of the printing and binding of the reports of the decisions of the supreme court of appeals of the state. . . . The reports shall be styled 'West Virginia Reports.'"); W. Va. Code § 51-8-5 (1967) (Repl. Vol. 2000) (providing for the distribution of West Virginia Reports). However, in the unofficial reporter, South Eastern Reporter, it erroneously lists four syllabus points. The majority opinion has cited to one of the four syllabus points set out in the South Eastern Reporter, *i.e.*, Syllabus point 3. This syllabus point is not contained in the West Virginia Reporter. Insofar as the official reporter for this Court did not contain the syllabus point cited in the majority opinion, I am duty bound to take the position that the syllabus point cited in the majority opinion from *Collins was not created by this Court*. Instead, the purported syllabus point (and two others) was no doubt intended to be a "headnote" by the unofficial reporter that was inadvertently listed as a syllabus point.

of action against the employer in her capacity as administratrix of the decedent's estate. The sum total of the discussion on that specific issue was as follows:

> The question is raised that no recovery can be had in this action by the administratrix because Code, 23-4-2, gives the right of action to "the widow, widower, child or dependent of the employee." We do not think this contention well founded. The statute in question 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.

Collins, 114 W. Va. at 235-36, 171 S.E. at 759.

In the instant proceeding, the majority opinion relied upon the above dicta in *Collins* to permit Ms. Savilla to maintain the cause of action against Speedway on behalf of Ms. Moschgat. I strongly assert that the majority opinion committed an error of law in relying on the *Collins'* dicta.

Collins indicated that the passage "as if this chapter had not been enacted" was intended to mean that a deliberate intent cause of action, on behalf of a widow/widower, child or dependent, could be instituted in the name of a decedent's estate, as permitted under our wrongful death statute. This is simply a legally wrong interpretation of the passage. The correct meaning of this passage was stated in the case of *Weis v. Allen*, 147 Or. 670, 35 P.2d

478 (1934).

In *Weis*, the plaintiff filed a deliberate intent cause of action against his employer after he was shot by a spring gun while on the employer's property. A jury returned a verdict awarding the plaintiff general and punitive damages. The employer appealed. One of the issues raised by the employer was that the plaintiff could not recover punitive damages under the state's workers' compensation statute. The statute authorizing a deliberate intent cause of action stated the following:

> "If injury or death results to a workman from the deliberate intention of his employer to produce such injury or death, the workman . . . shall have the privilege to take, under this act, and also have cause for, action against the employer, *as if this act had not been passed*, for damages over the amount payable hereunder."

Weis, 147 Or. at 672, 35 P.2d at 479 (quoting Or. Code § 49-1828) (emphasis added). The opinion in *Weis* found that the language under the statute, "as if this act had not been passed," permitted a recovery of punitive damages. The opinion explained this passage as follows:

> Were it not for the special provision of our Code, the employee probably would have to elect whether to pursue his remedy under the Workmen's Compensation Act or sue at common law. Instead of compelling the injured workman to elect at his peril which course to pursue, section 49-1828, Oregon Code 1930, assures him at least the compensation which he would be entitled to receive in any event for the injuries suffered, and in addition grants him the right to avail himself of his common-law remedy.
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> The wording of the statute . . . is that if the injury results from the deliberate

> intention of the employer, the employee shall have cause of action against his employer, "as if this act had not been passed," for the recovery of damages in a sum over and above that to which he is entitled as an award under the act. The defendant does not dispute that at common law it would have been proper to submit to the jury the question of punitive damages, in the light of the facts in this case. The section of the act in question does not limit the amount of recovery on the part of the injured employee, but creates an additional fund for the payment of a part of the damages for injuries sustained.

Weis, 147 Or. at 683-84, 35 P.2d at 483. *Weis* is instructive in explaining that the phrase, "as if this act had not been passed," means that for the cause of action authorized by the workers' compensation statute, a plaintiff is entitled to *all remedies* afforded by the law for injury or death. The phrase means nothing more.[4]

In this case, our workers' compensation statute provides that if an employee is killed, a deliberate intent cause of action against the employer may be brought "as if this [statute] had not been enacted." W. Va. Code § 23-4-2(c). The quoted phrase does not mean that in order for a widow/widower, child or dependent to bring a cause of action, it must be done in the name of a decedent's estate as provided by our wrongful death statute. The rationale for this is that our workers' compensation statute establishes the right to a cause of action in specifically named plaintiffs, as discussed further below, such that no other authority is required for bringing an action. Therefore, to the extent *Collins* may be read as requiring a widow/widower, child or dependent to bring a cause of action in the name of a

[4]In 1983, the Legislature enacted W. Va. Code § 23-4-2(d)(2)(iii)(A) (1983) (Repl. Vol. 1985), which prohibits punitive damages against an employer for a deliberate intent cause of action. Prior to enactment of this provision, punitive damages could be recovered.

decedent's estate, it was legally wrong. By adopting the *Collins* dicta, the majority opinion has perpetuated this legal error.

To accept the logic of *Collins* and the majority opinion, I would also have to conclude that persons who may recover under a deliberate intent cause of action are those who may recover under our wrongful death statute. Under the present wording of our wrongful death statute, persons who may recover include a decedent's "spouse and children . . . brothers, sisters, parents and any persons who were financially dependent upon the decedent[.]" W. Va. Code § 55-7-6(b). Ms. Savilla argued that she was a beneficiary in this case because of our wrongful death statute and therefore sought damages under that statute. The majority opinion, like *Collins*, has selectively prohibited use of the provision of our wrongful death statute that permits recovery by those not mentioned in our workers' compensation statute. This is disingenuous. Either the wrongful death statute has no application to a deliberate intent cause of action, as I contend, or all of its provisions must apply. The issue cannot legally be piece-mealed as the majority opinion has done in its reliance upon *Collins'* ill-conceived dicta.

In essence, the ultimate point I make is that under W. Va. Code § 23-4-2(c), a representative of the estate of a decedent is not authorized to bring a cause of action for a widow/widower, child or dependent. *Collins* was wrong in suggesting this by way of dicta, and the majority opinion is wrong in making this dicta the law in our State.

B. W. Va. Code § 23-4-2(c) Sets out Two Causes of Action and Four Categories of Plaintiffs

Except for the dicta in *Collins*, the instant case presented the first opportunity for this Court to determine the proper persons who may bring a cause of action under W. Va. Code § 23-4-2(c). This statute states in full:

> 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.

W. Va. Code § 23-4-2(c). Under the statute, a deliberate intent cause of action exists for an injury or death to an employee. For the purposes of my dissent, I will examine both causes of action separately.

1. Nonfatal injury. Under W. Va. Code § 23-4-2(c), a deliberate intent cause of action for an injury to an employee may be brought by "the employee, the widow, widower, child or dependent of the employee[.]" In other words, for a nonfatal injury there are four categories of plaintiffs under the statute: employee, widow/widower, child or dependent. Obviously, if a nonfatal injury occurs, a "widow/widower" does not exist. Therefore, our cases have logically and implicitly recognized that for a nonfatal injury "widow/widower" means "spouse." As a result of this implicit recognition that "widow/widower" means spouse, our cases have not questioned the right of a spouse to bring

a separate claim in a deliberate intent cause of action for a nonfatal injury.

For example, in the case of *Cecil v. D and M Inc.*, 205 W. Va. 162, 517 S.E.2d 27 (1999), the plaintiffs, Eric Cecil and his wife, Esther Cecil, brought a deliberate intent cause of action against the employer as a result of injuries Mr. Cecil sustained during the course of his employment. The jury returned a verdict in favor of the plaintiffs, and the defendant appealed. This Court affirmed the jury verdict, but found the employer was entitled to a reduction in the amount awarded by the jury. More importantly, for the purposes of my dissent, this Court noted that "Mrs. Cecil was awarded compensatory damages for past and future loss of consortium, kindly offices, society and companionship of her husband." *Cecil*, 205 W. Va. at 171 n.11, 517 S.E.2d at 36 n.11. The award granted to Mrs. Cecil was not made in the capacity of a widow because her husband was not dead. The award was made to her in her capacity as a spouse of an injured employee. *See Tolley v. ACF Indus., Inc.*, 212 W. Va. 548, 575 S.E.2d 158 (2003) (nonfatal deliberate intent cause of action where spouse brought separate claim); *Nutter v. Owens-Illinois, Inc.*, 209 W. Va. 608, 550 S.E.2d 398 (2001) (same); *McBee v. U.S. Silica Co.*, 205 W. Va. 211, 517 S.E.2d 308 (1999) (same); *Jones v. Patterson Contracting, Inc.*, 206 W. Va. 399, 524 S.E.2d 915 (1999) (same); *Harris v. Martinka Coal Co.*, 201 W. Va. 578, 499 S.E.2d 307 (1997) (same); *Tolliver v. Kroger Co.*, 201 W. Va. 509, 498 S.E.2d 702 (1997) (same); *Blake v. John Skidmore Truck Stop, Inc.*, 201 W. Va. 126, 493 S.E.2d 887 (1997) (same); *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995) (same); *Sias v. W-P Coal Co.*, 185 W. Va. 569, 408 S.E.2d 321 (1991)

(consolidated actions wherein two of the cases involved claims by spouses).

This Court has never held that a deliberate intent cause of action for a nonfatal injury is limited to the employee. We have assumed, as has the bench and bar, that W. Va. Code § 23-4-2(c) extends such a cause of action to a spouse, child or dependent. *See Roberts v. Consolidation Coal Co.*, 208 W. Va. 218, 539 S.E.2d 478 (2000) (the injured employee, his spouse and two children filed deliberate intent cause of action against employer).

2. Fatal injury. Although there has been no confusion in our cases as to who may bring a cause of action for a nonfatal injury to an employee, the decision of the majority opinion in this case has muddied the waters with respect to a fatal injury to an employee. Under the majority opinion, a representative of a decedent's estate can bring a cause of action for only a widow/widower, child or dependent; and any recovery can be distributed to only the widow/widower, child or dependent. As I will demonstrate, this interpretation of W. Va. Code § 23-4-2(c) by the majority opinion is legally wrong and grossly unsound.

To begin, W. Va. Code § 23-4-2(c) expressly states that a deliberate intent cause of action for the death of an employee may be brought by "the employee, the widow, widower, child or dependent of the employee[.]" In other words, for a fatal injury, there are four categories of plaintiffs under the statute: employee, widow/widower, child or dependent. Obviously, if a fatal injury occurs, the "employee" cannot bring a direct action. However,

just as our opinions have logically inferred "widow/widower" to mean spouse, so too have we implicitly recognized that "employee" means the estate of the employee. *See Michael v. Marion County Bd. of Educ.*, 198 W. Va. 523, 482 S.E.2d 140 (1996) (spouse of decedent brought deliberate intent cause of action against employer individually and as representative of decedent's estate); *Cline v. Jumacris Min. Co.*, 177 W. Va. 589, 355 S.E.2d 378 (1987) (same).[5]

This Court's implicit recognition that the estate of a deceased employee has a separate cause of action was expressly addressed by the Supreme Court of Oregon in the case of *Kilminster v. Day Management Corp.*, 323 Or. 618, 919 P.2d 474 (1996).

In *Kilminster*, the father of a deceased employee brought a deliberate intent

[5]I fully comprehend that some attorneys have not understood the application of W. Va. Code § 23-4-2(c) and have brought deliberate intent death actions only in the name of the estate of the decedent, even though others existed who had separate causes of action. *See e.g., Brooks v. Isinghood*, 213 W. Va. 675, 584 S.E.2d 531 (2003) (deliberate intent death action brought only in name of decedent's estate by widow); *Costilow v. Elkay Min. Co.*, 200 W.Va. 131, 488 S.E.2d 406 (1997) (same); *Dunn v. Consolidation Coal Co.*, 180 W. Va. 681, 379 S.E.2d 485 (1989) (same); *Chambers v. Sovereign Coal Corp.*, 170 W. Va. 537, 295 S.E.2d 28 (1982) (same). In fact, the original action filed in this matter was brought by Ms. Moschgat only on behalf of the decedent's estate. The fact that some lawyers have not appreciated that W. Va. Code § 23-4-2(c) establishes four separate categories of persons who may bring an action for death or injury does not justify distorting the intent of the statute as the majority opinion has done.

cause of action against the employer on behalf of his son's estate.[6] The lower courts[7] rejected the claim in part because the workers' compensation statute did not expressly provide a cause of action for the estate of a decedent. The statute provided the following:

> "If injury or death results to a worker from the deliberate intention of the employer of the worker to produce such injury or death, *the worker, the widow, widower, child or dependent* of the worker may take under this chapter, and also have cause for action against the employer, as if such statutes had not been passed, for damages over the amount payable under those statutes."

Kilminster, 323 Or. at 628, 919 P.2d at 480 (quoting Or. Rev. Stat. § 656.156(2)) (emphasis added). The Supreme Court reversed the ruling of the lower courts. In doing so, the opinion addressed the issue as follows:

> Defendants argue, "[a]s a threshold matter, [that p]laintiff[ ] lack[s] standing to maintain a claim under" ORS 656.156(2), because that statute explicitly gives a right to bring an action under that subsection only to the worker, widower, child, or dependent of the worker. Defendants reason that, because a personal representative is not in any of those listed categories, plaintiff may not maintain this action. That argument is not well taken.
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> Under ORS 656.156(2), in the event of a worker's death resulting from the employer's deliberate intention to produce such death, "the worker . . . may . . . have cause for action against the employer, as if such [workers' compensation] statutes had not been passed, for damages over the amount payable under those statutes." That statute thus removes the bar that otherwise would prevent a worker from maintaining an action for damages against the employer, even though the worker is dead. Logically, the only party who can

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[6]The father also brought a statutory wrongful death claim on behalf of his son's estate, but that claim was rejected as being barred by the workers' compensation statute. Further, the father and his wife brought an individual cause of action under another legal theory that was rejected.

[7]Oregon's court structure includes trial courts, a Court of Appeals and a Supreme Court.

> pursue that action, and thereby effectuate the substantive right afforded the deceased worker by ORS 656.156(2), is the worker's personal representative. Plaintiff is a person who may bring a claim, the bar to which has been removed by ORS 656.156(2), in the circumstances.

Kilminster, 323 Or. at 629, 919 P.2d at 480.

Until the decision in the instant case, the reasoning used in *Kilminster* was the basis for this Court's implicit recognition that the estate of a deceased employee had a separate cause of action against an employer. Under today's majority opinion, a representative of the employee's estate may bring a cause of action, but only on behalf of a widow/widower, child or dependent. In other words, the majority opinion has abolished a right granted to an employee to have a separate cause of action for his/her death through his/her estate. *See Zelenka v. City of Weirton*, 208 W. Va. 243, 249, 539 S.E.2d 750, 756 (2000) (Davis, J., concurring) (observing that the deliberate intent death action "was not filed in the circuit court by the spouse, children, or other dependents of the decedent[,] [because] the decedent[] did not have a spouse, child or any other dependents"). This unacceptable result was reached because the majority was determined to allow Ms. Savilla to stay in this case, even though she ultimately recovers nothing under the ill-advised majority opinion.[8]

[8]I would have affirmed the dismissal only because Ms. Savilla brought this action to recover damages under our wrongful death statute. She was not seeking a recovery that would have been distributed by the decedent's will or under our descent and distribution statutes.

In summation, under W. Va. Code § 23-4-2(c), if an employee sustains a nonfatal injury, a separate deliberate intent cause of action is provided for the employee, his/her spouse, child or dependent. Further, under the statute, if an employee dies, a separate deliberate intent cause of action has been reserved for the estate of the employee, his/her widow/widower, child or dependent.[9] In the context of a death claim, the estate of an employee is not authorized to bring a cause of action for a widow/widower, child or dependent. The latter three categories of plaintiffs have been given independent causes of action by W. Va. Code § 23-4-2(c).

C. The Majority Opinion Violates Rule 17 of the West Virginia Rules of Civil Procedure

As I have previously pointed out, the majority opinion has effectively abolished the separate statutory cause of action granted to the estate of a decedent by W. Va. Code § 23-4-2(c). According to Syllabus point 3 of the majority opinion, the only "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." In addition to distorting W. Va. Code § 23-4-2(c) in order to abolish the separate rights of the estate of a deceased employee, the majority opinion also violates Rule 17 of the West Virginia Rules of Civil Procedure. The majority does so in

[9]Any recovery that is made by the estate of an employee is distributed according to his/her will or, where there is no will, in accordance with the laws of descent and distribution as set forth in W. Va. Code § 41-1-1, *et seq*.

syllabus point 2, wherein the majority opinion gave standing to "[a] personal representative who is not one of the statutorily-named beneficiaries of a deliberate intention cause of action . . . to assert a deliberate intention claim against a decedent's employer on behalf of a person who has such a cause of action[.]"

Pursuant to West Virginia Rule of Civil Procedure 17(a), "[e]very action shall be prosecuted in the name of the real party in interest." In a commentary on Rule 17(a), the following was said:

> Justice Starcher articulated the purpose of Rule 17(a) in *Keesecker v. Bird*, [200 W. Va. 667, 490 S.E.2d 754 (1997)]. The opinion held that the purpose of the rule is to ensure that the party who asserts a cause of action possesses, under substantive law, the right sought to be enforced. Rule 17(a) allows circuit courts to hear only those suits brought by persons who possess the right to enforce a claim and who have a significant interest in the litigation. The requirement that claims be prosecuted only by a real party in interest enables a responding party (1) to avail him/herself of evidence and defenses that he/she has against the real party in interest, (2) to assure him/her of finality of judgment, and (3) to protect him/her from another suit later brought by the real party in interest on the same matter.

Franklin D. Cleckley, Robin J. Davis, and Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 17(a), at p. 528-29 (2d ed. 2006). It is clear from the text of Rule 17(a), and the purposes behind the rule, that the majority opinion is simply wrong in granting Ms. Savilla standing to assert a deliberate intent cause of action on behalf of Ms. Moschgat.[10]

[10]Obviously, Rule 17 recognizes situations where an action may be prosecuted by a representative of a real party in interest. However, the recognized exceptions do not

Ms. Savilla initiated this litigation against Speedway with the hopes of recovering damages through our wrongful death statute. The majority opinion correctly closed that door. With that door being closed, under the majority opinion Ms. Savilla has absolutely no interest in the outcome of the litigation against Speedway. The majority has expressly stated that she cannot obtain any recovery from Speedway. In spite of this fact, the majority opinion nevertheless has permitted Ms. Savilla to continue the litigation against Speedway on behalf of Ms. Moschgat. This decision sets horrendous precedent.

There are three extreme scenarios that can result from the majority decision, all of which are present in the instant case. First, the majority opinion now permits lawyers to intervene in a prior, validly commenced deliberate intent litigation on behalf of a client that has no interest in the litigation. Second, the opinion permits an intervenor to oust the only party who has an interest against an employer. Third, and most importantly, the majority opinion allows the intervenor to control the destiny of the litigation. This latter point is critical under the facts of the instant case because the record clearly demonstrates that Ms. Savilla is hostile towards Ms. Moschgat. This hostility may very well cause Ms. Savilla to adversely compromise the action in order to limit the amount of damages Ms. Moschgat could recover. Obviously, Ms. Savilla's counsel will attempt to prevent this. But, ultimately, the disposition of the claim is a decision to be made by the party bringing the action–not that

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encompass the amorphous creature created by the majority opinion.

party's attorney.

All three of the above-described extreme scenarios form part of the reason that Rule 17(a) requires litigation to be prosecuted by the real party in interest.

D. Ms. Moschgat has Settled her Claim against Speedway

The final point I wish to make in this dissent involves Ms. Moschgat's efforts to resolve the claim she filed against Speedway. The majority opinion, in an apologetic way, acknowledges that a settlement was reached by Ms. Moschgat in the claim she filed against Speedway. This settlement was contingent upon this Court affirming the dismissal of the claim brought by Ms. Savilla against Speedway. As a result of the majority's decision, the settlement has been removed from the table. Ms. Moschgat's potential recovery now rests in the hands of a plaintiff who does not want her to have a single penny.

One of the bedrock principles that permeates our civil litigation system is the lofty goal of encouraging parties to settle. Indeed, it has been recognized that "[t]he Supreme Court has made clear that the policy of the law is to encourage settlements." Cleckley et al., *Litigation Handbook*, § 16(a)(5), at p. 482. *See* Syl. pt. 1, *Sanders v. Roselawn Mem'l Gardens, Inc.*, 152 W. Va. 91, 159 S.E.2d 784 (1968) ("The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly

made and are not in contravention of some law or public policy."). Justice Albright expressed the great importance of settlement in *Riner v. Newbraugh*, 211 W. Va. 137, 141, 563 S.E.2d 802, 806 (2002), when he wrote that, "[i]n those instances where a settlement agreement was reached but not signed by the parties, the agreement may still be enforced provided the parties produce sufficient evidence concerning the attainment of an agreement and the mutually agreed upon terms of the agreement."

In the instant proceeding, the majority has destroyed our heretofore unbending commitment to encouraging and ratifying settlements. Speedway has attempted to buy its peace with Ms. Moschgat. In turn, Ms. Moschgat has accepted Speedway's offer to buy peace. There is nothing in the record to indicate that the conditional settlement agreement reached between Speedway and Ms. Moschgat is somehow unfair to either party. Even so, the majority opinion has destroyed that agreement and forced Speedway to endure a trial with a party who has absolutely no interest in the action against it. Where is the logic in this situation?

I have noted on several occasions that "'[w]isdom too often never comes, and so one ought not to reject it merely because it comes late.'" *Bass v. Rose*, 216 W. Va. 587, 593 n.1, 609 S.E.2d 848, 854 n.1 (2004) (Davis, J. dissenting) (quoting *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600, 69 S. Ct. 290, 293, 93 L. Ed. 259, 264 (1949) (per curiam) (Frankfurter, J., dissenting)). *Accord State v. Harris*, 207 W. Va. 275,

281 n.1, 531 S.E.2d 340, 346 n.1 (2000) (Davis, J., concurring). Because of the grave negative impact of the majority decision, I would urge the majority to reconsider the unwise precedent set out by its opinion.

For the reasons stated, I respectfully dissent. I am authorized to state that Justice Maynard joins me in this dissenting opinion.