



**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**IN RE: YEAGER AIRPORT LITIGATION**

**CIVIL ACTION NO. 16-C-7000**

**THIS DOCUMENT APPLIES TO:**

Central West Virginia Regional Airport Authority, Inc.,

v.

Civil Action No. 15-C-1022 KAN

Triad Engineering, Inc., et al.

**ORDER DENYING DEFENDANTS' JOINT MOTION IN LIMINE TO PLACE  
DEFENDANT TRIAD ENGINEERING, INC. ON THE VERDICT FORM AT TRIAL**

On February 8, 2019, the parties, by counsel, appeared before the Court for a pre-trial hearing. During the hearing, the Court took up numerous motions, including *Defendants' Joint Motion in Limine to Place Defendant Triad Engineering, Inc. on the Verdict Form at Trial* (Transaction ID 62849944). Upon consideration of the pleadings and papers filed by the parties and the argument of counsel, and 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 **DENY** the motion *in limine*.

Under the common law, West Virginia was "committed to the concept of joint and several liability among joint tortfeasors." Syllabus Point 2 of *Sitzes v. Anchor Motor Freight, Inc.*, 169 W.Va. 698, 289 S.E.2d 679 (1982). A plaintiff could elect to sue any or all of those responsible for their injuries and collect damages from whomever was able to pay, irrespective of their percentage of fault. *Id.* West Virginia's adoption of a modified rule for contributory negligence in *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879(1979), did not change its adherence to joint and several liability. *Id.*, *See also*, Syl. Pt. 3, *Bd. of Educ. of McDowell Cnty. v. Zando Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 792 (1990).

Under the comparative negligence doctrine, a party was not barred from recovering damages in a tort action so long as the party's negligence or fault did not equal or exceed the combined negligence or fault of the other parties involved in the accident. Syllabus Point 2, *Rowe v. Sisters of Pallotine Missionary Society*, 211 W.Va. 16, 21, 560 S.E.2d 491, 496 (2001), *citing* Syllabus Point 3, *Bradley v. Applachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879(1979).

As held in Syllabus Point 3 of *Bowman v. Barnes*, 168 W.Va. 111, 282 S.E.2d 613 (1981), "to obtain a proper assessment of the total amount of the plaintiff's contributory negligence under our comparative negligence rule, it must be ascertained in relation to all of the parties whose negligence contributed to the accident, and not merely those defendants involved in the litigation." *See also* Syllabus Point 6, *Rowe*. As further explained in Syllabus Points 7 and 8 of *Rowe*:

7. Without some proof of negligence by the plaintiff, there is no requirement that the jury be instructed to ascertain or apportion fault between the defendant and a non-party tortfeasor.

8. "It is improper for counsel to make arguments to the jury regarding a party's omission from a lawsuit or suggesting that the absent party is solely responsible for the plaintiff's injury where the evidence establishing the absent party's liability has not been fully developed." Syllabus Point 2, *Doe v. Wal-Mart Stores, Inc.*, 210 W.Va. 664, 558 S.E.2d 663 (2001).

In 2005, the common law was modified by enactment of West Virginia Code § 55-7-24, which provides in pertinent part:

(a) In any cause of action involving the tortious conduct of more than one defendant, the trial court ***shall***:

(1) ***Instruct the jury to determine***, or if there is no jury, find the total amount of damages sustained by the claimant and ***the proportionate fault of each of the parties in the litigation at the time the verdict is rendered***; and

(2) Enter judgment against each defendant found to be liable on the basis of the rules of joint and several liability, except that if any defendant is thirty percent or less at fault, then that defendant's liability shall be several and not joint and

he or she shall be liable only for the damages attributable to him or her, except as otherwise provided in this section.

(Emphasis added.) West Virginia Code § 55-7-24 was in effect from July 1, 2005, through May 24, 2015, when West Virginia adopted comparative fault and abolished joint and several liability. *See* West Virginia Code § 55-7-13a-d. Because the cause of action in this case accrued before May 24, 2015, the Court finds, and the parties do not dispute, that § 55-7-24 applies. The Court further finds that the language of West Virginia Code § 55-7-24 is peremptory. Applying West Virginia Code § 55-7-24 to this case, the Court concludes it must instruct the jury to determine the proportionate fault of each of the parties in the litigation at the time the verdict is rendered. Thus, only the Airport and the non-settling Defendants in this case must be on the verdict form.

Defendants argue the Supreme Court of Appeals directly addressed the issue of an “empty chair” of a settled defendant in *Modular Bldg. Consultants of W.Va., Inc. v. Poerio, Inc.*, 235 W.Va. 474, 774 S.E.2d 555 (2015), and held case law and the equities warranted placing a non-party on a jury verdict form for purposes of not only the defendants but also the plaintiff’s comparative fault. Mot. pp. 6-7 However, the Court finds that Defendants’ reliance on *Modular* is misplaced because that case is factually distinguishable from the case at bar.

In *Modular*, plaintiff Jarrett Smith was injured when his vehicle collided with a truck owned by Modular. Mr. Smith sued Modular alleging negligence. *Id.* at 477. Modular then brought a third-party complaint against Poerio for contribution and indemnification pursuant Modular and Poerio’s lease agreement. *Id.* at 477-478. Mr. Smith did not assert a direct claim against Poerio. *Id.* at 478. Shortly before trial, Modular settled with Mr. Smith and obtained a release from Mr. Smith for both Modular and Poerio. *Id.* Trial as to Modular’s third-party claim against Poerio proceeded. *Id.* The jury found Poerio did not breach the lease agreement, but found Poerio twenty percent at fault for the accident, Modular twenty percent at fault, and Mr.

Smith sixty percent at fault. Because plaintiff was found sixty percent at fault, judgment was entered in favor of Poerio. *Id.* The Supreme Court of Appeals of West Virginia held that “where a tortfeasor settles with an injured plaintiff *and obtains a release for a joint tortfeasor*, such release preserves the settling tortfeasor’s right of contribution against the joint tortfeasor.” *Id.* at 565. (Emphasis added.) Therefore, Modular’s contribution claim was not extinguished by its settlement with Mr. Smith. *Id.*

As recognized by *Modular*,

It is well-established that a settlement with a plaintiff by a joint tortfeasor extinguishes any claim for contribution against that settling tortfeasor. In Syllabus Point 6 of *Bd. of Educ. of McDowell Cnty. v. Zando Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 792 (1990), the Court held that “[a] party in a civil action who has made a good faith settlement with the plaintiff prior to a judicial determination of liability is relieved from any liability for contribution.” Moreover, the Court has historically found the opposite to also be true, *i.e.* the settling tortfeasor cannot pursue contribution claims against a non-settling tortfeasor.

*Id.* at 561.

In this case, Triad reached two good faith settlements with the Airport, which extinguish all claims asserted by the Airport and all common law cross-claims filed by and against Triad. Unlike *Modular*, Triad did not obtain a release of any of the other Defendants in this case, and Triad is not seeking to maintain any of its contribution claims against any of the other Defendants. Additionally, Triad and Cast & Baker Corporation have released and voluntarily dismissed, with prejudice, “all claims which were or could have been asserted between them concerning the subject of this action, including their respective cross-claims for express indemnification, implied indemnification, and contribution, pursuant to Rule 41(a) and (c) of the West Virginia Rules of Civil Procedure.” *Agreed Order Dismissing Cross-Claims Between Triad Engineering, Inc., And Cast & Baker Corporation* (Transaction ID 62984534).

The Court finds that neither Triad nor any of the other settling Defendants should be included on the portion of the verdict form in which comparative fault is allocated. As held in Syllabus Point 7 *Bd. of Educ. of McDowell Cnty. v. Zando Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 792 (1990):

Defendants in a civil action against whom a verdict is rendered are entitled to have the verdict reduced by the amount of any good faith settlement previously made with the plaintiff by other jointly liable parties. Those defendants against whom the verdict is rendered are jointly and severally liable to the plaintiff for payment of the remainder of the verdict. Where the relative fault of the nonsettling defendants has been determined, they may seek contribution among themselves after judgment if forced to pay more than their allocated share of the verdict.

Thus, the non-settling Defendants are entitled to an offset against any verdict in the amount of all settlements with the Airport. If Triad and the other settling Defendants were to remain on the verdict, any recovery by the Airport would be reduced by both the amount of the settlements and potentially be further reduced by any fault assessed to the settling Defendants.

For the foregoing reasons, *Defendants' Joint Motion in Limine to Place Defendant Triad Engineering, Inc. on the Verdict Form at Trial* (Transaction ID 62849944) is **DENIED**.

It is so **ORDERED**.

**ENTER:** February 26, 2019.

/s/ Derek C. Swope  
Lead Presiding Judge  
Yeager Airport Litigation