COURT OF APPEALS
OF THE
STATE OF NEW MEXICO

SHANNON SPOON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF DANIEL SPOON, DECEASED, Plaintiff/Appellee,	**Court of Appeals #32,674**
v.	Eddy County District Court No. CV-2012-00-983 Judge Jane Shuler Gray
ARTURO C. MATA and BURN CONSTRUCTION COMPANY, INC. Defendants,	
v.	
KORINA FLORES, as PARENT, GUARDIAN, NEXT FRIEND OF MINOR NOAH SPOON, Intervenor/Appellant	

ANSWER BRIEF OF APPELLEE, SHANNON SPOON, PERSONAL REPRESENTATIVE OF DANIEL SPOON, DECEASED

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ORAL ARGUMENT IS REQUESTED

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ANSWER BRIEF OF APPELLEE, SHANNON SPOON, PERSONAL REPRESENTATIVE OF DANIEL SPOON, DECEASED

This case is a straightforward action for the wrongful death of Shannon Spoon's husband, Daniel Spoon, in an automobile accident. It is not nearly as difficult or convoluted as Appellant is asserting to this court, and the statutory and the case law in the State of New Mexico is quite clear in determining by whom and how a death claim may be made. Appellee, Shannon Spoon, has followed that law in all respects as demonstrated by her complaint (RP- 4), and by the ruling of the Honorable Jane Shuler Gray. (RP-84 thru 87)

REQUIREMENTS FOR FILING A DEATH ACTION

Plaintiff's counsel, pursuant to New Mexico case law, filed the death complaint on August 8, 2012, and it is uncontroverted that at the time of the filing, she was the only legal heir of the deceased. It was unknown, by anyone, nor could it have been known that Noah was an heir of Daniel Spoon at the time of the filing of the complaint, and therefore, Plaintiff's counsel could not have named him as a known heir at that time. It is true that there was contact between Plaintiff's counsel and Appellant at a substantial time after the filing of the complaint, although it is controverted as to how that contact was initiated. (TR 10:29:46) Appellee's counsel advised the court below that he believed that she contacted him because he had no way to know who she was or how to contact her, although Korina Florez testified that counsel contacted her. In any event, that is a controverted issue, although an unimportant one. It is uncontroverted that during the conversation that Appellant was told by Appellee's counsel that if she had papers proving that Noah was an heir of the deceased, he would be entitled to one half of any recovery. (TR 10:29:46, 10:36:52, 10:37:22) Subsequently, Appellant's counsel contacted Appellee's counsel

and advised that he was representing Noah and would assert a claim. It is uncontroverted he was told, and he cannot controvert this, that upon proof by the DNA test that Noah was in fact an heir, he would be entitled to one half of the recovery. It is disingenuous for Dugan to assert that Appellee or her counsel ever attempted to exclude Noah from recovery, when he is fully aware that he was told otherwise. He was also fully aware that when he wrote his brief that at the hearings in front of the Honorable Jane Shuler that Appellee's counsel always advised the Judge that Noah was entitled to one half of the recovery. (TR10:29:46) Incidentally, there was no proof of heirship of Noah until September 24, 2012, at which time the DNA test confirmed his heirship. (RP 170) This was almost seven weeks after the complaint was filed.

Immediately after the disclosure of the DNA testing, Appellant through her attorney attempted to intervene in this case. Appellant has been told repeatedly by the lower court, he had no right to intervene, and this case was properly before the court with a proper complaint filed in a proper manner. (RP-84 thru 87)

The Appellate Courts of New Mexico have repeatedly followed the Death Act (Section 41-2-3 NMSA 1978 Comp.) that provides for the Personal Representative to file this action. The Supreme Court has also ruled that it is not necessary to have a formal appointment of a Personal Representative, but to just name a person for the purposes of filing the lawsuit, which was done in this case.

In *Mackey v. Burke*, 1984, 102 NM 294, 694 P2d 1359, the court specifically found that the natural parent's of the deceased infant daughter did not have standing to bring the wrongful death action against the doctors, hospital and clinics since neither of them was the "Personal Representative" of the deceased. This case has routinely been followed by this court and the

Supreme Court of New Mexico.

The court has also found the Personal Representative is the statutory trustee for discoverable and identifiable beneficiaries named in a wrongful death suit. *Dominguez v. Rodgers,* 1983, 100 NM 605, 673 P2d 1338. Those facts are almost identical to the one in the case at bar. Shannon Spoon must bring the case and she is the statutory trustee for all of the heirs, including herself and Noah Spoon in this instance.

Contrary of the assertion of the Appellant and her counsel, there is no conflict for Shannon Spoon to continue in her capacity as Personal Representative of this estate and to pursue recovery of the death benefits. In *Leyba v. Whitley*, 1995, 120 NM 768, 907 P2d 172 this court held the Personal Representative's sole task under the act is to distribute any recovery in strict accordance with the statute. (emphasis supplied) The *Leyva* case, supra, also provided that the attorney hired by the Personal Representative had a duty to advise the Personal Representative of her status as fiduciary to the beneficiaries of the action and of her duty to insure the beneficiary received the proceeds of the action. This has been done in this case.

It cannot be more plain in the law of the State of New Mexico exactly what the duties of Shannon Spoon as Personal Representative of the Estate of Daniel Spoon are, nor can it be more plain what the duties of the attorney representing Shannon Spoon would be with the recovery. Clearly, there is no conflict between the Blenden Law Firm and Noah Spoon as Plaintiff's counsel. It goes without saying that the more recovery Appellee's counsel would get for her, the more recovery he would get for Noah Spoon. Appellee's counsel could not favor Shannon Spoon even if he were inclined to do so, which he is not.

Appellant's counsel has gone on extensively with complaints of how this matter has been

handled, but that does not make ineffective assistance of counsel. It is only a difference of opinion about how things should be handled (strategy). Judge Shuler made a specific finding that there was effective assistance of counsel. (TR 85 ¶11, TR86 ¶12) Secondly, he has complained about the lack of discovery when Appellant's counsel knows himself that the lack of discovery is solely because of his actions in this case, even to the point that all actions are now stayed by this court and there cannot be any discovery.

In *Wasson v. Wasson*, 1978, 98 NM 162, 585 P2d 713, the court stated:

> "Thus we hold that Appellant has failed to make a showing of inadequate representation, which would warrant his intervention in the wrongful death action. We have considered his remaining arguments and have found them to be without merit." (emphasis supplied)

The court further stated at page 608:

> "Section 41-2-3 clearly names a nominal party as the person who must bring the wrongful death action on behalf of all the statutory beneficiaries (emphasis supplied). We do not believe the legislature intended Rule 24(a) to operate as a device by which a party could thwart the representative form of action authorized in wrongful death suits. Otherwise, there would be no reason why every statutory beneficiary could not intervene as a matter of right." Citing the Styles case 57NM 281, 258 P2d 386 (1953).

For the foregoing reasons, this court is fully aware that in order to bring an action for the death of a party, it must be brought in the name of the Personal Representative, and the Personal Representative has a duty to protect all the heirs which is being done in this case. This issue has already been disposed of by this court when the court proposed summary affirmance and this court knows that this case has been properly filed and is being properly pursued by the Personal Representative and her counsel. Because the court understands that, Appellee will not burden this brief nor this court with an extensive review of the statutes and authorities on intervention. There is no need for intervention in this case as this court has repeatedly ruled.

THE POSSIBILITY OF CONFLICT OF INTEREST

The one issue that this court should examine closely is whether or not Appellee and her counsel have a conflict of interest when she represents the estate as Personal Representative, and has a separate loss of consortium claim or a bystander's liability claim or both. That specific issue has not been decided by the New Mexico Supreme Court nor was it specifically addressed in *Spencer v. Barber*, 2013-NMSC-010. It was alluded to in Paragraph 29 of that opinion, but was not a holding in the case. However, Appellee concedes that issue should be addressed by this court, not only for this case, but for further instruction to the members of the bar of the State of New Mexico.

In almost every case wherein a husband or wife is killed in an accident, there will be at least a loss of consortium claim and sometimes, as in this case, there will also be a bystander's liability claim. The *Spencer* case, supra, did not address this specific issue in its holding. That case involved an attorney having a direct conflict by failing to pay one of the heirs as both the statute and the case law require. There is no question of a conflict on that issue, but that is not the case before the court now.

The issue presented to this court is whether or not an attorney may represent a personal representative for the recovery of damages under Section 41-2-3 NMSA for the death of a spouse and also make a claim for loss of consortium and/or bystander's liability when there is another heir that will be entitled to some of the death claim. Appellee believes that the court in *Spencer* case, supra, made a basic determination that both the personal representative and the attorney could proceed under those circumstances, but at their own peril, if in fact an issue was raised and was not agreed to by the other heir. Therefore, this court could decide that there is no fatal

conflict for Appellee and her attorney to proceed with both the death claim and the loss of consortium and bystander's liability in this case in view of the fact Appellant has an independent counsel who would be entitled to know the relative amounts of the claims to be paid the minor in the case of settlement (Of course, it goes without saying that there would not be a problem if the case was tried because the issue of damages would be established by the jury.)

The court in *Spencer*, supra, in commenting on Rule of Professional Conduct 16-100 NMRA stated in Paragraph 34:

> "When the attorney for the Personal Representative gives notice to a statutory beneficiary as required by Leyba, adequate disclosures will normally include, at a minimum: (1) the fact the person is a beneficiary in a wrongful death lawsuit as well as the identities of parties of the lawsuit; (2) the amount of any settlement or verdict reached, or any settlement offers under consideration; (3) the percentage of the settlement or verdict to which the beneficiary is entitled under the statute; (4) the basic position of the adverse party, e.g. "She does not believe you were entitled to any money because you abandoned your child"; (5) the fact that the attorney now represents the adverse party against the beneficiary and is not looking out for the beneficiaries interest.

Appellee and her counsel both agree that all of these disclosures have been or will be made timely, if an offer of settlement is forthcoming. Insofar as the death claim is concerned, Appellee nor her attorney has any conflict with the heir. Appellant and her counsel have been repeatedly told that Noah receives one-half of any settlement of the death claim pursuant to New Mexico statute 41-2-3 NMSA. Appellant is entitled to disclosure of all the facts and issues stated above and at this point has been advised of everything. There have been no settlement offers, so those cannot be disclosed at this point.

Appellee's position herein is that with the disclosures of everything set forth in the *Spencer* case, supra, then Appellee should be entitled to proceed. If this court finds she cannot proceed, then the issues in this case will be split, additional attorneys will have to be employed,

which could in itself cause a conflict.

The Supreme Court has already decided that in case of a failure to pay to the respective heirs, the amount they have coming, an heir has the right to sue the attorney and/or the Personal Representative. That was established in the *Leyba* case, supra, and was reiterated in *Spencer*, supra. Therefore, this court could confirm there is sufficient protection under tort law and certainly holding an attorney to the ethical standards, and both of those would be sufficient to protect the heir in this instance.

Maybe a more specific rule is needed.

The New Mexico Supreme Court cited with approval a Georgia Court of Appeals case; *Home Ins. Co. v. Wynn,* 1997, 493 SE2d 622, 624 wherein they stated that the lady in that case had brought both claims on her behalf and as the fiduciary for her husband's estate and the court said she had "..an improper incentive to allocate the settlement for the claims for which she was the only beneficiary."

But, that court found a way to avoid the problem. That court stated:

> "The trustee must avoid being placed in such a position, and if she cannot avoid it, she may resign, may fully inform the beneficiaries of the conflict or may request the court appoint a guardian ad litem to protect the unprotected interests. If she fails to do any of these things, she proceeds at her own peril." (emphasis supplied)

Note that the court said "may" three separate times, and then said she could proceed at her own peril. They did not say she could not proceed.

Clearly, in this case, the Appellant has independent counsel who will be entitled to see any settlement offers and see the allocation of funds, to see if there has been a fair allocation of funds by Appellee and her counsel. In almost all cases, this would not be any problem. The

Personal Representative and her counsel have a duty to treat the beneficiaries of the estate fairly as has been appointed out above in *Dominguez*, supra, *Mackey*, supra, and *Leyba*, supra. To do otherwise, would be to subject both of them to liability as well as being an ethical violation for the attorney.

However, in the rare case as in this one, wherein Appellate's attorney seems intent on taking a fee regardless of the work he does, (Appellant's Brief in Chief, Page 7) then there should be some rule to protect all parties. His taking the fee he proposes would be unreasonable and would be a gross violation of the New Mexico Ethical Rules in attempting to charge such a fee. Appellee would certainly object to such a distribution as being unfair to Noah and would bring that to the attention of the trial court.

Appellee submits to this court that the proper solution for this court to reach is the one set forth by the Georgia court, in that if there is a disagreement, as in this case, then the court should appoint a Guardian ad Litem to oversee the settlement and the allocation of funds between the estate and the other two claims made by the personal representative. This would not be a difficult matter to do. Damages for the death of a person, insofar as the estate is concerned, are usually fairly easy to delineate by expert testimony and financial calculation. The other damages are more akin to pain and suffering and there can be a wide discrepancy in the amounts set forth for those damages.

It may be the best solution for the court to resolve this issue by requiring a Guardian ad Litem to oversee any settlement figures and the amounts attributable to each claim for court approval. In the absence of that, the bar will be in the situation that is going on in this case, wherein an heir and their attorney are dissatisfied that they are not allowed in the case, and will

cause problems such as in this case. Appellee submits that it is untenable to have a lawyer represent a personal representative (widow or widower) and have to obtain another lawyer to represent the same person for the other issues of loss of consortium and/or bystander's liability. It would add to the burden of the trial, it would unnecessarily bring additional people into the hearing, and would require a personal representative to hire an attorney that he or she did not necessarily want in view of the fact an attorney had already been hired to represent him or her to recover the death damages.

This seems to be a sensible solution for every case of this nature whether a minor was involved or not, and would resolve the issue of parties being at odds over the settlement when that settlement would be approved by the court upon the recommendation of a Guardian ad Litem, if the heir is dissatisfied.

Appellee proposes this rule for the court in this case.

The last issue involved is the one of the loss of consortium of the minor. Mr. Dugan can certainly represent the minor in that claim and if this court orders Judge Shuler to allow an intervention for that particular claim which would be a proper ruling for this court to make. Alternatively, Appellant could file a separate claim for loss of consortium, but in the event that was done, there is no doubt that in the interest of judicial economy, the court would join that case and they would be tried together.

As a matter of personal privilege, Appellee's counsel would like to point out that Appellant has asserted on pages 1, 2, 8, and 31of his brief that Appellee's counsel is a relative of Shannon Spoon. That is untrue and Appellant's counsel knows that is untrue. He is fully aware of the fact that counsel for Appellee's was married to Shannon Spoon's aunt, but they have been

divorced since 1993, and there has been virtually no contact with Mrs. Spoon over the past 20 years. (TR 10:26:26) Appellee's counsel is aware that this is extraneous matter, but so is the assertion made by Appellant's counsel, and his assertion is disingenuous and calculated to attempt to influence this court in a manner that is certainly unprofessional.

Of additional comment, the limited discovery includes answers to interrogatories by the Defendants that have been sequestered by the District Judge, but they clearly reflect more than adequate insurance coverage for all claims, contrary to the inference that coverage could be exhausted by the claims of Appellee. Pursuant to the suggestion in this brief by Appellee that a Guardian ad Litem should be appointed, then it makes no difference about the insurance coverage even if it were insufficient for all claims, which it is not.

CONCLUSION

Appellee respectfully requests this court to uphold the statutory and case law cited above and not permit an heir to intervene because of a fee involved. Otherwise, it would harm the case law that has been settled for many years by this court. Appellee would further suggest to this court that a case law rule be promulgated that would require or allow counsel in this type of case, where an heir or his attorney is dissatisfied with not being in the case, to ask for a court appointed Guardian ad Litem and court approval upon any settlement, and Appellee would request that the same rule be applied to this case. Appellee further requests this court permit either an intervention on behalf of Noah for the purpose of bringing his consortium claim, if any claim exists under these facts, or permit him to file a separate action, which would then be consolidated for trial purposes.

RESPECTFULLY SUBMITTED,

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Appellee concurs with Appellant's request for Oral Argument.

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was delivered on this 6th day of June 2013, to the following parties:

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