No. 31406 The Estate of Robert L. Postlewait, by Eric Postlewait, Fiduciary, Karen L. Postlewait v. Ohio Valley Medical Center, Inc., a corporation, et al. and Ohio Valley Medical Center, Inc., a corporation, and Ohio Valley Medical Center, Inc., a corporation

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, C.J., concurring:

I concur with the majority's decision to reverse the circuit court's order, and to allow plaintiff Karen L. Postlewait to recover her agreed-upon share of the medical malpractice settlement proceeds.

Contrary to what my dissenting colleague suggests, the facts in this case are not "straightforward" – rather, they are subject to considerable debate. The record does not establish that Mrs. Postlewait "pushed her husband off a porch causing him to fall onto concrete and suffer a serious brain injury that ultimately resulted in his death."[1] The record, instead, indicates that Robert Postlewait had been drinking on the night in question, and that Mrs. Postlewait shoved him away from her door. Mrs. Postlewait's deposition – which is quoted in the majority's opinion – indicates that somehow, Mr. Postlewait fell or rolled across a three-foot-wide porch, down two steps with a banister on each side, and hit his head

[1]The record also does not establish, as my dissenting colleague asserts, that "Mrs. Postlewait filed a medical malpractice/wrongful death action against her husband's medical providers and successfully negotiated a settlement netting herself more than half a million dollars!" Instead, the record establishes that Mr. Postlewait's son by a prior marriage, Eric Postlewait, filed the lawsuit on behalf of his father's estate, and negotiated a $3.2 million settlement. The younger Mr. Postlewait then agreed that his stepmother should receive $691,021.66.

on the concrete at the base of the steps. Mrs. Postlewait, upon seeing her husband several minutes later crumpled on the concrete, then helped her husband into the house and helped him get cleaned up. Had Mr. Postlewait sought medical treatment immediately, he might have survived his fall. Because he waited, and because the medical treatment he finally received – by the defendants' own admission – was below the standard of care, he did not.

Our law bars a person from sharing in a judgment or settlement when they have been "convicted of feloniously killing another," *W.Va. Code*, 42-4-2 [1931], or "[w]here there is no such conviction, then [when] evidence of an unlawful and intentional killing [has been] shown in a civil action." Syllabus Point 2, *McClure v. McClure*, 184 W.Va. 649, 403 S.E.2d 197 (1991). Mrs. Postlewait was acquitted of misdemeanor involuntary manslaughter. Additionally, the facts recited above simply do not prove that Mrs. Postlewait engaged in an "unlawful and intentional killing." She might have been guilty of negligence or gross negligence in shoving her husband – assuming it was the shoving that caused him to fall off the porch – but we have made clear that "negligence or gross negligence will not bar recovery under a slayer statute because the common law rule requires an intentional killing." *McClure*, 184 W.Va. at ___ n. 6, 403 S.E.2d at 200 n. 6.

In other words, there is no "straightforward," undisputed, jury-considered evidence in the record for a court to say Mrs. Postlewait intentionally caused the death of her husband. There is therefore no legal reason for a court to bar her from recovering for her husband's death – particularly when that death was the proximate result of clear-cut, admitted medical malpractice.

What I find most distressing about the circuit court's decision to invalidate the parties' settlement in this case is that nobody – neither the other beneficiaries to the settlement nor any of the medical defendants – objected to Mrs. Postlewait's receipt of her portion of the settlement. None of the defendants filed briefs before this Court, but the administrator of Mr. Postlewait's estate filed briefs – both in his individual capacity and in his fiduciary capacity – urging this Court to reverse the circuit court and allow the estate to distribute Mrs. Postlewait's share to her.

While a circuit court certainly has the authority, under *W.Va. Code*, 55-7-7 [1989] to review and approve the form and substance of a settlement in a wrongful death action, that review should generally focus on whether all of the statutory beneficiaries have been included or considered in the settlement, and whether the settlement is the result of fraud, duress, or some other invalidating factor. *See* Syllabus Point 7, *Arnold v. Turek*, 185 W.Va. 400, 407 S.E.2d 706 (1991). The circuit court in this case went too far in relying upon disputed facts to reach a legal conclusion that the parties didn't even assert.

I therefore concur with the majority's opinion.