



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: YEAGER AIRPORT LITIGATION

CIVIL ACTION NO. 16-C-7000

THIS DOCUMENT APPLIES TO:

THEODORE CARTER and
REBECCA CARTER, husband
and wife,

Plaintiffs,

v.

Civil Action No. 15-C-1074 KAN

CENTRAL REGIONAL WEST
VIRGINIA AIRPORT AUTHORITY, et al.

Defendants.

ORDER REGARDING OFFSET

The Presiding Judges have reviewed and maturely considered Defendant *Central West Virginia Regional Airport Authority, Inc.*'s Motion for Order on Statutory Right of Offset of any Payment or Monetary Benefit Made to Plaintiffs by Nationwide Mutual Insurance Company and by Any Other Defendant (Transaction ID 61377796) and Plaintiffs' Response (Transaction ID 61421850). The Presiding Judges find the facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Having conferred with one another to insure uniformity of their decision, as contemplated by Rule 26.07(a) of the West Virginia Trial Court Rules, the Presiding Judges unanimously FIND that Defendant Central West Virginia Regional Airport Authority, Inc. ("Airport Authority") is entitled to an offset in the total amount of all settlements entered into between Plaintiffs and any other settling parties or entities.

Plaintiffs sued the Airport Authority, Triad Engineering, Inc., Cast & Baker Corporation, John Wellford and Corotman, Inc. for damages arising from the failure of the slope at the end of

Runway 5 at Yeager Airport on March 12, 2015, and the Airport Authority's decision to demolish Plaintiffs' home during its response to the slope failure and subsequent flooding of homes on Keystone Drive. Plaintiffs also filed a declaratory judgment action against Defendant Nationwide Mutual Fire Insurance Company, with whom Plaintiffs had a homeowner policy, to recover for damage to their home and other structures on their property. To date, Plaintiffs represent that they have settled their claims against all Defendants except the Airport Authority.

The Airport Authority contends it is entitled to an offset for any payment or monetary benefit paid by Nationwide to Plaintiffs, and also that it is entitled to an offset in the amount of any settlements entered into between Plaintiffs and any other entity. Mot. pp. 3-4 Plaintiffs argue the issue of offset is not ripe for consideration until after a trial verdict is returned based upon jury findings in response to special interrogatories. Resp. p. 1 Plaintiffs dispute there is a statutory offset for any settlement payments from other parties, particularly its insurer, arguing:

[t]here are differing theories of liability, different remedies, and different elements of damage that are not common or available in respect to claim against an insurance carrier as compared to an entity such as the Airport that engaged in fraud and concealment. Thus, it is important for the Court to be able to evaluate the actual verdict against the Airport to assess whether the nature of damages available to or alleged by the Plaintiff against their insurer is comparable to or the same as the damages that are actually awarded to the plaintiff against the Airport.

Id. pp. 1-2

As this Court has previously found, the Airport Authority is a political subdivision of the State of West Virginia pursuant to W.Va. Code, § 29-12A-3(c). See, e.g., *Order Granting Motion To Dismiss Punitive Damages Claim* (Transaction ID 60400938); *Order Granting Motion To Dismiss Defendant Central West Virginia Regional Airport Authority, Inc.* (Transaction ID 60412293). Accordingly, any claims against the Airport Authority are subject to The Governmental Tort Claims and Insurance Reform Act, W.Va. Code § 29-12A-1, *et seq.*

(“the Act”)

West Virginia Code § 29-12A-13(c) provides that, “[a]ll actions filed against a political subdivision shall be filed in the name of the real party or parties in interest and in no event may any claim be presented or recovery be had under a right of subrogation.” In Syllabus Point 5 of *Foster v. City of Keyser*, 202 W.Va. 1, 22, 501 S.E.2d 165, 186 (1997), the Supreme Court of Appeals of West Virginia concluded that § 29-12A-13(c), “requires that there be an offset of any recovery by an injured plaintiff from a political subdivision in the amount of first-party insurance proceeds received by the plaintiff as compensation for their injuries or damages.” Here, Plaintiffs have settled with Nationwide, their first-party insurer, for damages to their home and property arising from the failure of the slope at the end of Runway 5 at Yeager Airport on March 12, 2015. Thus, the Airport Authority, as a political subdivision, is entitled to an offset in the amount of the first-party insurance proceeds received by Plaintiffs.

Plaintiffs also argue the Airport should not get credit for the attorney fee portion of the settlement with the first party insurer, unless possibly the jury verdict against the Airport would include entitlement to attorney fees under the rationale in *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986). Resp. p. 3 However, the West Virginia Supreme Court recently addressed the issue of offset of attorney fees in *Quicken Loans, Inc. v. Marsha Gale Walters*, No. 16-0298 (W.Va. June 15, 2017), holding in Syllabus Point 5 that attorney fees and costs awarded under W.Va. Code § 31-17-17(c), a fee-shifting statute for successfully prosecuting a claim against Quicken Loans, “are compensatory in nature and shall be subject to offset by the amount of any good faith settlements previously made with the plaintiff by other jointly liable parties.” The Supreme Court concluded the trial court erred in awarding only a partial offset of settlement monies and directed the trial court on remand to offset the total

amount of the prior settlements against the total compensatory damages, i.e. the sum of the jury's award of damages and the court's award of costs and fees. The Court noted that the trial court:

fashioned what appears to be some sort of apples-to-apples methodology, offsetting the jury's damages award by that portion of settlements payable to the plaintiff or on her behalf, and offsetting the attorney fees award by that portion of the settlement payable to the attorneys – with the end result that Quicken Loans did not receive the offset benefit of \$38,500.00 of the prior settlements. We can find nothing in the law to support this approach, as more than thirty years ago the Supreme Court of the United States held that an attorney fee award belongs to the client, not the attorney. *Evans v. Jeff D.*, 475 U.S. 717, 730-31 & n. 19 (1986). *** This is entirely consistent with our cases holding that an award of attorney fees and costs, where appropriate, is an element of compensatory damages for a prevailing party; the character of the award does not change depending on who cashes the check

Just as the Supreme Court in *Quicken Loans* rejected the “apples-to-apples approach towards offset,” taken by the trial court, the Presiding Judges reject that approach in this case.

With respect to the settlements between the Plaintiffs and the other Defendants, the Court finds Syllabus Points 5 and 8 of *Board of Education of McDowell County v. Zando, Martin & Milstead*, 182 W.Va. 597, 390 S.E.2d 796 (1990) instructive:

5. “‘Where a payment is made, and release obtained, by one joint tort-feasor, the other joint tort-feasors shall be given credit for the amount of such payment in the satisfaction of the wrong.’ Point 2, Syllabus, *Hardin v. The New York Central Railroad Company*, 145 W.Va. 676 [116 S.E.2d 697 (1960)].” Syllabus Point 1, *Tennant v. Craig*, 156 W.Va. 632, 195 S.E.2d 727 (1973).

8. Where there is a single indivisible loss arising from the actions of multiple parties who have contributed to the loss, ***the fact that different theories of liability have been asserted against them does not*** foreclose their right of contribution *inter se* or ***prevent them from obtaining a verdict credit for settlements made with the plaintiff by one or more of those jointly responsible.***

(emphasis added)

Like *Board of Education of McDowell County v. Zando, Martin & Milstead*, there is a single loss in the *Carter* case arising from the actions of multiple parties who have allegedly contributed to the loss. No matter what theories of liability the *Carter* Plaintiffs are asserting against the

parties, the Airport Authority is entitled to an offset for settlements made with the *Carter* Plaintiffs by the other Defendants.

For the reasons set forth above, the Presiding Judges unanimously FIND the Airport Authority is entitled to an offset in the total amount of all settlements entered into between Plaintiffs and any other settling parties or entities.

It is so **ORDERED**.

ENTER: January 16, 2018.

/s/ John A. Hutchison
Lead Presiding Judge
Yeager Airport Litigation