

11-0386

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CHRISTOPHER G. SMITH,  
PLAINTIFF,

VS.

ALICIA K. HALCOMB,

DEFENDANT/THIRD-PARTY PLAINTIFF,

VS.

EDWARD KEITH WITHROW,

THIRD-PARTY DEFENDANT.

CIVIL ACTION NO. 08-C-1152

FILED  
2011 JAN 21 PM 3:28  
CATHERINE S. HARRIS, CLERK  
KANAWHA CO. CIRCUIT COURT

**ORDER DENYING DEFENDANT/THIRD-PARTY PLAINTIFF'S  
POST-TRIAL MOTIONS**

On January 10, 2011, came the Plaintiff, by his counsel, Michael J. Del Giudice and the law firm of Ciccarello, Del Giudice & LaFon, and came the Defendant/Third-Party Plaintiff, Alicia K. Halcomb, by her counsel, Gary E. Pullin, Nathan J. Chill and the law firm of Pullin Fowler Flanagan Brown & Poe, upon Defendant/Third-Party Plaintiff's Post-Trial Motions for Judgement Notwithstanding the Verdict and for a New Trial.

The Court, based upon the Motions filed by the Defendant/Third-Party Plaintiff and the response of the Plaintiff thereto, the arguments of counsel on said Motions, the evidence presented at the trial of this matter and the entire file, the Court is of the **OPINION** and does hereby **FIND** as follows:

1. Edward Keith Withrow's name was placed on the jury verdict form for

purposes of determining comparative fault on the causation of the accident at issue. The jury found him to be 0% at fault and Alicia K. Halcomb to be 100% at fault.

2. The evidence presented at trial did not substantiate the necessity of placing Christopher Smith's name on the jury verdict form for purposes of determining fault. He was a backseat passenger without control of the vehicle and was not engaged in any type of joint enterprise or activity with Edward Keith Withrow. Furthermore, Edward Keith Withrow's testimony was that he did not hear Christopher Smith state the intersection was clear and that Edward Keith Withrow began crossing the intersection based upon his own visible inspection of when it was safe. Since the jury determined Edward Keith Withrow was not negligent in crossing the intersection at the time he did, no negligence can be attributed to Christopher Smith.

3. Defendant's Jury Instruction No. 2 was properly refused. There were direct claims and third-party claims involved in this litigation and neither Alicia K. Halcomb or Edward Keith Withrow were entitled to a presumption that they were not negligent. Furthermore, Defendant's Jury Instruction No. 1 adequately instructed the jury that it was the Plaintiff's burden of proof to prove all elements of his claim against Alicia K. Halcomb.

4. Defendant's Jury Instruction No. 6 was properly denied. Plaintiff's

Jury Instruction No. 9 adequately instructed the jury that damages which were speculative could not be recovered. Furthermore, the Defendant/Third-Party Plaintiff's defense in this matter was not that the injuries of Christopher Smith were speculative, but rather they were not caused by the motor vehicle accident.

5. The Court properly gave Plaintiff's Jury Instruction No. 2. There was no objection by the Defendant/Third-Party Plaintiff to Plaintiff's Jury Instruction No. 2. Said instruction is an adequate and correct reading of the law and particularly of West Virginia Code 17-C-6-1(a). Defendant/Third-Party Plaintiff had the opportunity to offer other portions of that statute, but none was offered.

The Court, based upon the findings and facts set forth hereinabove is of the **OPINION** and does hereby conclude as a matter of law that the Defendant/Third-Party Plaintiff's post-trial Motions should be and are hereby **DENIED**. The jury verdict form and the instructions read to the jury were all appropriate under the circumstances of this case and any error that may have occurred was not unfairly prejudicial to the Defendant/Third-Party Plaintiff.

The Court notes the objections of the Defendant/Third-Party Plaintiff to all rulings adverse to her interests and directs the Clerk of the Circuit Court of Kanawha County, West Virginia to send certified copies of this Order to Michael J. Del Giudice, Esq., 1219 Virginia Street, East, Suite 100, Charleston, West Virginia 25301, Gary E. Pullin, Esq. and Nathan J. Chill, Esq., James Mark

Building, 901 Quarrier Street, Charleston, West Virginia 25301 and Edward Keith Withrow, Third-Party Defendant, 2975 Twisted Antler Drive, Lot #10, North Charleston, South Carolina 29406.

Entered this 24<sup>TH</sup> day of Jan., 2011.

[Signature]  
JUDGE

Prepared by:

**CICCARELLO, DEL GIUDICE & LAFON**

By: [Signature]

Michael J. Del Giudice (WV #982)  
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Charleston, West Virginia 25301  
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Attorney for Plaintiff

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, 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 SEAL OF SAID COURT THIS  
DAY OF January 2011  
[Signature] CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Approved as to form by:

**PULLIN FOWLER FLANAGAN BROWN & POE**

By: \_\_\_\_\_

Gary E. Pullin (WV #4528)  
Nathan J. Chill (WV 8793)  
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Attorney for Defendant/Third-Party Plaintiff

Date: 1-27-11  
Certified copies sent to:  
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Other directives accomplished:  
[Signature]  
Clerk

M. Del Giudice  
G. Pullin/N. Chill  
E.K. Withrow