STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

DIANNA MAE SAVILLA, Administratrix of the Estate of LINDA SUE GOOD KANNAIRD, Deceased, Plaintiff Below Respondent

v.) No. 35563 (Kanawha County No. 00-C-974)

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, Intervenor Below, Petitioner

FILED
June 7, 2011
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

We review this case for the second time. See *Savilla v. Speedway Superamerica, LLC*, 219 W.Va. 758, 639 S.E.2d 850 (2006) (herein "Savilla I").

The seminal event in this matter was the death of Linda Kannaird on February 18, 2000. Ms. Kannaird was an employee of Speedway Superamerica, LLC ("Speedway") and at the time of her death was being evacuated from the convenience store operated by Speedway. Ms. Kannaird was not married and was survived by one child, Eugenia Moschgat, as well as a number of siblings, one of which was the Appellee, Diana Mae Savilla.

Following her mother's death, Ms. Moschgat was appointed Administratrix of the Estate of Linda Sue Good Kannaird, and filed suit in that capacity on April 11, 2000. The defendants in that action were Superamerica LLC d/b/a Rich Oil Company, a Delaware corporation; City of Charleston, a municipality; Charleston Fire Department; Bruce Gentry, and Rob Warner. The suit against Speedway was a deliberate intent cause of action pursuant

to West Virginia Code § 23-4-2(d)(2) (2005).[1] The suit against the remaining defendants was a claim of negligence thus being a wrongful death claim pursuant to West Virginia Code § 55-7-6 (1992).

I.
Savilla I

Shortly after Ms. Moschgat qualified as the personal representative of her mother's estate, matters started to take on a peculiar twist. On June 28, 2000, Ms. Kannaird's siblings filed a motion to intervene in the Moschgat suit, and moved the trial court for an order removing Ms. Moschgat as the personal representative of the Kannaird beneficiaries (including all siblings and Ms. Moschgat) and to name Dianna Mae Savilla as the Administratrix of the Kannaird estate replacing Ms. Moschgat. On January 8, 2001, the trial court, following a series of hearings, found a hostile relationship existed between Ms. Moschgat and her mother on the basis that Ms. Moschgat and her mother had been estranged for a number of years prior to her death, and on the basis of that finding the trial court removed Ms. Moschgat as Administratrix and personal representative of the Kannaird estate and named Dianna Mae Savilla as the Administratrix and plaintiff in the wrongful death and deliberate intent cases against Speedway and the municipal defendants.

Following her removal as the personal representative, Ms. Moschgat, acting independent of Savilla, entered into some type of settlement agreement relating to the deliberate intent claim.[2]

After the "settlement" between Ms. Moschgat and Speedway, Speedway sought to be dismissed from the underlying lawsuit, arguing that the deliberate intention claim could only be asserted by those statutorily named persons in West Virginia Code § 23-4-2(c)[3] and not

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[1]Prior to the decision in *Bell v. Vecellio & Grogan*, 197 W.Va. 138, 475 S.E. 2d 138 (1996), the bench and bar of this state used the term "Mandolidis" as a euphemism for a deliberate intentional injury. This Court declared in *Bell* the extinction of "Mandolidis:" "it might be an appropriate time to introduce 'deliberate intention' into our lexicon of causes of action instead of 'Mandolidis' - it no longer exists!" *Id.* at 144 n. 11.

[2]Neither the prose of this agreement nor its date were in the record of Savilla I.

[3]West Virginia Code § 23-4-2(c) (2005) 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 dependant of the employee has the privilege to take under this chapter and has a cause of action against the employer*[.]" (Emphasis added.)

the beneficiaries in a wrongful death claim under West Virginia Code § 55-7-6 (1992).[4]

The lower court agreed with Speedway and granted its motion to be dismissed holding that deliberate intent claims on behalf of those specifically named in West Virginia Code § 23-4-2(c) (2005) may not be asserted by the personal representative of the decedent in a wrongful death suit within the context of West Virginia Code § 55-7-6 (1992).[5]

This Court reversed the trial court's ruling and concluded that the circuit court erred in dismissing Speedway on the grounds that the named plaintiff in the suit against Speedway (Savilla) was the personal representative of the estate of Linda Sue Good Kannaird and not Ms. Moschgat.

The Court then addressed the second ground raised by Speedway in addition to the lack of Savilla's standing. This alternative ground was that there were no further claims against Speedway to be pursued in the suit against Speedway and therefore Speedway was entitled to be dismissed. It is within this Court's response to Speedway's contention in the alternative argument that contains the core holding that forms the basis of this appeal.

The Court appropriately discussed the myriad of problems that occur when one but not all beneficiaries in a wrongful death case (including a deliberate intent case) desires to settle their claim against a defendant. The problems inherent in this setting result in dilemmas which can only be addressed after a complete evidentiary hearing following the remand.

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[4]The class of beneficiaries eligible to take under West Virginia Code §55-7-6 (1992) are broader than West Virginia Code § 23-4-2(c) and are: "*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 . . .* 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 set forth in chapter forty-two of this code." (Emphasis added.)

[5]It is appropriate to note that after Savilla I was decided, this Court revisited and overruled Syllabus Point 3 of Savilla I: "Under the clear and unambiguous terms of West Virginia Code § 23-4-29(c) (2005), an employee, widow, widower, child, or dependent has a deliberate intention cause of action against the employer for injury or death of an employee. In the event of an employee's death, the decedent's estate has a claim. To the extent that syllabus point three of *Savilla v. Speedway Superamerica, LLC*, 219 W.Va. 758, 639 S.E.2d 850 (2006), conflicts with this holding, it is expressly overruled." Syl. pt. 3, *Murphy v. E. Am. Energy Corp.*, 224 W. Va. 95, 680 S.E.2d 110 (2009).

II.
Mandate Post-Savilla I

Not to put too fine a point on it, this Court mandated that upon remand the specific contours of the required hearing would be that the trial court must conduct a hearing to develop a full record which:

1. Addresses the complex balancing act between those parties who desire to settle and those who do not;

2. Decides upon what conditions Speedway and Moschgat can resolve the deliberate intent cause of action against Speedway and the context of the overall lawsuit in which Savilla is the personal representative and named Plaintiff;

3. Assures that any resolution of these issues does not unfairly prejudice the other potential beneficiaries of the lawsuit;

4. Provides for compensation to the personal representative for fees, expenses, and attorney fees without creating unfairness to Ms. Moschgat and her separate counsel.

Despite this clear mandate, and despite at least two futile attempts to conduct a hearing contemplated by this Court, no evidentiary hearing was ever conducted within the framework of the opinion and mandate of Savilla I.

Subsequent to the hearing held on June 19, 2007, proposed findings of fact and conclusions of law were submitted to the trial court by counsel for the respondent.[6] However, the record reflects that such proposed findings of fact and conclusions of law were never served upon opposing counsel, in clear violation of Rule 5 of the West Virginia Rules of Civil Procedure.[7]

Objections to the proposed order were filed by the petitioner, and somehow a document entitled "Revised Order Awarding Attorneys Fees" (herein "Revised Order") found its way to the trial court and was entered on September 14, 2009. This "Revised

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[6]Counsel for the respondent acknowledges that he submitted such a document to the court.

[7]Rule 5(a) of the West Virginia Rules of Civil Procedure clearly sets forth, "Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of the numerous defendants . . . shall be served upon each of the parties."

Order" contains findings of fact and conclusions of law which, this Court concludes, must have been fashioned from "whole cloth" because there never was an evidentiary hearing upon which the "Revised Order" could be legitimately constructed.

It was a challenge for this Court to understand how such a comprehensive and elaborate document such as the "Revised Order" could have been prepared absent an evidentiary hearing being conducted. Each of the judges on this panel conducted an exhaustive search for the transcript which may contain the evidentiary hearing without any success.[8]

Consequently, this Court now must, once again, remand this case to the trial court with a renewed and specific direction to fully comply with the mandate expressed within the exact contours of this opinion which emulate Savilla I.

This Court cannot reshape the language of the remand direction in Savilla I with any greater clarity. As previously set forth herein, Savilla I is unambiguous that the trial court is to provide for compensation to the personal representative for fees, expenses, and attorney fees without creating unfairness to Ms. Moschgat and her separate counsel.

However, it was not and is not the intent of this court to require that attorney fees be paid out of the settlement proceeds twice, and this Court is deeply troubled that counsel for the petitioner has already taken the "full amount" of his attorney fees from the proceeds of the $250,000.00 settlement that counsel contends he was due from a contractual arrangement with Ms. Mochgat.

The trial court is to conduct a hearing as to just compensation for counsel in this case, applying the factors as enunciated in Syllabus Point 2, *Kopelman and Associates, L.C. v. Collins*, 196 W. Va. 489, 473 S.E.2d 910, (1996), and to appropriately award attorney fees, without requiring Ms. Mochgat to pay twice.

To achieve this, counsel for the petitioner must deposit with the Clerk of the Circuit Court of Kanawha County, West Virginia, all fees and expenses that he previously collected

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[8]There were two hearings before the trial judge. Both hearings contain discourse between and among the lawyers. This palaver between the lawyers and the trial court does not totally constitute the type of evidentiary hearing contemplated by Savilla I. However, the mandated hearings required by Savilla I were at least fifty percent (50%) completed by Judge Zakaib – during the first hearing, he approved the settlement of Ms. Moschgat with Defendant Speedway. Also, it is the settlement fund that generated the fees which we believe were paid to Mr. Ranson by Ms. Moschgat.

out of the $250,000.00 settlement proceeds, so that the trial court can comply with the requirements of this court.

Therefore, the only thing that remains to be done is for the trial court to fully comply with that mandate and the mandate issued herein.

III.
Conclusion

The "Revised Order" awarding attorney fees entered September 14, 2009, is hereby vacated, and the trial court is specifically directed to conduct the evidentiary hearing expressed within Savilla I and in the opinion *sub judice.*

So that all parties can fully complete the mandated hearing upon remand with as much equilibrium as possible, this Court hereby ORDERS that all fees paid by or on behalf of Ms. Moschgat arising in any manner from the wrongful death settlement with Defendant Speedway be disgorged, and counsel for the petitioner shall, within 30 days of the issuance of the mandate herein, deposit those fees in a special account with the Clerk of the Circuit Court of Kanawha County.

REVERSED AND REMANDED

ISSUED: June 7, 2011

CONCURRED IN BY:

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

Judge Gary L. Johnson, temporarily assigned Acting Chief Justice
Judge Arthur M. Recht, temporarily assigned
Judge Robert B. Stone, temporarily assigned
Judge Jack Alsop, temporarily assigned
Judge Thomas C. Evans, III, temporarily assigned