

14-0158

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

JARRETT L. SMITH and SHARON SMITH,

Plaintiffs,

v.

MODULAR BUILDING CONSULTANTS
OF WEST VIRGINIA, INC., and
BILLY JOE MCLAUGHLIN,

Defendants / Third-Party Plaintiff,

v.

POERIO INCORPORATED,

Third-Party Defendant.

Civil Action No. 11-C-277
Judge Joseph K. Reeder

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PUTNAM CO. CIRCUIT COURT
W. MATTHEW

ORDER

On September 18, 2013, came Defendants/Third-Party Plaintiffs, Modular Building Consultants of West Virginia, Inc. (hereinafter referred to as "Modular") and Billy Joe McLaughlin (hereinafter referred to as "McLaughlin") by counsel Brent K. Kesner and the law firm of Kesner and Kesner, and came Third-Party Defendant Peorio, Incorporated (hereinafter Peorio) by counsel, Benjamin T. Hughes, Linnsey M. Amores, and Pullin, Fowler, Flanagan, Brown & Poe, PLLC, on Defendants/Third-Party Plaintiffs' *Motion for Judgment as a Matter of Law or for a New Trial*.

Upon review of the Motion, Response, and Reply briefs, and supporting Memoranda of Law filed by the parties, as well as argument of counsel, the Court does hereby **ORDER, ADJUDICATE, and DECREE** that Defendants/Third-Party Plaintiffs' *Motion for Judgment as a Matter of Law or for a New Trial* is **DENIED**. Defendants/Third-Party Plaintiffs' objections are hereby noted.

The Court makes the following Findings of Fact and Conclusions of Law:

I. **FINDINGS OF FACT AND PROCEDURAL POSTURE**

This case arose out of an automobile accident that occurred on July 14, 2011, when Modular's driver, Defendant McLaughlin, parked his truck trailer at an entrance to Geary Elementary School in Left Hand, Roane County, West Virginia, blocking a lane of traffic. Plaintiff Jarrett Smith then drove into the trailer portion of the vehicle, suffering severe injuries. McLaughlin had driven Modular's truck to the elementary school that day in order to pick up a storage container, which had been rented by Poerio for use during the construction project at the school.

Plaintiffs then filed suit against Modular and McLaughlin. In turn, Modular and McLaughlin filed a third-party complaint against Poerio for contribution and/or indemnification based upon Poerio's alleged breach of contract. Plaintiffs did not bring any direct claims against Poerio.

Modular and McLaughlin's claims against Poerio arise from a lease agreement for the use of a storage container between Modular and Poerio executed on or about June 14, 2010. Modular alleged that Poerio breached the contract in two ways: (1) Poerio moved the container unit during the construction process without prior written consent from Modular, and (2) Poerio did not provide free and clear access to the storage unit at the time of pick up. See *Lease Agreement*, at ¶¶ 2 and 10. Based upon these alleged breaches of contract, Modular sought indemnification from Poerio based upon the following lease provision: "Lessee shall indemnify and hold Lessor harmless from and against any loss, cost or expenses and from any liability to any person on account of any damage to person or property arising out of any failure of Lessee to

comply in any respect with and perform any of the requirements and provisions of this Lease." See *Lease Agreement*, at ¶ 14.

Prior to the trial of this case, Modular and McLaughlin reached a settlement with Plaintiffs and obtained a general release of Plaintiffs' claims against themselves and any potential claims against Poerio.

The case proceeded to trial on April 15, 2013 solely with respect to the claims of Modular and McLaughlin against Poerio, i.e. breach of contract, contribution, and indemnification. On April 18, 2013, the jury found that Poerio did not breach its lease agreement with Modular. The jury also found that all of the parties, including Plaintiff Jarrett Smith, were negligent, and assigned sixty percent negligence to Plaintiff Smith, twenty percent negligence to McLaughlin, and twenty percent negligence to Poerio.

This Court entered a Judgment Order on July 16, 2013, in favor of Poerio on the Defendants/Third-Party Plaintiffs' claim for breach of contract and for the claim for contribution. Then, based upon the West Virginia Supreme Court's holding in *Jennings v. Farmers Mutual Insurance Company*, 687 S.E.2d 574 (W. Va. 2009), the Court found that Defendants/Third-Party shall not recover any damages from Third-Party Defendant Poerio on their contribution claim.

Modular and McLaughlin subsequently filed their *Motion for Judgment as a Matter of Law or New Trial* on July 29, 2013. On September 10, 2013, Poerio filed its *Response* brief. On September 16, 2013, Modular and McLaughlin filed their *Reply* brief. Oral argument on Modular and McLaughlin's motion was held on September 18, 2013.

II. CONCLUSIONS OF LAW

A. BREACH OF CONTRACT CLAIM.

Counsel for Modular and McLaughlin argued that the jury's findings with respect to the breach of contract claim were inconsistent with the evidence at the trial and inconsistent with the jury's determination that Poerio was found twenty percent negligent for causing the accident. Modular and McLaughlin contend that Poerio was negligent in two respects, (1) moving the storage unit after it had been placed by Modular and (2) failing to provide clear access to the unit when Modular's driver arrived to pick it up. Modular argued that there was no further evidence upon which the jury could determine that Poerio was negligent, and, therefore, the negligence finding was actually a perversely expressed breach of contract finding.

In response, Poerio argued that the jury's findings with regard to the breach of contract claim and negligence claim were distinguishable and that the evidence found by the jury to apply to one did not necessarily have to apply to the other. Poerio maintained that at the trial, Modular and McLaughlin attempted to paint it in a bad light, for example, claiming that Poerio did not offer directions to pick up the storage unit and did not offer to provide flaggers, which could have been the basis of the jury's finding of negligence against Poerio. Poerio further argued that the jury was not asked to provide a reason as to why it found Poerio negligent, and, therefore, any attempts to state that it was based upon the evidence related to the breach of contract was unsupported by the evidence in the record and the jury's findings.

After hearing the arguments of counsel and reviewing the memoranda of law filed in regard to this issue, the Court hereby **FINDS** that the jury's finding of negligence upon Poerio is consistent with the jury's determination that Poerio did not breach its lease agreement with Modular. It was properly within the province of the jury to weigh the evidence presented at trial and determine that Poerio did not violate the terms of the lease, while also finding twenty percent negligence on the part of Poerio. Therefore, the Court **CONCLUDES** that the jury's verdict on the breach of contract claim was proper and shall not be overturned.

In Modular's *Motion for New Trial*, it argued that because Poerio was found twenty percent negligent that it then owed Modular defense and indemnity. Poerio contends that because it was not found to have breached the lease agreement, it does not owe defense or indemnity to Modular, and the Court agrees. In regard to the contractual provision that applies to indemnity and defense, the contract states, "Lessee shall indemnify and hold Lessor harmless from and against any loss, cost or expenses and from any liability to any person on account of any damage to person or property arising out of any failure of Lessee to comply in any respect with and perform any of the requirements and provisions of this Lease." See *Lease Agreement*, at ¶ 14. The Court hereby **CONCLUDES** that because the jury found that Poerio did not breach the lease agreement, Poerio does not owe Modular indemnification and defense simply because it was found to be twenty percent at fault for the subject accident.

B. CONTRIBUTION CLAIM.

Prior to the trial of this matter, the parties advised the Court that Modular and McLaughlin settled their claims with Plaintiffs as well as any potential claims of Plaintiffs

against Poerio. Plaintiffs did not directly sue Poerio. Modular and McLaughlin then argued that their contribution claim against Poerio survived the settlement. This is an issue of first impression in West Virginia and no case law exists that specifically addresses it. During the trial of this matter, the Court heard arguments from both parties about whether the contribution claim survived settlement, and the Court ultimately allowed the issue to proceed to verdict. However, upon entry of the Judgment Order, the Court determined that based upon the holding in *Jennings v. Farmers Mutual Insurance Company, Defendants/Third-Party Plaintiffs* could not recover any damages from Third-Party Defendant Poerio on their contribution claim.

In making its determination during the trial of this matter and on the motion filed by Defendants/Third-Party Plaintiffs, this Court relies upon the West Virginia Supreme Court's holdings in *Board of Education v. Zando, Martin & Milstead*, 390 S.E.2d (W. Va. 1990), *Smith v. Monongahela Power*, 429 S.E.2d 643 (W. Va. 1993), and *Jennings v. Farmers Mutual Insurance Company*, 687 S.E.2d 574 (W. Va. 2009). Although this is an issue of first impression, these cases are analogous and provide the Court with guidance in its decision.

The Court held in Syllabus point 6 of *Zando*, "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." *Board of Education v. Zando, Martin & Milstead*, 390 S.E.2d (W. Va. 1990). The Court's ruling applied to cross-claims against co-defendants and claims between third-party plaintiffs and third-party defendants. *Id.* at FN. 1.

Because Plaintiffs never directly sued Poerio, this Court also considered *Smith v. Monongahela Power*, wherein a third-party defendant settled directly with the plaintiff, and was found to have extinguished any claims for contribution by the third-party plaintiff against it. *Smith v. Monongahela Power*, 429 S.E.2d 643 (W. Va. 1993). The Court ultimately held, "If a plaintiff enters into a settlement with a non-party against whom it has not directly asserted a cause of action, and the settlement occurs before a judicial determination of liability, the settlement relieves the non-party of all further obligations to the plaintiff and all liability for contribution to the non-party's joint tortfeasor, if the settlement was made in good faith and the amount of the settlement is disclosed to the trial court for the purpose of reducing the verdict." *Id.* at Syl. Pt. 4.

In *Smith*, the Court held in Syllabus Point 7, that the main concern of the trial court is to determine if the circumstances of the settlement indicate that the "non-settling tortfeasor was substantially deprived of a fair trial because of corrupt behavior on the part of the other parties." *Id.* at Syl. Pt. 7. The Court relied upon its analysis of good faith settlements from *Zando*, stating, "The good faith test carries its own safeguards. It is highly unlikely that a plaintiff will make a minimal settlement with a defendant who has the financial ability to pay and whose liability is substantial." 429 S.E.2d at 805. In *Smith*, the plaintiffs' attorney made a determination that the plaintiff could not formulate a legal theory of recovery against the third-party defendant. *Id.* at 653. The court held that the fact that the third-party defendant, although not directly sued by the plaintiff, settled any potential future claims the plaintiff may have brought against it did not constitute bad faith. *Id.*

The West Virginia Supreme Court took its analysis of settlement and contribution even further in the matter of *Jennings v. Farmers Mutual Insurance Company*, 687 S.E.2d 574 (W. Va. 2009), which this Court relied upon in its Judgment Order in this matter. In *Jennings*, the plaintiff sued Farmers Mutual and her insurance agent, Kevin Fike, alleging breach of contract and violations of the Uniform Trade Practices Act. *Id.* at 577. Farmers filed a cross-claim against Fike for misrepresentation, contribution, and indemnity. *Id.* Farmers settled with Jennings before trial, but tried to pursue Jennings' claims against Fike through assignment. However, despite these efforts, the circuit court held that Farmers' claims for contribution against Fike were dismissed, and the West Virginia Supreme Court agreed. *Id.*

The Court held that under *Zando*, Farmers' settlement with Jennings extinguished any claim for contribution that Fike may have had against Farmers. *Id.* at 578. The Court further held that the opposite is also true: Any claims that Farmers may have had against Fike were also extinguished because "it would be unfair to permit the settling defendant to pursue a claim of contribution against a non-settling defendant, while simultaneously precluding the non-settling defendant from pursuing a claim for contribution against the settling defendant." *Id.*

Lastly, the West Virginia Supreme Court further held, "If a tortfeasor is not a part of the litigation – whether because of a settlement or because the tortfeasor was not sued – our law is clear that no contribution may be had from that tortfeasor." *Id.* Farmers was deemed to no longer be "in the litigation" in order to assert claims of contribution because it settled with Jennings. *Id.*

In their *Motion*, Modular and McLaughlin argue that because they settled Plaintiffs' claims on behalf of themselves and Poerio, and then attempted to preserve their contribution claims against Poerio in the settlement documents, Modular and McLaughlin are entitled to contribution from Poerio for the total amount of the settlement based upon the jury's verdict. Defendants/Third-Party Plaintiffs argued that the *Jennings* case is distinguishable because Farmers only obtained a release for the claims made against it, rather than a release for the non-settling defendant. Defendants/Third-Party Plaintiffs reasoned that because Fike, the agent in *Jennings*, could have been found liable for more than his *pro tanto* share, the Court found that such an outcome would be unfair based on the principles of contribution set forth in *Zando*. Defendants/Third-Party Plaintiffs argue that this case is different because Poerio did not remain exposed to an excess verdict after the settlement and thus no longer had an independent right of contribution. Thus, Defendants/Third-Party Plaintiffs were forced to pay more than their *pro tanto* share in order to obtain a resolution of the case, but were unfairly denied their ability to recover the amount they paid in excess of their actual degree of fault. Defendants/Third-Party Plaintiffs then argued that it would be against the public policy of West Virginia to discourage settlement by extinguishing their claim for contribution as it would force them to risk a jury verdict in excess of the amount they were willing to pay to settle the claim.

In response, Poerio argued that the law in *Jennings* clearly states that not only would a settlement between Plaintiff and Modular result in the extinguishment of a claim by Poerio for contribution against Modular, but it would also result in the extinguishment of a claim by Modular for contribution against Poerio. Defendants/Third-Party Plaintiffs

argument that they settled for more than their pro tanto share of liability in order to resolve the case is irrelevant. Poerio argued that Modular had the contractual claim on which to rely in order to potentially recover the entirety of their settlement. Further, Poerio argued that Modular could have entered into a "Mary Carter settlement," which would have preserved their contribution claim while giving them the protection over a verdict in excess of their pro tanto share. Poerio rejected the notion that Modular could unilaterally decide the value of the case, settle and receive a release on its behalf, then seek contribution from Poerio based upon the holding in *Smith*.

After hearing arguments of counsel and reviewing the briefings filed, the Court hereby **CONCLUDES** that it is not against the public policy in West Virginia to extinguish Defendants/Third-Party Plaintiffs' claim for contribution against Third-Party Defendant upon the settlement with Plaintiffs under the West Virginia Supreme Court's holding in *Jennings*. Although *Jennings* is somewhat factually distinguishable from the facts of this matter, it is analogous to the case at hand and applicable to the issues confronted by the Court. Thus, the Court **CONCLUDES** 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" and the opposite is also true. *Jennings*, 390 S.E.2d 796. The Court **FINDS**, based upon the standard for good faith settlements set forth in *Smith* that the settlement agreement between Plaintiffs and Defendants/Third-Party Plaintiffs as well as Third-Party Defendant was in good faith.

Having found that the settlement is in good faith, the Court then applies the standard for extinguishment of contribution claims upon settlement as discussed in *Jennings*: "It would be unfair to permit the settling defendant, [in this case Modular], to

pursue a claim of contribution against a non-settling defendant, [Poerio], while simultaneously precluding the non-settling defendant, [Poerio], from pursuing a claim for contribution against the settling defendant, [Modular]." *Id.* Applying this law to the facts of this case, the Court **CONCLUDES** that the settlement amongst the parties extinguished Defendants/Third-Party Plaintiffs' claim for contribution against Third-Party Defendant. The Court further **CONCLUDES** that Defendants/Third-Party Plaintiffs' shall not recover any damages from Third-Party Defendant on their contribution claim.

C. JURY CONSIDERATION OF THE NEGLIGENCE OF EACH OF THE PARTIES.

Modular argued that because the jury was permitted to determine the negligence of Plaintiff in addition to the negligence of McLaughlin and Poerio that it is entitled to a new trial or that Poerio is liable for contribution to Modular. Modular continued that West Virginia's joint and several liability statute, W. Va. Code § 55-7-24, precluded the jury from proportioning fault to Plaintiff at trial. Poerio responded that it was proper for Plaintiff's comparative negligence to be considered as there was no harm to the parties participating in the trial by the jury's determination of fault for each of the parties; due to the assertion of contributory negligence as an affirmative defense; because Modular called Plaintiff Jarrett Smith to testify as to his version of events at the trial of this matter; and joint and several liability was inapplicable to this case given its procedural posture at the time of trial.

The Court **FINDS** that because the jury heard Plaintiff's testimony about how the accident occurred, the jury had the evidence necessary to determine Plaintiff's proportionate negligence. The apportionment of fault amongst the parties based upon this testimony was not an error, and, even if it were, it would constitute harmless error.

Therefore, the Court hereby **CONCLUDES** that it was proper for the jury to determine the negligence of Plaintiff Jarrett Smith in proportion to the negligence of McLaughlin and Poerio.

The Court further **FINDS** that the joint and several liability statute does not contemplate a case wherein a plaintiff settles prior to trial and the plaintiff's percentage of fault has not been determined before the jury is asked to apportion fault to the alleged joint tortfeasors. As the plaintiffs were no longer a party to this litigation at the time of the jury's verdict, there were not joint tortfeasors amongst whom fault should be apportioned. Instead, as the case went to the jury, the case had simply become "Third-Party Plaintiffs v. Third-Party Defendant." Therefore, the Court **CONCLUDES** that the joint and several liability statute is inapplicable to this case.

The Court hereby **ORDERS and ADJUDGES** that it was appropriate for the jury to determine the fault of Plaintiff, McLaughlin, and Poerio at the trial of this matter, and this determination does not affect the Third-Party Plaintiffs' ability to recover under their claim for contribution against Third-Party Defendant.

D. REQUEST FOR CERTIFIED QUESTION.

In their Reply to Poerio's Response brief, Modular and McLaughlin requested that this Court certify a question to the West Virginia Supreme Court, seeking an answer to whether their settlement with Plaintiffs extinguished their claims for contribution. While the Court agrees that this is an important issue of first impression, the Court **FINDS** that it would be inappropriate procedurally to certify the question at this time. Therefore, the Court hereby **DENIES** this request and **CONCLUDES** that the more

appropriate remedy would be an appeal from this Order if Defendants/Third-Party Plaintiffs choose to do so.

III. CONCLUSION

In conclusion, it is hereby **ORDERED AND ADJUDGED** that Defendants/Third-Party Plaintiffs' *Motion for Judgment as a Matter of Law or for New Trial* is **DENIED**. The Court **CONCLUDES** that the jury's verdict in favor of Poerio on the breach of contract claim was proper and supported by the evidence adduced at trial. The Court further **CONCLUDES** that the settlement with Plaintiffs by Modular, McLaughlin, and Poerio extinguished Modular's claim for contribution. Lastly, the Court **CONCLUDES** that it was proper for the jury to consider the negligence of Plaintiff Jarrett Smith in making its determination. The Court hereby **DENIES** Defendants/Third-Party Plaintiffs' request for to certify a question to the West Virginia Supreme Court. The Court **AFFIRMS** that the Judgment Order entered on July 9, 2013, was proper and shall not be overturned.

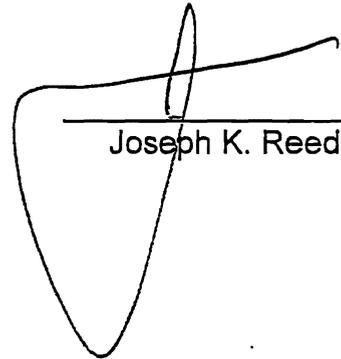
The Court hereby acknowledges and notes the exceptions and objections of Defendants/Third-Party Plaintiffs as aggrieved and as preserved by the parties at the trial of this action and the oral argument held on September 18, 2013.

This is a **FINAL ORDER** in this matter and the Circuit Clerk is thereby ordered to remove this case from the Court's docket. Additionally, the Circuit Clerk shall mail copies of this Order to all the parties on record, including the following parties:

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ENTERED this 12th day of December, 2013.



Joseph K. Reeder, Circuit Judge

STATE OF WEST VIRGINIA
COUNTY OF PUTNAM, SS:

I, Ronnie W. Matthews, Clerk of the Circuit Court of said
County and in said State, do hereby certify that the
foregoing is a true copy from the records of said Court.
Given under my hand and the seal of said Court

this 13 day of Dec, 2013


_____, Clerk
Circuit Court
Putnam County, W.Va. 