



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.

Triad Engineering, Inc., et al.

Civil Action No. 15-C-1022KAN

Kenneth W. Carter

v.

Cast & Baker Corporation, et al.

Civil Action No. 15-C-1791 KAN

Robert L. Harrah II

v.

Cast & Baker Corporation, et al.

Civil Action No. 15-C-1792 KAN

Terry Letart, et al.

v.

Cast & Baker Corporation, et al.

Civil Action No. 15-C-1793 KAN

Deborah K. Harrah

v.

Cast & Baker Corporation, et al.

Civil Action No. 15-C1794 KAN

Patricia A. Wolfe, et al.

v.

Cast & Baker Corporation, et al.

Civil Action No. 16-C-1815 KAN

Brotherhood Mutual Insurance Co.

v.

**Central West Virginia Regional Airport
Authority, Inc., et al.**

Civil Action No. 16-C-293 KAN

**ORDER GRANTING TRIAD'S MOTION TO SEVER AND
CONSOLIDATE CROSS-CLAIMS AGAINST CAST & BAKER**

The Presiding Judges have reviewed and maturely considered *Triad's Motion to Sever and Consolidate Cross-Claims Against Cast & Baker*, (Transaction ID 61823102) Defendant *Cast & Baker Corporation's Response in Opposition to Triad's Motion to Sever and Consolidate Cross-Claims Against Cast & Baker* (Transaction ID 61870626), and *Triad's Reply to Cast &*

Baker's "Response in Opposition to Triad's Motion to Sever and Consolidate Cross-Claims Against Cast & Baker" (Transaction ID 61901543) and have considered oral argument of counsel regarding the same. 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 **GRANT** the motion, based on the following **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**:

FINDINGS OF FACT

1. In 2003, Yeager Airport undertook plans to construct a 500-foot extension of the 5 end of Runway 5-23 in order to create a Runway Safety Area. The runway extension is adjacent to part of Keystone Drive.

2. On March 12, 2015, the Runway Safety Area suffered a partial slope collapse.

3. The Complaint filed by the Central West Virginia Regional Airport Authority ("Airport") on May 22, 2015, that being Civil Action No. 15-C-2022, was the first filed Complaint in the Yeager Airport Litigation. In Triad's Answer to the Airport's Amended Complaint, which it served on July 30, 2015, Triad asserted certain cross-claims against Cast & Baker, including a cross-claim for express indemnification. This cross-claim was based on an indemnification provision set forth in the March, 2005 Agreement between Cast & Baker and the Airport for the Runway 5, Runway 23, and Taxiway Safety Area Improvements (including the construction of the MSE slope at issue in the Airport's case and all subsequent civil actions).

4. Triad's Answer to the Airport's Amended Complaint also included cross-claims against The Travelers Indemnity Company ("Travelers") based on the allegation that Cast & Baker was obligated, under its contract with the Airport, to obtain insurance coverage for claims arising out of the project naming both the Airport and Triad as additional insureds. In its cross-

claim against Travelers, Triad further alleged that, notwithstanding that Cast & Baker's agreement was an insured contract and that Triad was an additional insured under Travelers' policies, Travelers improperly denied coverage to Triad for both defense and indemnity with regard to the Airport's claims. Finally, in its cross-claim against Travelers, Triad alleged that it had been named as a defendant in the civil actions brought by Kenneth W. Carter, Robert L. Harrah II, Terry Letart, et al., Deborah K. Harrah, and Brotherhood Insurance Company¹ (the "property owner cases"), and that Travelers had also improperly denied Triad's claims for coverage under the Travelers' policies in those cases.

5. On June 16, 2016, the Court entered the "Agreed Amended Order Granting Plaintiff's Motion for Leave to Amend," which deemed as filed the Airport's "Second Amended Complaint." Triad served its "Answer, Counterclaim, and Cross-Claims of Triad Engineering, Inc., to Second Amended Complaint" on June 30, 2016. The cross-claims asserted by Triad in this pleading are nearly identical to the cross-claims that it asserted in its Answer to the Amended Complaint on July 30, 2015.²

6. Subsequently, Triad similarly asserted cross-claims against Cast & Baker for express indemnification in Triad's Answers to the Complaints filed in the property owner cases. Triad's cross-claims in these cases are identical to the cross-claims originally asserted by Triad in its Answer to the Amended Complaint filed by the Airport Authority.

¹ Triad was later named as a Defendant in the Complaints filed by Patricia Wolfe and Curtis Naylor, Civil Action No. 16-C-1815, by James and Donna Johnson, Civil Action No. 16-C-1826, and by Keystone Apostolic Church, consolidated with Civil Action No. 16-C-293.

² Triad's cross-claim against Travelers was expanded to include claims for declaratory relief regarding Travelers' duty to defend and indemnify Triad in the following additional cases: *Theodore and Rebecca Carter v. Central West Virginia Regional Airport Authority, et al.*, Civil Action No. 15-C-1074 KAN (settled during the first mediation held on April 27-28, 2017); *Kenneth W. Carter v. Cast & Baker Corp., et al.*, Civil Action No. 15-C-1791 KAN; *Robert L. Harrah II v. Cast & Baker Corp., et al.*, Civil Action No. 15-C-1792 KAN; *Terry and Rosemary Letart v. Cast & Baker Corp., et al.*, Civil Action No. 15-C-1793 KAN; *Deborah K. Harrah v. Cast & Baker Corp., et al.*, Civil Action No. 15-C-1794 KAN; *Brotherhood Mutual Insurance Co. a/s/o The Keystone Apostolic Church f/k/a The Pentecostal Assembly of Jesus Christ v. Central West Virginia Regional Airport Authority, et al.*, Civil Action No. 2:16-cv-03118 S.D.W.Va. / 16-C-293 KAN.

7. As a result of the mediation conducted by the Resolution Judges on February 1-2, 2018, all of the cases filed by the property owners were settled, with the exception of the Johnson case, which was dismissed on March 16, 2018 pursuant to the Court's entry of the *Order Granting "Defendants' Motion for Summary Judgment"* thereon. The settlements of the property owners' cases include the dismissal of all claims asserted between and among the parties therein with the sole exception of Triad's cross-claims against Cast & Baker for express indemnification.

8. Due to this exception, final judgments cannot be entered in the property owner cases until Triad's cross-claims against Cast & Baker are resolved, unless *Triad's Motion to Sever and Consolidate Cross-Claims Against Cast & Baker* is granted herein.

CONCLUSIONS OF LAW

1. All of Triad's cross-claims for express indemnification against Cast & Baker involve common questions of law and fact within the meaning of Rule 42(a) of the West Virginia Rules of Civil Procedure.

2. Triad does not seek in its Motion, nor is the Court inclined to issue at this juncture, a ruling on the merits of Triad's cross-claims for express indemnification against Cast & Baker or the defenses thereto.

3. Triad could have chosen to bring its express/contractual indemnification claim against Cast & Baker in a separate litigation, but first asserted that claim in Civil Action No. 15-C-1022.

4. Cast & Baker's duty to indemnify and hold harmless Triad and the Airport is independent of its insurer's duty to defend and indemnify and remains at issue in Civil Action No. 15-C-1022, as well by the terms of the settlement agreements in the property owner cases.

5. “There are two basic types of indemnity: express indemnity, based on a written agreement, and implied indemnity, arising out of the relationship between the parties. One of the fundamental distinctions between express indemnity and implied indemnity is that an express indemnity agreement can provide the person having the benefit of the agreement, the indemnitee, indemnification even though the indemnitee is at fault. Such result is allowed because express indemnity agreements are based on contract principles. Courts have enforced indemnity contract rights so long as they are not unlawful.” Syl. Pt. 1, *Valloric v. Dravo Corp.*, 178 W. Va. 14, 15, 357 S.E.2d 207, 208 (1987)

6. It will not be determined until the liability trial, which is set to begin on March 4, 2019, whether Cast & Baker was negligent and, if so, whether that negligence was a proximate cause of the slope failure. Since all of the cases are consolidated for one liability trial, Triad will present evidence in support of its cross-claims during that trial, regardless of whether or not Triad’s cross-claims in the property owner cases are severed and consolidated into Civil Action No. 15-C-1022.

7. The effect of the failure to grant Triad’s Motion to Sever and Consolidate would be that the (otherwise resolved) property owner cases would have to remain open to allow Triad to present proof of the significant costs that it and its insurers incurred in defense of those cases, with the concomitant result that the property owners, as well as other parties in those cases who have no interest in this contractual issue solely between Triad and Cast & Baker, would be deprived of the final resolution of those cases.

8. Based on the above, the Presiding Judges find that it is in the interests of judicial economy and the promotion of efficiency and closure for all parties other than Triad and Cast & Baker to grant *Triad’s Motion to Sever and Consolidate Cross-Claims Against Cast & Baker* for

express indemnification in each of the property owner cases,³ and consolidating those cross-claims with its cross-claims in Central Regional West Virginia Airport Authority v. Triad Engineering, Inc., et al., Civil Action No. 15-C-1022 KAN.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that *Triad's Motion to Sever and Consolidate Cross-Claims Against Cast & Baker* is hereby **GRANTED**. Cast & Baker's objections to this Order are noted and preserved.

Counsel for Triad Engineering, Inc., is ORDERED to draft final dismissal orders in all of the Property Owner cases to present to the Court for its consideration and entry.

It is so ORDERED.

ENTER: January 9, 2019.

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

³ Triad's cross-claim raised in Johnson v. Cast & Baker, et al., Civil Action No. 16-C-1826KAN is not included in this Order. The claims raised by the Johnsons were separately dismissed pursuant to the *Order Granting "Defendants' Motion for Summary Judgment"* entered by this Court on March 16, 2018 (Transaction ID 61812258). Subsequently, during the hearing on October 15, 2018, *Defendant Cast & Baker Corporation's Motion for Summary Judgment* filed on April 24, 2018 (Transaction ID 61953458) was granted by this Court and the Order reflecting that ruling is being entered contemporaneously with this Order. As a result, all claims and cross-claims raised in the Johnson case are now dismissed and are not being transferred and consolidated in Civil Action No. 15-C-1022 KAN.