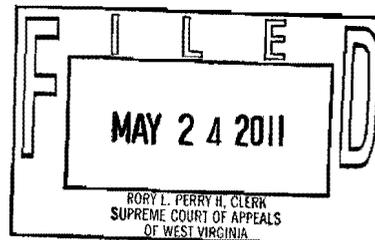

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 11-0386



ALICIA K. HALCOMB,

Defendant/Third-Party Plaintiff Below,
Petitioner

Appeal from a final order
Of the Circuit Court of Kanawha County
(08-C-1152)

v.

CHRISTOPHER G. SMITH,

Plaintiff Below,
Respondent

PETITIONER ALICIA K. HALCOMB'S BRIEF

Counsel for Petitioner, Alicia K. Halcomb

GARY E. PULLIN, ESQUIRE (WVSB #4528)
NATHAN J. CHILL, ESQUIRE (WVSB #8793)
PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
JamesMark Building
901 Quarrier Street
Charleston, West Virginia 25301
Telephone (304) 344-0100
Facsimile (304) 342-1545
Counsel for Petitioner
Alicia K. Halcomb

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

ASSIGNMENTS OF ERROR 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 8

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 10

ARGUMENT 10

A. The Trial Court erred when the jury was improperly not permitted to assess the comparative negligence of Edward K. Withrow and Chris Smith on the jury verdict form presented to the jury.....10

 1. West Virginia law permits the comparative negligence of a guest passenger to be assessed by the jury.....20

 2. West Virginia law permits the comparative negligence of all joint tortfeasors, whether parties to the lawsuit or not, to be assessed by the jury.....25

B. The Trial Court erred in the entry of its August 4, 2009 and October 9, 2009 Orders denying Petitioner Alicia Halcomb’s motion to set aside the settlement agreement between Respondent Christopher Smith and Third-Party Defendant Edward K. Withrow, and Misread and Misapplied W. Va. Code § 55-7-24.....27

C. The Trial Court erred when it refused Petitioner’s jury instruction number.....35

D. The Trial Court erred when it refused Petitioner’s jury instruction number.....36

E. The Trial Court erred when Respondent’s jury instruction number 2 was improperly given to the jury37

CONCLUSION.....38

TABLE OF AUTHORITIES

A. WEST VIRGINIA CASES

<u>Board of Education of McDowell County v. Zando, Martin & Milstead, Inc.,</u> 182 W.Va. 597, 390 S.E.2d 796, (W.Va. 1990).....	34
<u>Bowman v. Barnes</u> , 168 W.Va. 111, 282 S.E.2d 613 (W.Va. 1981)	26
<u>Bradley v. Appalachian Power Co.</u> , 163 W.Va. 332, 256 S.E.2d 879 (W.Va. 1979).....	26
<u>Cline v. White</u> , 183 W.Va. 43, 393 S.E.2d 923 (W.Va. 1990)	26
<u>Farmer v. Knight</u> , 207 W.Va. 716, 536 S.E.2d 140 (W.Va. 2000)	20, 21
<u>Frampton v. Consolidated Bus Lines</u> , 134 W.Va. 815, 62 S.E.2d 126 (W.Va. 1950).....	23
<u>Griffith v. Wood</u> , 150 W.Va. 678, 149 S.E.2d 205 (W.Va. 1966).....	35
<u>Haba v. Big Arm Bar & Grill, Inc.</u> , 196 W.Va. 129, 468 S.E.2d 915 (W.Va. 1996)..	26
<u>Louk v. Isuzu Motors, Inc.</u> , 198 W.Va. 250, 479 S.E.2d 911 (W.Va. 1996)	25, 26
<u>Oney v. Binford</u> , 116 W.Va. 242, 180 S.E.2d 11 (W.Va. 1935).....	23
<u>Raines v. Lindsey</u> , 188 W.Va. 137, 423 S.E.2d 376 (W.Va. 1992)	22
<u>Smith v. Monongahela Power Company</u> , 189 W.Va. 237, 429 S.E.2d 643 (W.Va. 1993).....	9, 28, 29, 30, 34
<u>State ex rel. Vapor Corp. v. Narick</u> , 173 W.Va. 770, 320 S.E.2d 345, (W.Va. 1984).....	34
<u>Stone v. United Engineering, a Div. of Wean, Inc.</u> , 197 W. Va. 347, 475 S.E.2d 439 (W.Va. 1996)	36
<u>Wilson v. Edwards</u> , 138 W.Va. 613, 77 S.E.2d 164 (W.Va. 1953)	22, 23

B. OTHER JURISDICTION CASES

Collins v. McGinley, 558 N.Y.S.2d 979, (N.Y.App.Div.3.Dept. 1990) 24

Howes v. Fultz, 115 Idaho 681, 769 P.2d 558 (Idaho 1989)..... 24

Jorgenson v. Minneapolis, St. P. & S.S. Marie Ry. Co.,
231 Minn. 121, 42 N.W.2d 540 (MINN 1950) 23, 24

Rice v. Merchants Nat. Bank, 213 Ill. App. 3d 790, 801,
157 Ill. Dec. 370, 572 N.E.2d 439, 447 (2d Dist. 1991) 24

C. STATUTES, REGULATIONS, RULES

W. Va. Code § 17C-6-1(a) and (b)..... 37

W. Va. Code §55-7-241, 5, 7, 9-11, 19, 25, 27, 30-35

WV Legis. S.B. 421 (2005)..... 32

Rule 50 of the *West Virginia Rules of Civil Procedure* 3, 6

Rule 59 of the *West Virginia Rules of Civil Procedure* 6

Rev. R.A.P. 18(a) 10

Rev. R.A.P. 19..... 10

D. MISCELLANEOUS

American Jurisprudence, Second Edition, Automobiles and Highway
Traffic, AMJUR AUTOS § 554 20

ASSIGNMENTS OF ERROR

1. The Trial Court erred when the jury was improperly not permitted to assess the comparative negligence of Edward K. Withrow and Christopher Smith on the jury verdict form presented to the jury
2. The Trial Court erred in the entry of its August 4, 2009 and October 9, 2009 Orders denying Petitioner Alicia Halcomb's motion to set aside the settlement agreement between Respondent Christopher Smith and Third-Party Defendant Edward K. Withrow
3. The Trial Court erred when it Misread and Misapplied W. Va. Code § 55-7-24
4. The Trial Court erred when it refused Petitioner's jury instruction number 2
5. The Trial Court erred when it refused Petitioner's jury instruction number 6
6. The Trial Court erred when Respondent's jury instruction number 2 was improperly given to the jury

STATEMENT OF THE CASE

This case arises from a motor vehicle accident that occurred on or about February 16, 2007, wherein Plaintiff Below (Respondent) Christopher Smith was a passenger in a vehicle operated by Third-Party Defendant Edward Keith Withrow, Jr. Mr. Withrow's vehicle, traveling southbound on Mountaineer Boulevard, proceeded from a stop sign and into the intersection of Southridge Boulevard and Mountaineer Boulevard, and collided with a vehicle operated by Defendant/Third-Party Plaintiff Below (Petitioner) Alicia Halcomb, who was proceeding eastbound on Southridge Boulevard from US 119, without a stop sign. The two vehicles collided in the intersection with the front of Ms. Halcomb's vehicle striking the right rear quarter panel of Mr. Withrow's vehicle.

On or about June 12, 2008, Respondent Chris Smith filed his *Complaint* in the above-styled civil action against Alicia Halcomb, alleging that she was liable for injuries and damages to the Respondent Chris Smith as a result of the events related to the aforementioned automobile accident. See Exh. A, Respondent's Complaint.

On or about August 26, 2008, Alicia Halcomb filed her Answer to Respondent's Complaint, denying any liability for the accident. *See* Exh. B, Petitioner's Answer and Certificate of Service.

Petitioner filed an Amended Third-Party Complaint against Edward Keith Withrow, Jr. on May 27, 2009, alleging that Mr. Withrow was solely responsible for the accident and seeking indemnity and/or contribution from Mr. Withrow as well as reimbursement for property damage to Ms. Halcomb's vehicle. *See* Exh. C, Petitioner's Amended Third Party Complaint.

Prior to trial, Christopher Smith settled his personal injury claims with Mr. Withrow for the nominal sum of \$100.00. *See* Exh. D, Notice of Settlement, dated June 10, 2009.

On June 19, 2009, Petitioner filed a motion to challenge and set aside Respondent's settlement with Edward Keith Withrow Jr., in which Petitioner objected to the settlement on the basis that it was not a good faith settlement. *See* Exh. E, Motion to Challenge and Set Aside Settlement.

On June 22, 2009, the Court entered an order dismissing Edward Keith Withrow as a Third-Party Defendant, entered solely upon the basis of Respondent's counsel's assertions in his notice of settlement that the settlement was effected in good-faith. *See* Exh. F, Dismissal Order.

On June 23, 2009, Petitioner filed a supplement to her motion to challenge and set aside Respondent's settlement with Mr. Withrow. *See* Exh. G, Supplement to Motion.

On July 08, 2009, Respondent filed his response to Petitioner's motion to challenge and set aside Respondent's settlement with Mr. Withrow. *See* Exh. H, Respondent's Response to Motion to Challenge and Set Aside Settlement.

On July 09, 2009, the Court heard oral arguments on Petitioner's motion to challenge and set aside Respondent's settlement with Mr. Withrow.

Judge King upheld the settlement as done in good faith, and denied Ms. Halcomb's motion to set aside this settlement in Orders dated August 4, 2009 and October 9, 2009, preserving Petitioner's objections. The Orders dismissed Mr. Withrow from any and all claims regarding personal injuries sustained by Chris Smith, over objection from Respondent's counsel, but ordered that Mr. Withrow would remain as a Defendant in the case only for Ms. Halcomb's property damage claims against him. *See Exhibits I and L, Orders*¹

The case proceeded to trial on November 1, 2010, and concluded on November 8, 2010.

On November 4, 2010, Respondent completed presenting his evidence and rested. At this time, counsel for Petitioner moved the Court pursuant to Rule 50 of the *West Virginia Rules of Civil Procedure* for Judgment as a Matter of Law, and argued to the Court that Respondent had been fully heard by the Jury on the issue of liability and that there was no legally sufficient evidentiary basis for a reasonable jury to find for Respondent on the issue that Ms. Halcomb was liable for the subject accident. The Court denied Petitioner's motion. *See Exh. X, trial transcript, p.231, lines 10-18.*

On November 5, 2010, after the Petitioner completed presenting her evidence and rested, she renewed her motion for Judgment as a Matter of Law pursuant to Rule 50 of the *West Virginia Rules of Civil Procedure* on the same grounds presented at the close of Respondent's evidence. The Court again denied Petitioner's motion. *See Exh. X, trial transcript, p.365, line 16 through p. 366, line 2.*

After hearing jury instructions, and closing arguments of counsel, the case was given to the jury on November 5, 2010. *See Exh. M, Jury Charge.* The jury adjourned that day and announced it would commence deliberations on November 8, 2010.

¹ It is noted that a motion for reconsideration of the August 4, 2009 order was filed by Petitioner, who argued that certain findings contained within the order were not appropriate, specifically those relating to there not being an issue of liability relating to Chris Smith. The Court agreed that there was in fact an issue of disputed fact relating to the liability of Chris Smith, as evidenced by the entry of the 10/09/09 corrected order, which removed paragraphs containing language that Chris Smith's liability was not in dispute. *See Exhibits. J and K, Motion for Reconsideration of the 8/04/09 Order and Transcript of the hearing on the motion for reconsideration that occurred on 9/28/09.*

Evidence was presented at trial indicating compelling evidence of the negligence of Edward Withrow in causing the subject accident. In addition, the evidence presented at trial also indicated the comparative negligence of Chris Smith in causing the subject accident. While sitting at the stop sign of the subject intersection, Chris Smith said to Mr. Withrow, "It's clear, let's go." Mr. Smith also testified that after he said to Mr. Withrow, "it's clear, let's go," Mr. Withrow started out through the intersection:

Q. Okay. And when you were sitting there at the stop sign, you said to Mr. Withrow, "It's clear, let's go"?

A. When it was clear, I told him . . .

* * * *

Q. So after you said to Mr. Withrow, "it's clear, let's go," he then started out through the intersection?

A. Right.

See Exh. X, trial transcript, at p.205, line 10 through p. 207, line 7 (Chris Smith). *See Also, Id.* at p.170, line 15 through p.171, line 9.

Chris Smith also testified that he eventually saw Ms. Halcomb's vehicle, but he did not testify that he ever said anything to Mr. Withrow about the vehicle coming towards them. *See* Exh. X, trial transcript, at p.172, lines 17-24, p. 173, line 1 (Chris Smith).

Again, after sitting at the stop sign for at least a minute, Mr. Smith verbally informed Mr. Withrow that the intersection was "clear," and instructed Mr. Withrow to "go," and Mr. Withrow in fact pulled out into the intersection and collided with Ms. Halcomb who was traveling on Southridge Boulevard through the subject intersection toward Marquee cinemas.

On November 8, 2010, Petitioner objected to the verdict form that the Court ruled would be presented to the Jury on the basis that it did not allow the jury to assess the comparative negligence

of Christopher Smith and Edward Keith Withrow with regard to liability for the accident itself. Petitioner cited relevant West Virginia law which provides that the jury may assess the negligence of all parties who may be negligent in the matter, including guest passengers. The Court ruled that West Virginia Code §55-7-24 does not require the jury to assess the comparative negligence of all parties at fault. The Court further ruled that under the facts of this case, the negligence would only be apportioned between Ms. Halcomb and the driver of the car, Mr. Withrow, and not Mr. Smith as a guest passenger. Petitioner objected to these rulings of the Court. *See* Exh. X, trial transcript, p.435-437.

It is noted that Edward K. Withrow appears on the actual jury verdict form for a liability allocation related solely to Alicia Halcomb's Third-Party claim for property damage against Edward Withrow. Neither Mr. Withrow's nor Mr. Smith's liability for the subject accident and the damages claimed by the Respondent were permitted to be assessed by the jury, as the Trial Court did not allow a line of the jury verdict form for the liability assessment of either Mr. Withrow or Mr. Smith.

Evidence was presented to the Jury during the trial that clearly created an issue of fact as to the comparative negligence of Christopher Smith and Edward K. Withrow in causing the subject accident. Petitioner submitted a proposed Jury Verdict Form which would have allowed the jury to consider and apportion the negligence, if any, of Alicia Halcomb, Edward Withrow and Christopher Smith. *See* Exh. R, Petitioner's Proposed Jury Verdict Form. Again, the Court refused Petitioner's jury verdict form holding that the negligence of Edward Withrow and Christopher Smith was not an issue with regard to the cause of action asserted by Respondent Christopher Smith, even after the Court was presented with law supporting the admission of evidence regarding the comparative negligence of guest passenger Chris Smith and Edward K. Withrow. *See* Exh. Q, Bench Brief. *See Also* Exh. X, trial transcript, p.435-437. As a result, the Jury was only allowed to consider the

negligence of Petitioner Alicia Halcomb in assessing liability for the subject accident and Respondent Chris Smith's alleged damages.

The Court also refused Petitioner's jury instructions numbers 2 and 6 and gave Respondent's jury instruction number 2 over Petitioner's objection. *See* Exhibits N, O and P. Petitioner's proposed jury instructions numbers 2 and 6, Respondent's proposed jury instruction 2. *See Also* Exh. X, trial transcript, at p.433, line 21 through p.463, line 5.

On November 8, 2010, the jury deliberated and returned a verdict in favor of Respondent Christopher Smith against Petitioner Alicia Halcomb in the amount of \$573,542.32. *See* Exh. S, Jury Verdict Form.

Judge King entered the judgment order in this case on November 16, 2009. *See* Exh. T, Judgment Order.

On November 23, 2010, Petitioner Alicia Halcomb filed her Motion for Judgment as a Matter of Law or in the Alternative Petitioner's Motion for New Trial and a Memorandum of Law in support thereof, moving the Court, pursuant to Rules 50 and 59 of the *West Virginia Rules of Civil Procedure*, for judgment as a matter of law or in the alternative to grant a new trial, on the following grounds:

- (A) the jury was improperly not permitted to assess the comparative negligence of Edward K. Withrow and Chris Smith on the jury verdict form presented to the jury,
- (B) Petitioner's jury instructions number 2 and 6 were improperly refused to be given to the jury, and
- (C) Respondent's jury instruction number 2 was improperly given to the jury.

See Exh. U, Motion for Judgment as a Matter of Law or in the Alternative Petitioner's Motion for New Trial and Memorandum of Law.

Respondent filed his memorandum of Law in Opposition to Petitioner Alicia K. Halcomb's Post-Trial Motions for Judgment and/or New Trial on January 5, 2011. *See* Exh. V, Respondent's Memorandum of Law in Opposition to Petitioner's Motion.

On January 24, 2011, Judge King entered an Order denying Petitioner's post-trial motions. (*See* Exh. W, Order Denying Petitioner/Third-Party Plaintiff's Post-Trial Motions).

Petitioner, Alicia K. Halcomb, appeals from the following rulings of the Kanawha County Circuit Court below:

(1) the August 04, 2009 Order denying Petitioner's motion to challenge and set aside Respondent's settlement with Third-Party Defendant Edward Keith Withrow, Jr.; dismissing Mr. Withrow from any and all claims regarding personal injuries sustained by the Plaintiff, but Ordering that Mr. Withrow will remain as a Defendant for Ms. Halcomb's property damage claims against him.

(2) the October 09, 2009 Corrected Order denying Petitioner's motion to challenge and set aside Respondent's settlement with Third-Party Defendant Edward Keith Withrow, Jr.; dismissing Mr. Withrow from any and all claims regarding personal injuries sustained by the Plaintiff, but Ordering that Mr. Withrow will remain as a Defendant for Ms. Halcomb's property damage claims against him.

(3) the November 16, 2010 Judgment Order entering the jury verdict; and

(4) the January 20, 2011 Order Denying Petitioner / Third-Party Plaintiff's Post-Trial Motions

Petitioner also seeks relief from certain errors committed during the trial of this matter, including the improper and/ or non-application of W. Va. Code §55-7-24, the improper presentation of a Jury Verdict Form to the Jury that did not permit the Jury to assess the liability and comparative

negligence of Chris Smith and Edward K. Withrow for the subject accident and resultant damages to Chris Smith, and the improper refusal of Petitioner's proposed Jury Instructions numbers 2 and 6, as well as the improper giving of Respondent's proposed Jury Instruction number 2.

SUMMARY OF ARGUMENT

First, the Trial Court erred when the jury was improperly not permitted to assess the comparative negligence of Edward K. Withrow and Chris Smith on the jury verdict form presented to the jury. The Trial Court ruled that under the facts of this case, the negligence for the accident and Plaintiff's resulting injuries would only be apportioned between Ms. Halcomb and the driver of the car, Mr. Withrow, and not Mr. Smith as a guest passenger. The Trial Court erred because West Virginia law permits the comparative negligence of a guest passenger to be assessed by the jury, as well as the comparative negligence of all joint tortfeasors, whether parties to the lawsuit or not, to be assessed by the jury.

It was clearly for the jury to determine whether it was negligent for Mr. Withrow to pull out into the subject intersection. Likewise, it was clearly an issue of fact for a jury to determine whether it was negligent for Christopher Smith to instruct Mr. Withrow to pull out into the subject intersection. As such, the jury should have been able to consider this testimony and apportion whatever percentage of comparative fault to Chris Smith for his negligent actions in causing the subject accident as the jury deemed appropriate. The trier of fact should have been permitted on the jury verdict form to make a determination as to whether their actions caused and/or contributed to the subject accident and apportion negligence between Edward Withrow, Christopher Smith and Alicia Halcomb.

Second, the Petitioner argues that the Trial Court erred in the entry Orders denying Petitioner's motion to set aside the settlement agreement between Respondent Christopher Smith and

Third-Party Defendant Edward K. Withrow. Petitioner argues that that the settlement was not in “good-faith,” when examined in light of the various factors set forth in *Smith v. Monongahela Power Company*, 189 W.Va. 237, 429 S.E.2d 643 (W.Va. 1993) which may be relevant to determining whether a settlement lacks good faith. For example, Mr. Withrow’s settlement with Plaintiff for \$100 in comparison to his potential liability is grossly unproportional. The verdict in the underlying case was in excess of \$500,000. Furthermore, the evidence presented at trial clearly shows that Mr. Withrow is a primary tortfeasor in this civil action. Further, a relationship between Mr. Smith and Mr. Withrow exists that is naturally conducive to collusion. Also, the nominal settlement of Mr. Withrow’s claims impaired the ability of Ms. Halcomb from receiving a fair trial. In addition, the motivation of Respondent and Mr. Withrow to settle was to single out Ms. Halcomb, as a non-settling defendant for wrongful tactical gain. Respondent clearly attempted to circumvent the joint and several liability apportionment statute embodied at W. Va. Code § 55-7-24 in an attempt to proceed against the only insured defendant, Alicia Halcomb.

Third, the Petitioner asserts that the Trial Court also erred when it misread and misinterpreted W. Va. Code § 55-7-24 when it ruled that the statute does not apply when there is only one defendant at the trial. It is this Petitioner’s position that since the subject settlement was not in good faith, Mr. Withrow was, and should have, at minimum, been found by the Trial Court to be, pursuant to W. Va. Code § 55-7-24, “in the litigation at the time the verdict is rendered,” and should have been on the jury verdict form along with Ms. Halcomb and Mr. Smith for liability assessment by the Jury.

Petitioner also argues that the clear reading of W. Va. Code § 55-7-24 in light of the equitable legislative intent is that W. Va. Code § 55-7-24 should have been applied to require the jury to *assess the proportion at fault of each of the parties in the litigation (Mr. Withrow, Mr. Smith and Ms. Halcomb), at the time the verdict is rendered.*

In other words, pursuant to the clear language of the statute, once a civil action involves the tortious conduct of more than one defendant, the Court is then required to instruct the jury, pursuant to section (a)(1) to assess the proportion at fault of each of the parties in the litigation. **This whole process is to be performed and occur “at the time the verdict is rendered.”** The language “*at the time the verdict is rendered*” does not mean only those defendants left in the case at the end should have their liability assessed. Instead, this phrase “*at the time the verdict is rendered*” communicates when the apportionment process is to occur among all parties in the litigation.

Fourth, the Trial Court erred when Petitioner’s jury instruction numbers 2 and 6 were improperly refused to be given to the jury

Fifth, The Trial Court erred when Respondent’s jury instruction number 2 was improperly given to the jury

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral Argument is necessary pursuant to the criteria in Rev. R.A.P. 18(a). Pursuant to Rev. R.A.P. 19, this case is suitable for, and the Petitioner specifically requests, oral argument to be held regarding this Petition and disposition by memorandum decision. This case is suitable for Rule 19 argument because it involves assignments of error in the application of settled law.

ARGUMENT

A. The Trial Court erred when the jury was improperly not permitted to assess the comparative negligence of Edward K. Withrow and Chris Smith on the jury verdict form presented to the jury

The trial court erred when it did not allow a place on the Jury Verdict form in this case for the jury to assess the comparative negligence of Chris Smith and Edward Withrow.

On November 8, 2010, Petitioner objected to the verdict form that the Court ruled would be presented to the Jury on the basis that it did not allow the jury to assess the comparative negligence

of Christopher Smith and Edward Keith Withrow with regard to liability for the accident and the damages alleged by the Respondent. Petitioner cited relevant West Virginia law which provides that the jury may assess the negligence of all parties who may be negligent in the matter, including guest passengers. The Court ruled that West Virginia Code §55-7-24, the joint and several liability apportionment statute, does not require the jury to assess the comparative negligence of all parties at fault.² The Court further ruled that under the facts of this case, the negligence would only be apportioned between Ms. Halcomb and the driver of the car, Mr. Withrow, and not Mr. Smith as a guest passenger. Petitioner objected to these rulings of the Court. *See* Exh. X, trial transcript, p.435-437.

Edward K. Withrow does appear on the jury verdict form, but only for a liability allocation related solely to Alicia Halcomb's Third-Party claim for property damage against Edward Withrow. Neither Mr. Withrow's nor Mr. Smith's liability for the subject accident and Mr. Smith's claim for damages was permitted to be assessed by the jury, as the Trial Court did not allow a line of the jury verdict form for the liability assessment of either Mr. Withrow or Mr. Smith.

Evidence was presented to the Jury during the trial that clearly created an issue of fact as to the comparative negligence of Christopher Smith and Edward K. Withrow in causing the subject accident.

Evidence of Negligence of Edward K. Withrow Jr. and Chris Smith

It is undisputed that every lane of travel in the four way intersection of Southridge Boulevard and Mountaineer Boulevard where the accident occurred had a stop sign, except the lane of travel of Alisha K. Halcomb, who had turned off Corridor G onto Southridge Boulevard proceeding eastbound towards Marquee Cinemas through the subject intersection. The vehicle operated by

² This statute is discussed in depth later in this brief relating to the settlement between Mr. Smith and Mr. Withrow.

Petitioner Alisha K. Halcomb did not have a stop sign at the four way intersection where the accident occurred. *See* Exh. X, trial transcript, at p.292, lines 20-22 “The traffic coming in [off of 119] does not stop. It doesn’t have any [stop] signs or anything like that . The other three ways do have stops.” (Officer Benjamin Paschall).

Alisha K. Halcomb had the right of way at this intersection. In fact, Mr. Withrow testified he knew that Ms. Halcomb had the right-of-way at this particular intersection:

Q. And so you know that you had to yield to the traffic coming off of 119 when you are sitting there at that stop sign?

A. Yes.

Q. No doubt about that?

A. Absolutely

See Exh. Y, trial transcript, Vol. 2, at p.91, lines 18-23 (Edward Keith Withrow).

The testimony in this case was that all occupants of the Withrow vehicle were eating at Famous Dave’s at Southridge Shopping Center in South Charleston, WV. The occupants of the Withrow vehicle were Edward K. Withrow, the driver, and passengers Chris Smith, James Pauley and Tim White. *See* Exh. Y, trial transcript, Vol. 2, at p.57, lines 1-11 (James Pauley). Mr. Smith and Mr. Pauley had to be at work at Smokey Bones at 5:00 p.m. *See* Exh. Y, trial transcript, Vol. 2, at p.55, line 24 through p.56, line2, p.58 lines 12-13 (James Pauley). They left Famous Daves with the intention of dropping Mr. Smith and Mr. Pauley off for work at Smokey Bones. *See* Exh. Y, trial transcript, Vol. 2, at p.58, lines 3-11 (James Pauley). *See Also* Exh. Y, trial transcript, Vol. 2, at p.73, lines 15-22 (Edward Keith Withrow). Either James Pauley or Chris Smith had mentioned to Edward Keith Withrow at Famous Dave’s that Mr. Pauley and Mr. Smith had to be at work at Smokey Bones, in an attempt to make sure that Mr. Withrow knew that he did not have time to eat at Famous Dave’s before he dropped them off at work. *See* Exh. Y, trial transcript, Vol. 2, at p.73, lines 15-22 (Edward Keith Withrow). *See Also* Exh. X, trial transcript, at p.203, line 24; p.204,

lines 1-5 (Chris Smith).

When they left Famous Dave's, it was after 5:00. *See* Exh. Y, trial transcript, Vol. 2, at p.73, lines 20-22 (Edward Keith Withrow). *See Also* Exh. X, trial transcript, at p.203, lines 19-23 (Chris Smith). They proceeded in the Withrow vehicle southbound on Mountaineer Boulevard to the stop sign at the intersection of Mountaineer Boulevard and Southridge Boulevard. They sat at the stop sign at this intersection waiting for traffic to clear so that Mr. Withrow could cross the intersection and proceed to take Mr. Smith and Mr. Pauley to work. Traffic was very heavy at this time. *See* Exh. X, trial transcript, at p.111, lines 18-19 (Shelly Newman). *See Also* Exh. Y, trial transcript, Vol. 2, at p.17, lines 4-5 (Jay Eisner – “[traffic] was frustrating because of that time of the day.”). *See Also* Exh. Y, at p.29, lines 20-23, (Eric Stanley). *See Also* Exh. Y, trial transcript, Vol. 2, at p.58, lines 17-22, (James Pauley). *See Also* Exh. X, trial transcript, at p.204, lines 20-23 (Chris Smith). *See Also* Exh. X, trial transcript, at p.278, lines 13-14 (Patricia Wigle).

Mr. Withrow sat at the stop sign for quite a while. *See* Exh. X, trial transcript, at p.112, lines 15-18 (Shelly Newman – at least a minute). *See Also* Exh. Y, trial transcript, Vol. 2, at p.23, lines 18-21, p. 24, lines 6-9. (Jay Eisner – sat there for quite some period of time . . . frustrated for setting there so long). *See Also* Exh. X, trial transcript, at p.170, line 21; p.205, lines 4-6(Chris Smith – “we sat there for a minute. . .”).

Mr. Withrow testified at trial as follows:

- Q. How long do you believe that you were waiting there (at the stop sign of the subject intersection) for an opportunity to cross?
- A. I think it was over a minute. I was there for quite some time and I was there long enough to realize that it was 5:00 and I am going to have to wait forever. I was kind of getting aggravated because I was thinking I may have to go a different way because there was so much traffic. But as soon as I started that I might turn around and go a different direction, there was a break in the traffic. And so I had a clear shot and I took it.

See Exh. Y, trial transcript, Vol. 2, at p.75, lines 6-15 (Edward Keith Withrow).

Again, at this point, it was already after 5:00 p.m. The Accident occurred at 5:12 p.m. See Exh. X, trial transcript, at p.291, lines 1-5 (Officer Benjamin Paschall). At this point, according to passenger James Pauley, Mr. Pauley and Mr. Smith were already late for work:

Q. If I told you this accident happened at 5:12 p.m. then when you were at the intersection you and Mr. Smith were already late for work is that right?

A. Yeah.

Q. And you don't disagree with the accident report that says the accident happened at 5:12 p.m.?

A. No, sir.

See Exh. Y, trial transcript, Vol. 2, at p.58, line 23 through p. 59, line 5, (James Pauley).

While sitting at the stop sign of the subject intersection, Chris Smith said to Mr. Withrow, "It's clear, let's go." Mr. Smith also testified that after he said to Mr. Withrow, "it's clear, let's go," Mr. Withrow started out through the intersection:

Q. Okay. And when you were sitting there at the stop sign, you said to Mr. Withrow, "It's clear, let's go"?

A. When it was clear, I told him . . .

* * * *

Q. So after you said to Mr. Withrow, "it's clear, let's go," he then started out through the intersection?

A. Right.

See Exh. X, trial transcript, at p.205, line 10 through p. 207, line 7 (Chris Smith). See Also, *Id.* at p.170, line 15 through p.171, line 9.

Chris Smith also testified that he eventually saw Ms. Halcomb's vehicle, but he did not testify that he ever said anything to Mr. Withrow about the vehicle coming towards them. See Exh.

X, trial transcript, at p.172, lines 17-24, p. 173, line 1 (Chris Smith).

Mr. Withrow testified that immediately after the impact, “I didn’t know if I had pulled out in front of somebody. I just never seen and to this day, I have never seen the car that hit me.” *See* Exh. Y, trial transcript, Vol. 2, at p.79, lines 4-7 (Edward Keith Withrow).

Further, Mr. Withrow and James Pauley both testified that Mr. Withrow apologized to the passengers in his vehicle immediately after the accident, and also apologized to Ms. Halcomb. *See* Exh. Y, trial transcript, Vol. 2, at p.79, lines 12-13 “I said I’m sorry guys I am going to get help, I don’t know what happened. . .” (Edward Keith Withrow). *See Also* Exh. Y, trial transcript, Vol. 2, at p.61, lines 4-9, (James Pauley). *See Also*, Exh. X, trial transcript, at p.247, lines 10-13 “he came up to me, and he said I’m sorry” (Alicia Halcomb).

It is undisputed that Mr. Withrow had no automobile insurance and was driving on a suspended license at the time of the accident. *See* Exh. Y, trial transcript, Vol. 2, at p.83, lines 19-20. (Edward Keith Withrow).

Responding Officer Ben Paschall issued Mr. Withrow a citation for reckless driving regarding the subject accident. *See* Exh. Y, trial transcript, Vol. 2, at p.83, lines 10-11. (Edward Keith Withrow). Officer Paschall did not issue Alicia Halcomb a citation as a result of this accident.

Alicia Halcomb testified that she was stopped at the red light on 119, in the far right lane. When the light turned green, Ms. Halcomb made a left-hand turn onto Southridge Boulevard and remained in the right hand lane heading toward Marquee cinemas. (*See* Exh. X, trial transcript, at p.241, line 17 through p. 242, line 18 (Alicia Halcomb). She was driving at a normal, non-excessive speed. *Id.* at p.245, line 9-12; p. 267, lines 13-19. As she approached the subject intersection, when she was right at the intersection, the car driven by Mr. Withrow shot across the intersection at a high

rate of speed and darted in front of her. *See* Exh. X, trial transcript, at p.240, line 19 through p. 241, line 3; p.243, line 3-17; p.247, line 19 through p.248, line 1 (Alicia Halcomb).

Ms. Halcomb immediately applied her brakes, but because Mr. Withrow's car was so close to her, she was not able to avoid hitting him. She also did not have any time to try and swerve or take any other evasive measures to prevent her vehicle from impacting with Mr. Withrow's vehicle. *See* Exh. X, trial transcript, at p.244, line 14 through p. 245, line 8; p.248, lines 2-5 (Alicia Halcomb).

Patricia Wigle was a passenger in a vehicle two vehicles behind Ms. Halcomb the entire time from the stoplight on 119 until the accident occurred. *See* Exh. X, trial transcript, at p.276, line 23 through p. 277, line 22 (Patricia Wigle). Ms. Wigle testified that Ms. Halcomb was traveling at a normal, non-excessive speed. *See* Exh. X, trial transcript, at p.279, line 20 through p. 280, line 4 (Patricia Wigle). She testified that she saw the Withrow vehicle moving very quickly, faster than normal, across the intersection, when the vehicle she was traveling in was approximately half way between 119 and the subject intersection. She also testified that that Ms. Halcomb was already at or in the intersection when Mr. Withrow began pulling out into the intersection at a high rate of speed. *See* Exh. X, trial transcript, at p.280, line 5 through p.281, line 14 (Patricia Wigle).

Shelly Newman, another witness driving a car behind the Withrow vehicle, testified that Mr. Withrow "cross[ed] the intersection quickly." . (*See* Exh. X, trial transcript, at p.116, lines 21, 22. (Shelly Newman).

Edward Withrow himself admitted that he crossed the intersection quickly:

I was trying to cross quickly because the traffic was bad that day and I wanted to take the opportunity while it was clear to get across, I was only trying to go quickly because of the type of intersection that it is .

..

See Exh. Y, trial transcript, Vol. 2, at p.82, lines 7-10. (Edward Keith Withrow).

There was another car at a stop sign directly across from Mr. Withrow. Neither this car nor any of the other cars at that intersection that had stop signs attempted to cross the same intersection when Mr. Withrow attempted to cross. *See* Exh. X, trial transcript, at p.119, lines 21-24, p.120, lines 1-5. (Shelly Newman). *See Also* Exh. Y, trial transcript, Vol. 2, at p.24, lines 10-13 (Jay Eisner). *See Also* Exh. Y, trial transcript, Vol. 2, at p.91, line 24 through p. 92, line 3. (Edward Keith Withrow). *See Also* Exh. X, trial transcript, at p.243, line 24 through p. 244, line 3 (Alicia Halcomb).

The clear implication of this evidence is that when Ms. Halcomb started coming off 119, leading another line of traffic onto Southridge Boulevard, Mr. Withrow and Mr. Smith realized that if they did not beat Ms. Halcomb across the intersection, they were going to have to wait until the light turned red again, and be even later for work. Mr. Withrow and Mr. Smith simply took a chance that they could beat Ms. Halcomb across the intersection. Again, it is noted that the Court did not even permit the Jury to consider this negligence of Chris Smith and Edward K. Withrow on the jury verdict form.

Petitioner submitted a proposed Jury Verdict Form which would have allowed the jury to consider and apportion the negligence, if any, of Alicia Halcomb, Edward Withrow and Christopher Smith. *See* Exh. R, Petitioner's Proposed Jury Verdict Form. Again, the Court refused Petitioner's jury verdict form holding that the negligence of Edward Withrow and Christopher Smith was not an issue with regard to the cause of action asserted by Respondent Christopher Smith. The Petitioner presented the Court with law supporting the admission of evidence regarding the comparative negligence of guest passenger Chris Smith and Edward K. Withrow. *See* Exh. Q, Bench Brief. *See Also* Exh. X, trial transcript, p.435-437. As a result, the Jury was only allowed to consider the negligence of Petitioner Alicia Halcomb in assessing liability for the subject accident and

Respondent Chris Smith's alleged damages.

Petitioner's proposed Jury Verdict Form presented to the Court stated the following, in part:

1. Do you the jury find from a preponderance of the evidence that the defendant, Alicia K. Halcomb, was guilty of negligence which proximately caused or contributed to the automobile accident on February 16, 2007 and the injuries and damages alleged by the plaintiff, Christopher G. Smith?

_____ Yes _____ No

....

2. Do you the jury find by a preponderance of the evidence that Edward K. Withrow was guilty of negligence which proximately caused or contributed to the injuries and damages alleged by the Plaintiff, Christopher G. Smith?

_____ Yes _____ No

....

3. Do you the jury find by a preponderance of the evidence that the plaintiff, Christopher G. Smith, was guilty of negligence which proximately caused or contributed to the injuries and damages he has alleged?

_____ Yes _____ No

4. Using a combined negligence of 100%, please assess the proportions of percentages of negligence or fault of each of the respective parties.

<u>Name of Party</u>	<u>Percentage of Negligence</u>
Edward K. Withrow, Jr.	_____ %
Christopher G. Smith	_____ %
Alicia K. Halcomb	_____ %
TOTAL	<u>100</u> %

See Exh. R, Petitioner's proposed jury verdict form.

Again, the Trial Court refused this proposed jury verdict form, ruling that Mr. Smith and Mr. Withrow should not be on the jury verdict form for purposes of the jury assessing whether they were guilty of negligence which proximately caused or contributed to the injuries and damages alleged by the Plaintiff.

The actual jury verdict form presented to the jury stated as follows, in part, regarding liability for the subject accident and damages to Chris Smith:

1. Was the Defendant, Alicia K. Halcomb, negligent in the operation of her motor vehicle on February 16, 2007?

_____ Yes _____ No

.....
2. Do you find that the negligence of Alicia K. Halcomb proximately caused the injury to the Plaintiff, Christopher Smith?
_____ Yes _____ No

.....
3. What amount of damages do you award to Christopher Smith?

See Exh. S, Petitioner’s proposed jury verdict form.

The Trial Court based its decision to omit Mr. Withrow from the jury verdict form from accident liability assessment on its ruling that as Edward Withrow had settled in “good-faith,” he was no longer a party to the lawsuit for liability purposes regarding personal injuries sustained by the Plaintiff.

The Trial Court based its decision to omit Mr. Smith from the jury verdict form from accident liability assessment on its ruling that as Chris Smith was a “guest passenger,” he could not be found comparatively negligent in causing the accident.

As set forth above, sufficient evidence was presented at trial for a Jury to find that the negligence of Edward Withrow and Chris Smith caused or contributed to the subject accident. The Trial Court clearly committed reversible error when it did not permit the jury to assess the comparative negligence of Edward K. Withrow and Chris Smith for causing or contributing to the subject accident and resultant injuries and damages alleged by Chris Smith.

The Petitioner believes the trial court erred when it ruled that Plaintiff’s comparative negligence should not be considered because he was a “guest passenger.”

The Petitioner also believes that the trial court erred when it ruled that Edward Withrow’s comparative negligence should not be considered because he was not an actual party to lawsuit at the time of trial. The Court based its ruling on the language of W. Va. Code § 55-7-24, which is discussed later in this brief in relation to another assignment of error.

It was clearly for the jury to determine whether it was negligent for Mr. Withrow to pull out into the subject intersection when he did. Likewise, it was clearly an issue of fact for a jury to determine whether it was negligent for Christopher Smith to instruct Mr. Withrow to pull out into the subject intersection at the time he did so.

1. West Virginia law permits the comparative negligence of a guest passenger to be assessed by the jury

It is clear that West Virginia law permits the comparative negligence of a guest passenger such as Chris Smith to be assessed by the jury.

As previously stated, the Trial Court ruled that Chris Smith's comparative negligence should not be considered because he was a "guest passenger." Petitioner asserts that this ruling by the Trial Court was clearly erroneous.

There is no law in West Virginia that prohibits a jury from weighing evidence regarding the comparative negligence of a party simply because he/she is a guest passenger.

To the contrary, there is a volume of legal authority that works to permit a jury to consider the comparative fault of a guest passenger for similar actions. "Ordinarily, the issue of whether a guest in a vehicle involved in an accident was negligent is one for the jury to decide in light of all the surrounding facts and circumstances..." *American Jurisprudence, Second Edition, Automobiles and Highway Traffic, AMJUR AUTOS § 554*; Duty of passenger to take action prevent injury to him or herself

a) *Farmer v. Knight*, 207 W.Va. 716, 536 S.E.2d 140 (W. Va. 2000)

In *Farmer*, a guest passenger, who was injured in single-car accident when the car slid off of an icy road into a hillside, brought a negligence action against the driver and against the driver's mother under the family purpose doctrine. The Circuit Court of Logan County entered judgment on

the jury verdict, apportioning 51% negligence to driver and mother and 49% negligence to the passenger, resulting in a net verdict of \$3,031.95. The guest passenger appealed, and the Supreme Court of Appeals held that the passenger's admission that she was aware of the dangerous road conditions, and that she had the opportunity to get out the car before the driver made the first attempt to drive up an icy hill was sufficient evidence to support a verdict finding that the guest passenger assumed the risk of injury and was 49% negligent.

In rendering this holding, the Court stated that “the issue for the jury to decide was whether [the guest passenger] participated in or concurred with the decision to drive up the hill.” *Id.* at 719, 143. The issue of the guest passenger’s negligence was presented the jury. The evidence was as follows:

[The driver] testified that [the guest passenger] never attempted to get out of the car after it slid the first time, nor did [she] ask [the driver] not to try to drive up the hill again. [The driver] claimed that [the guest passenger] never said to stop the car or park at the bottom of the hill. To the contrary, [the guest passenger] testified that she told [the driver] to park the car at the bottom of the hill and they would walk up to her house. She said that [the driver] told her they could make it and did not give her time to get out of the car before starting up the hill a second time. However, [the guest passenger] conceded that she could have gotten out of the car before they tried to drive up the hill the first time.

The jury weighed the evidence and found the guest passenger 49% liable. The Supreme Court upheld the jury’s finding that the guest passenger did in fact participate in and/or concur with the decision to drive up the hill:

Apparently, the jury believed that Farmer had in fact assumed some risk of injury and was almost at fault as much as Knight was for the accident. During her testimony, Farmer admitted that she was aware of the dangerous road conditions and that she had the opportunity to get out the car before Knight tried to drive up the hill the first time. Given this evidence, we do not find the jury's verdict finding that the appellant assumed the risk of injury plainly wrong.

Id. at 720, 144.

b) *Raines v. Lindsey*, 188 W.Va. 137, 423 S.E.2d 376 (W.Va. 1992)

In *Raines*, a suit was brought seeking damages for injuries sustained in a one-car automobile accident. The Supreme Court of Appeals held that there was sufficient evidence of contributory negligence on part of the guest passengers, who were together with the driver in various bars drinking liquor for a long time, in accepting a ride from driver so as to warrant giving driver's comparative negligence instruction. The West Virginia Supreme Court held it was reversible error to have instructed the jury that plaintiffs could not be found to be contributorily negligent in accepting a ride with defendant

This case presents one simple issue: Did the trial court err by refusing to give a defendant's instruction on comparative contributory negligence [of the guest passengers]? We find that there was sufficient evidence of contributory negligence to warrant such an instruction, and because the defendants' entire theory of the case was contributory negligence, we reverse.

Id. at 137, 376

The Court also stressed the importance of the jury's determination of comparative negligence:

In a comparative negligence or causation action the issue of apportionment of negligence or causation is one for the jury or other trier of the facts, and only in the clearest of cases where the facts are undisputed and reasonable minds can draw but one inference from them should such issue be determined as a matter of law. The fact finder's apportionment of negligence or causation may be set aside only if it is grossly disproportionate.

Id. at 140, 379

c) *Wilson v. Edwards*, 138 W. Va. 613, 77 S.E.2d 164 (W.Va. 1953)

Wilson involved an action for the death of a guest passenger in an automobile in a collision between an automobile and rear of a truck which had been parked on the side of a highway near the end of curve at night.

Here the question whether [the guest passenger] was guilty of negligence which proximately caused or contributed to his injury was submitted to the jury under proper instructions. By its verdict the jury necessarily found that he was not negligent and, as that finding is not clearly wrong, or not contrary to the weight of the evidence, or not without evidence to support it, it will not be disturbed by this Court.

Id. at 175, 629.

d) *Oney v. Binford*, 116 W.Va. 242, 180 S.E. 11 (W.Va. 1935)

In *Oney*, a judgment in favor of a guest passenger against her boyfriend driver was set aside by the West Virginia Supreme Court.

The Supreme Court held that evidence regarding an automobile guest passenger's failure to protest to the driver as to his careless method of driving held to preclude the guest passenger's recovery for injuries. The Court in its Syllabus stated the following:

The driver of an automobile owes to an invited guest reasonable care for his safety; but the guest must exercise ordinary care for his own safety, and, when he knows, or by due diligence should know, that the driver is not taking proper precautions, it becomes the duty of the guest to remonstrate; and failure to do so bars his right to damages in case of injury.

e) *Frampton v. Consolidated Bus Lines*, 134 W.Va. 815, 62 S.E.2d 126 (W.Va. 1950)

In *Frampton*, the Court ruled that a jury instruction given to the jury was proper which stated that the jury should not find for the guest passenger plaintiff if she herself was negligent:

The instruction also told the jury that it should not so find for the plaintiff, if the jury should believe from the evidence 'that the plaintiff was herself guilty of some negligent act or omissions of duty on her own part which proximately contributed to her injuries in said collision.' We perceive no error in the giving of this instruction.

Id. at 140, 833.

Furthermore, the Supreme Court of Minnesota dealt with facts analogous to the facts of the case at bar. See *Jorgenson v. Minneapolis, St. P. & S. S. Marie Ry. Co.*, 231 Minn. 121, 42 N.W.2d 540 (MINN 1950). In *Jorgenson*, the driver and guest passenger in an automobile sued the railroad

for injuries sustained when the vehicle in which Plaintiffs were driving attempted to cross railroad tracks and was struck by a train. Plaintiffs prevailed at trial, and the defendant railroad appealed arguing that the trial court should have granted its motion for judgment notwithstanding verdict or for a new trial. The Supreme Court of Minnesota agreed, and held that “where plaintiff passenger looks for approaching train and thereafter informs driver that ‘track is clear and you can go,’ after which automobile is struck in attempting to cross track by train which must have been in plain view, passenger is guilty of such contributory negligence as a matter of law as to bar recovery.” *Id.* at Syl. Pt. 5.

Many cases outside of this Jurisdiction have ruled that a passenger's degree of fault should be compared to the driver's degree of fault. *See Rice v. Merchants Nat. Bank*, 213 Ill. App. 3d 790, 801 157 Ill. Dec. 370, 572 N.E.2d 439, 447 (2d Dist.1991). (“We find that the jury's verdict finding plaintiff [guest passenger] contributorily negligent was not against the manifest weight of the evidence. . . . We find that the present case involves a situation in which the jury could properly find that plaintiff [guest passenger] was aware that precautionary measures were necessary to protect her own safety. Plaintiff [guest passenger] had a duty to exercise ordinary care for her own safety.”) *See Also Collins v. McGinley*, 558 N.Y.S.2d 979, (N.Y.App.Div.3.Dept. 1990) (The Court ruled that apportionment of ten percent liability to automobile guest passenger accident victim was supported by the record, particularly in light of evidence that she distracted automobile operator just prior to accident.) *See Also, Howes v. Fultz*, 769 P.2d 558 (Idaho 1989) (The Court determined that a jury finding that a passenger was 5% negligent in an automobile accident was supported by evidence that she knew the driver had visual impairments, perhaps even a restricted driver's license, yet rode in a car knowing that the driver would be driving after dark, and that she saw what she thought was a van or piece of machinery in the road, but did not warn the driver.)

The testimony in this case was that plaintiff, Christopher Smith, said to the driver Edward Withrow, "It's clear, let's go," and Edward Withrow then pulled out from the stop sign and the collision followed.

As set forth above, the issue of the comparative negligence of Chris Smith regarding his actions and their relation to the cause of the subject accident should have been presented to the jury for the determination of a percentage of fault on part of Chris Smith. As set forth above, the fact that Mr. Smith was a guest passenger does not operate to bar assessment of his negligence by the Jury.

2. West Virginia law permits the comparative negligence of all joint tortfeasors, whether parties to the lawsuit or not, to be assessed by the jury

In addition, West Virginia law is clear that the comparative negligence of all joint tortfeasors, whether parties to the lawsuit or not, should be assessed by the jury. As such, the issue of the negligence of Edward Withrow regarding his actions and their relation to the cause of the subject accident and Chris Smith's damages should have been presented to the jury for the determination of a percentage of fault on part of Edward Withrow.

The Trial Court ruled that Edward Withrow's comparative negligence should not be presented to the Jury because, according to the language of W. Va. Code § 55-7-24(a)(1), Mr. Withrow was not "in the litigation at the time the verdict is rendered," as he had settled with Mr. Smith in "good-faith." Petitioner asserts that this ruling by the Trial Court was erroneous, and herein reincorporates her arguments relating to this issue as set forth above.

In *Louk v. Isuzu Motors, Inc.*, 198 W. Va. 250, 479 S.E.2d 911 (W. Va. 1996), one of the defendants in the lawsuit settled with Plaintiff prior to trial. Evidence of this settling defendant's comparative negligence was presented at the trial. The Supreme Court held that the evidence presented at trial "is sufficiently conflicting that it is for the jury to decide whether and to what

extend the negligence of [all defendants] and the [settling defendant], if any, contributed to the collision.” *Id.* at 266, 927.

The Court went on to state the following:

“Although the [settling defendant] is no longer a party to the action, the jury may consider the negligence of all joint tortfeasors whether parties or not. See *Haba v. Big Arm Bar & Grill, Inc.*, 196 W. Va. 129, 468 S.E.2d 915 (1996), where we approved implicitly the circuit court allowing the negligence of a non-party joint tortfeasor to be considered by the jury.” *Id.* (Emphasis Added).

The Court in *Haba*, as referenced above in the *Louk* case, stated the following when implicitly approving the Circuit Court’s allowing of the negligence of a non-party joint tortfeasor to be considered by the jury:

In *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979), this Court adopted the doctrine of comparative negligence and held, in syllabus point 3, “[a] party is not barred from recovering damages in a tort action so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident.” In explaining how this rule operates, we stated “[t]he jury should be required by general verdict to state the total or gross amount of damages of each party whom they find entitled to a recovery, and by special interrogatory the percentage of fault or contributory negligence, if any, attributable to each party.” *Id.* 256 S.E.2d at 885, 886. ***We then clarified the meaning of “each party” in syllabus point 3 of Bowman v. Barnes, 168 W.Va. 111, 282 S.E.2d 613 (1981), wherein we held “[i]n order 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.* (Emphasis Added).**

See *Haba v. Big Arm Bar & Grill, Inc.*, 196 W. Va. at 136, 137, 468 S.E.2d at 922, 923 (1996)

In addition, *see also Cline v. White*, 183 W.Va. 43, 45, 393 S.E.2d 923, 925 (1990), which holds that “defendants are entitled to have a jury consider the fault of all the joint tortfeasors involved in the injury.”

Given the foregoing authority, the issue of the comparative negligence of Edward K. Withrow and Christopher Smith regarding their actions and their relation to the cause of the subject accident should have been permitted to be presented to the jury for the determination of a percentage of fault on part of Edward K. Withrow and Christopher Smith.

B. The Trial Court erred in the entry of its August 4, 2009 and October 9, 2009 Orders denying Petitioner Alicia Halcomb's motion to set aside the settlement agreement between Respondent Christopher Smith and Third-Party Defendant Edward K. Withrow

Respondent filed this lawsuit against Petitioner. Petitioner filed an Amended Third-Party Complaint against the driver of the vehicle in which Chris Smith was a guest passenger, Edward Keith Withrow, Jr. on May 27, 2009, alleging that Mr. Withrow was solely responsible for the accident and seeking indemnity and/or contribution from Mr. Withrow as well as reimbursement for property damage to Ms. Halcomb's vehicle. *See* Exh. C, Amended Third Party Complaint.

Respondent Christopher Smith settled with Mr. Withrow prior to the trial of this case for the nominal sum of \$100. The trial court ruled in its August 4, 2009 and October 9, 2009 Orders that this settlement was in "good-faith," thus leaving the driver of the vehicle that was hit by Mr. Withrow's vehicle, Petitioner Alicia Halcomb, as the sole Defendant at trial. The Petitioner Alicia Halcomb objected to this settlement in her Motion to Challenge and Set Aside the settlement between Christopher Smith and Third-Party Defendant Edward K. Withrow, and moved to have it set aside, on the basis that the settlement was done in bad faith for a variety of reasons, including 1) the amount of Mr. Withrow's settlement in comparison to his potential liability was grossly unproportional, and 2) the motivation of Respondent and Mr. Withrow is to single out Ms. Halcomb, as a non-settling defendant for wrongful tactical gain, including an attempt to circumvent the provisions of the apportionment of damages statute, W. Va. Code §55-7-24.

West Virginia law is clear that contribution claims are only extinguished by good-faith settlements. Allowing the primary tortfeasor to settle for a nominal amount is not a good faith settlement. *Smith v. Monongahela Power Company*, 189 W.Va. 237, 429 S.E.2d 643 (W.Va. 1993). In *Smith*, the Supreme Court of Appeals of West Virginia found that the question as to whether a settlement between a plaintiff and settling tort-feasor was entered in good faith is a factual one and that if the matters of record present a close case of good faith, the trial court should hold a hearing.

According to the *Smith* Court, in order to make such a determination, the trial court must understand the factual details underlying the settlement, and the details should be placed on the record to permit effective appellate review. *Id.* The Court in *Smith* stated in Syllabus Point 6 that some factors which may be relevant to determining whether a settlement lacks good faith are : “(1) the amount of the settlement in comparison to the potential liability of the settling tortfeasor at the time of settlement... (2) whether the settlement is supported by consideration; (3) whether the motivation of the settling plaintiff and settling tortfeasor was to single out a non-settling defendant or defendants for wrongful tactical gain; and (4) whether there exists a relationship, such as family ties or an employer-employee relationship, naturally conducive to collusion” *Id.* at Syl. Pt. 6. That Court also found that the determination of whether a settlement has been made in good faith rests in the sound discretion of the trial court. *Id.* at Syl. Pt. 7.

The settlement between Mr. Smith and Mr. Withrow was not a good-faith settlement, and as such, should have been set aside by the Circuit Court.

Regarding factors one and two of the *Smith* case above, there can be little argument against the assertion that the amount of Mr. Withrow’s settlement of a mere \$100.00 in comparison to his potential liability is grossly disproportionate to Plaintiff’s alleged damages in this lawsuit. Petitioner presented evidence in the case that Mr. Withrow was the primary, if not sole, tortfeasor in this civil action. *See*

supra, Evidence of Negligence of Edward K. Withrow Jr. and Chris Smith.

In addition, Respondent Christopher Smith alleged a large amount of damages in this case. Respondent Chris Smith alleged the following special and general damages in his Complaint (past and future), against Ms. Halcomb: medical bills in excess of \$80,000.00, physical and mental injuries, both past and future, lost wages and other incidental expenses, physical and emotional pain and suffering, permanent scarring, annoyance and inconvenience, aggravation, mental anguish, loss of his capacity to enjoy life and punitive damages. *See* Exh. A, Complaint. In fact, the jury verdict in this case was for a total amount of 569,001.10, plus interest. *See* Exhibits. S and T, Jury Verdict Form and Judgment Order. Mr. Withrow's settlement amount was grossly disproportionate to the amount of damages alleged by Respondent particularly in light of his likely percentage of fault for the subject accident.

In her Motion to Challenge and Set Aside Plaintiff's Settlement with Defendant Edward Keith Withrow, Jr., Respondent cited excerpts from Mr. Withrow's deposition. *See* Exh. E, Motion to Challenge and Set Aside Settlement. In his deposition, Mr. Withrow stated the following regarding paying \$100.00 each to Mr. Smith along with Mr. White and Mr. Pauley, who are the two other passengers in the Withrow vehicle who each have filed separate lawsuits:

You know, \$100 isn't going to hurt my pocket too much, to give them each \$100. And if it keeps me from having to come to Charleston and pay \$1,500 for airfare and stuff, you know, that's the way I would do it. If given a choice, I'd rather just pay them each \$100 and be done with it.

See Exh. E, Motion to Challenge and Set Aside Withrow Settlement, p. 7, citing deposition of Edward Withrow (discovery), p. 15.

Regarding factor 4 of the *Smith* case above, a relationship between Mr. Smith and Mr. Withrow exists that is naturally conducive to collusion.

The evidence showed that Chris Smith and Edward Withrow know each other and both had the same friends. James Pauley is a good friend of Defendant Edward Withrow. *See* Exh. Y, trial transcript, Vol 2., at p.55, lines 14-15 (James Pauley). Mr. Pauley is also a good friend of Chris Smith. *See* Exh. Y, trial transcript, Vol 2., at p.55, lines 9-10 (James Pauley). Both Edward Withrow and Chris Smith are good friends with James Pauley.

Mr. Smith chose not to sue Mr. Withrow in this case, and instead, blame Ms. Halcomb for the accident. Mr. Withrow was brought into this suit by Ms. Halcomb's third-party complaint against Mr. Withrow. *See* Exh. C, Amended Third Party Complaint against Edward Keith Withrow.

Simply put, the evidence in this case reveals that Mr. Smith tactically did not pursue his case against Mr. Withrow, in part, due to their mutual friends. Such a relationship is naturally conducive to collusion.

As set forth in *Smith* above, factor three which may be relevant to determining whether a settlement lacks good faith is "(3) whether the motivation of the settling plaintiff and settling tortfeasor was to single out a non-settling defendant or defendants for wrongful tactical gain." *Smith*, Syl. Pt. 6.

The motivation of Respondent Christopher Smith and Third-Party Defendant Edward Withrow was to single out Ms. Halcomb, as a non-settling defendant for wrongful tactical gain. In essence, Respondent was attempting to circumvent the apportionment statute embodied in W. Va. Code §55-7-24 in order to proceed against the only insured defendant in the case, Alicia Halcomb, for his damages.

Respondent clearly attempted to settle with the uninsured defendant Withrow for a nominal amount and dismiss him from the lawsuit on the basis of the settlement in hopes of proceeding exclusively against Ms. Halcomb, who was the only insured defendant in this lawsuit.

West Virginia has always been a joint and several liability state. Under joint and several liability, at least up until 2005, all defendants to a civil action (except for those which settled out prior to trial) were jointly and severally liable for the entirety of any judgment rendered against the defendants. If a defendant was 1% or more liable for the judgment entered in a case, then that defendant could be made to pay the entirety of the verdict as to the plaintiff, and the paying defendant would be left with a right of contribution against the other defendants against whom the judgment was entered. This resulted in great inequities in situations where one defendant existed with the ability to pay a judgment and one or more co-defendants who either had no insurance or no assets with which to satisfy a judgment. It was not uncommon to have a defendant with a very low percentage of negligence in a case be required to pay the entire verdict because the other defendants were essentially judgment proof.

In 2005, the West Virginia Legislature attempted to ameliorate this situation by enacting W. Va. Code § 55-7-24, Apportionment of Damages. That newly enacted statute provides in pertinent part as follows:

- (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 proportion at 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 30% 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.

WV Legislature Senate Bill 421 (2005) sheds light on the equitable purpose and intent of W. Va. Code § 55-7-24:

[W. Va. Code § 55-7-24] is AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated § 55-7-2[4], relating to the apportionment of damages in court actions involving the tortious conduct of more than one person; allowing for several liability for certain defendants; allowing for several liability subject to reallocation for certain defendants; and providing for several liability for defendants that are found to be less than thirty percent at fault under certain circumstances.

WV Legis S.B. 421 (2005).

As set forth above, subparagraph (a) (1) of § 55-7-24 provides that the Court shall "instruct the jury to determine 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 ..."

The Trial Court ruled that the nominal settlement with Mr. Withrow resulted in there being only one defendant in the litigation at the time of trial, and as such, W. Va. Code § 55-7-24 would not apply, and the common law governing joint and several liability would control. As a result, Ms. Halcomb is liable for the entirety of the verdict. The Respondent clearly attempted to circumvent the apportionment statute embodied in W. Va. Code § 55-7-24, by settling with Mr. Withrow for a nominal amount, thus leaving only one defendant in the case who would be liable for the entirety of the verdict.

Petitioner argues that the apportionment statute embodied in W. Va. Code § 55-7-24 should still apply since this civil action was filed against multiple defendants. However, the Trial Court ruled that the statute does not apply when there is only one non-settling defendant at the time the trial

commences. Respondent settled with Mr. Withrow and argued that since there was only one defendant at the time of trial, W. Va. Code § 55-7-24 would not be applicable and the common law governing joint and several liability would control, which would mean Halcomb would be liable for the entirety of the verdict.

Respondent clearly proceeded against Ms. Halcomb only, and not Mr. Withrow, because of the relationship between Respondent and Mr. Withrow and because Ms. Halcomb was the only insured defendant. Respondent clearly attempted to circumvent the provisions and equitable intent of to W. Va. Code § 55-7-24 by settling with the uninsured defendant Withrow for a nominal amount and dismiss him from the lawsuit on the basis of proceeding exclusively against Ms. Halcomb. The Respondent's actions are clearly in contradiction to the equitable purpose of to W. Va. Code § 55-7-24 as set forth above.

Petitioner also asserts the Trial Court erred when it misread and misapplied W. Va. Code § 55-7-24.

The confusion and eventual error of the Trial Court occurred when it misread section (a)(1) to require the jury to ***assess the proportion at fault of each of the parties in the litigation at the time the verdict is rendered.*** The Court determined that the good-faith settlement with Mr. Withrow resulted in there being only one party in the litigation at the time the verdict is rendered (Ms. Halcomb).

Instead, the Clear reading of the statute in light of the legislative intent is that W. Va. Code § 55-7-24 should have been applied to require the jury to ***assess the proportion at fault of each of the parties in the litigation (Mr. Withrow, Mr. Smith and Ms. Halcomb), at the time the verdict is rendered.***

In other words, pursuant to the clear language of the statute, once a civil action involves the tortious conduct of more than one defendant, section (a) is satisfied, and the Court is then required to instruct the jury, pursuant to section (a)(1) to assess the proportion at fault of each of the parties in the litigation. **This whole process is to be performed and occur “at the time the verdict is rendered.”** The language “at the time the verdict is rendered” does not mean only those defendants left in the case at the end should have their liability assessed. Instead, this phrase “at the time the verdict is rendered” communicates when the apportionment process is to occur among all parties in the litigation.

At trial, Petitioner argued to the Trial Court that W. Va. Code § 55-7-24 merely applied to sort out the issue of the apportionment of the damages awarded once they were actually awarded by the jury, in that, the jury should still be permitted to assess the comparative negligence of all joint tortfeasors on a jury verdict form. The Trial Court disagreed, which forms the basis of the first assignment of error set forth in this brief.

As set forth above, all factors of the *Smith* case set forth above are satisfied in favor of finding that the subject settlement was not made in good-faith. In addition, The West Virginia Supreme Court has previously stated that “the chief consideration [as to what constitutes a good faith settlement] is whether the settlement arrangement substantially impaired the remaining defendants from receiving a fair trial.” *Board of Education of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 605-06, 390 S.E.2d 796, 804-05 (1990), citing *State ex rel. Vapor Corp. v. Narick*, 173 W.Va. 770, 773, 320 S.E.2d 345, 348 (1984).

With regard to the standard set forth in *Zando*, there can be no doubt that the subject settlement arrangement substantially impaired Ms. Halcomb from receiving a fair trial. The settlement arrangement between Mr. Smith and Mr. Withrow resulted in Ms. Halcomb being liable

for the entirety of the judgment. She was never afforded the true benefit of W. Va. Code § 55-7-24, which was intended to allow a defendant to pay only his/her pro rata share of a Plaintiff's damages in instances where a defendant is found to be less than 30% negligent.

Petitioner argues before this Court that the trial Court clearly erred in finding that the settlement between Mr. Smith and Mr. Withrow was a good faith settlement, and subsequently erred in the entry of its August 4, 2009 and October 9, 2009 Orders denying Petitioner Alicia Halcomb's motion to set aside the settlement agreement between Respondent Christopher Smith and Third-Party Defendant Edward K. Withrow. The Trial Court's ruling resulted in extreme unfairness and prejudice to Ms. Halcomb during the trial of this case.

C. The Trial Court erred when it refused Petitioner's jury instruction number 2

Petitioner's jury instruction number 2 was refused by the Court in its entirety, over objection from Petitioner's counsel. *See* Exh. N, Petitioner's proposed jury instruction number 2. *See Also* Exh. X, trial transcript, at p.433, line 21 through p.463, line 5. The information contained within this instruction was not contained in the Court's general jury charge. *See* Exh. M, Jury Charge. *See Also* Exh. X, trial transcript, at p.368, line 5 through p.380, line 17. This instruction should have been read to the jury in its entirety. This instruction instructed the Jury that Ms. Halcomb had no obligation to prove that she was not at fault for the accident. The instruction also made clear that the burden of proof was on the Respondent to prove any fault on part of Ms. Halcomb. The instruction correctly stated the law that the mere fact that an accident occurred is not enough to satisfy Respondent's legal burden of proving that Ms. Halcomb was guilty of negligence which proximately caused respondent's injuries. *Griffith v. Wood*, 150 W. Va. 678, 149 S.E.2d 205 (W. Va. 1966). ("It is elementary that ordinarily the mere occurrence of an accident does not give rise to the presumption of negligence . . . "The burden of establishing such negligence [of the defendant] rests upon the plaintiffs." *Id.* at 687, 212)

The burden of establishing such negligence of the defendant rests upon the plaintiffs.

Given the foregoing, Petitioner's Jury Instruction number 2 should have been given to the jury, and the Trial Court abused its discretion in refusing to give this Jury Instruction to the Jury.

D. The Trial Court erred when Petitioner's jury instruction number 6 was improperly refused to be given to the jury

Petitioner's jury instruction number 6 was refused by the Court in its entirety, over objection from Petitioner's counsel. *See* Exh. O, Petitioner's proposed jury instruction number 6. *See Also* Exh. X, trial transcript, at p.433, line 21 through p.463, line 5. The information contained within this instruction was not contained in the Court's general jury charge. *See* Exh. M, Jury Charge. *See Also* Exh. X, trial transcript, at p.368, line 5 through p.380, line 17. It is clear that this instruction should have been read to the jury in its entirety. This instruction instructed the Jury that damages cannot be awarded for an injury where the evidence is speculative, conjectural or uncertain as to the amount of damages. The instruction then stated that if the jury finds that Respondent's proof of damages is based merely on speculation, conjecture, or that the evidence is unclear as to the amount of damages, if any, the Respondent suffered, then it need not award the Respondent damages.

The instruction correctly stated the law that damages cannot be awarded for an injury where the evidence is speculative, conjectural or uncertain as to the amount of damages. The West Virginia Supreme Court has held that "[t]he general rule with regard to proof of damages is that such proof cannot be sustained by mere speculation or conjecture." *Stone v. United Engineering, a Div. of Wean, Inc.*, 197 W. Va 347, 475 S.E.2d 439.

Given the foregoing, Petitioner's Jury Instruction number 6 should have been given to the jury, and the Trial Court abused its discretion in refusing to give this Jury Instruction to the Jury.

E. The Trial Court erred when Respondent's jury instruction number 2 was improperly given to the jury

Respondent's jury instruction number 2 was given to the jury over objection of Petitioner's counsel. *See* Exh. P, Respondent's jury instruction number 2. *See Also* Exh. X, trial transcript, at p.383, line 6-5. It is clear that this instruction should not have been read to the jury. The instruction, entitled, "Duty to Control Speed," essentially refers to W. Va. Code § 17C-6-1(a), which states in part that the driver of a motor vehicle must drive at a reasonable speed given the existing conditions and potential hazards, and that the driver's speed shall be so controlled as may be necessary to avoid colliding with any person or vehicle on or entering the highways in compliance with legal requirements and the duty of all persons to use due care.

This instruction recites W. Va. Code § 17C-6-1(a), but does not mention § 17C-6-1(b), that clearly states that where no special hazard exists that requires lower speed for compliance with subsection (a) of this section, the speed of any vehicle not in excess of the limits . . . is lawful."

This instruction only sets forth a portion of the complete law, and clearly places an undue focus on Petitioner Alicia Halcomb based upon Respondent's assertions at trial that this accident was caused by Ms. Halcomb's excessive speed.

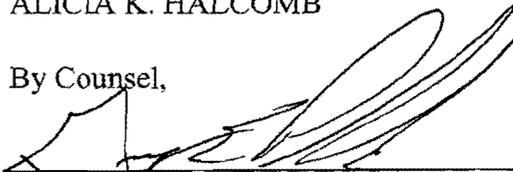
Given the foregoing, Respondent's Jury Instruction number 6 should not have been given to the jury, and the Trial Court's decision to give said instruction to the jury was clearly erroneous.

CONCLUSION

For all of the foregoing reasons, Petitioner Alicia K. Halcomb respectfully requests that this Honorable Court grant Petitioner's Petition for Appeal.

ALICIA K. HALCOMB

By Counsel,



GARY E. PULLIN, WV State Bar No. 4528
NATHAN J. CHILL, WV State Bar No. 8793

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
JamesMark Building
901 Quarrier Street
Charleston, WV 25301
Telephone (304) 344-0100
Facsimile (304) 342-1545

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 11-0386

ALICIA K. HALCOMB,

Defendant/Third-Party Plaintiff Below,
Petitioner

Appeal from a final order
Of the Circuit Court of Kanawha County
(08-C-1152)

v.

CHRISTOPHER G. SMITH,

Plaintiff Below,
Respondent

CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner, Alicia K. Halcomb, does hereby certify on this 24th day of May, 2011, that a true copy of the foregoing "**Petitioner Alicia K. Halcomb's Brief**" was served upon counsel of record by depositing same to him in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

Michael J. Del Giudice, Esquire
CICCARELLO, DEL GIUDICE & LaFON
1219 Virginia St., E., Ste. 100
Charleston, WV 25301



GARY E. PULLIN, WV State Bar No. 4528
NATHAN J. CHILL, WVSB #8793

Pullin, Fowler, Flanagan, Brown & Poe, PLLC
JamesMark Building
901 Quarrier Street
Charleston, West Virginia 25301
304/344-0100