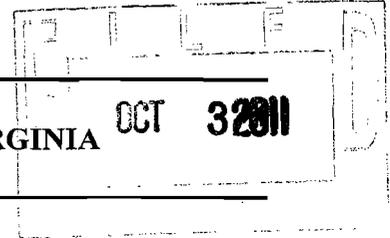

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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 REPLY
TO RESPONDENT CHRISTOPHER G. SMITH'S BRIEF**

Counsel for Petitioner, Alicia K. Halcomb

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Alicia K. Halcomb

NOW COMES the Petitioner, Alicia K. Halcomb, by Counsel, Gary E. Pullin, Nathan Chill, and the law firm of Pullin, Fowler, Flanagan, Brown and Poe, P.L.L.C., pursuant to Rule 10(g) of the West Virginia Rules of Appellate Procedure, and files Petitioner Alicia K. Halcomb's Reply to Respondent Christopher G. Smith's Brief. For her reply, Petitioner Alicia K. Halcomb herein re-incorporates all arguments set forth in her previously filed "Petitioner Alicia K. Halcomb's Brief" and additionally asserts the following as contained in this Reply.

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

In his response brief, Respondent asserts as apparent justification for the non-placement of Christopher Smith on the jury verdict form that "there is nothing in the record that provides support for the proposition that Smith contributed to the accident." *See* Respondent's Brief, p. 5. This is simply not true. As set forth in Petitioner's brief, there was ample evidence presented at the trial of this matter to lead a jury to determine that Mr. Smith's actions and inactions in the events of this case were contributing factors to the accident and proximately caused the 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. Chris Smith also saw Ms. Halcomb's vehicle, but never told Mr. Withrow it was approaching. The jury should have been able to weigh this evidence and assess negligence against Chris Smith if it so desired.

Regarding Mr. Withrow's liability, even Respondent "admits there were disputed facts presented at trial concerning the contributory negligence of Withrow." *See* Respondent's Brief, p. 8. Respondent asserts that the jury "had an opportunity to evaluate Withrow's culpability and contributory negligence in this matter." *Id.* at p. 7. Respondent's argument centers around the fact that a line for Mr. Withrow's negligence was included on the verdict form for assessment of Ms. Halcomb's property damage claim. The placement of Mr. Withrow on the jury verdict form is only for a liability allocation related solely to Alicia Halcomb's Third-Party claim for property damage against Mr. Withrow. Mr. Withrow's liability for the subject accident and the damages claimed by the Respondent was not permitted to be assessed by the jury, as the Trial Court did not allow a line on the jury verdict form for his liability assessment.

The Court's presentation of its jury verdict form to the Jury that only permitted the jury to assess the negligence of Alicia Halcomb for the subject accident and resultant injuries and damages

alleged by Chris Smith, without giving the jury an option to assess the negligence of Mr. Smith and Mr. Withrow for the same injuries and damages, given the evidence presented at trial showing their negligence, is clearly erroneous, in light of the case law of West Virginia and well established comparative negligence principles. 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.

Further, as argued in Petitioner's brief, West Virginia law permits the comparative negligence of a guest passenger to be assessed by the jury, and also permits the comparative negligence of all joint tortfeasors, whether parties to the lawsuit or not, to be assessed by the jury.

Respondent relies on *Price v. Hall*, 177 W. Va. 592, 355 S.E.2d 380 (1987), which Respondent asserts sets forth a general rule that there is no liability on the part of occupants of a vehicle for the negligence of the driver in the absence of a special relationship such as joint enterprise or venture, or master servant relationship. Petitioner would assert that the precedent set forth in her brief, including but not limited to *Farmer v. Knight*, 207 W. Va. 716, 536 S.E.2d 140 (W. Va. 2000), *Raines v. Lindsey*, 188 W. Va. 137, 423 S.E.2d 376 (W. Va. 1992), *Wilson v. Edwards*, 138, W. Va. 613, 77 S.E.2d 164 (W. Va. 1953), is controlling in this matter, and sets forth the law in West Virginia that the negligence of a guest passenger is an issue for the jury to determine.

In the *Price* case relied upon by Respondent, a defendant driver lost control of his automobile and struck a decedent's vehicle head-on. The decedent's estate brought the suit against the defendant driver and the defendant guest passenger who was riding with the defendant driver. The *Price* case involves a situation where a *Plaintiff of one vehicle is suing the guest passenger of a second vehicle* for actions associated with the provision of alcohol to the second vehicle's defendant driver. In

other words, the *Price* case involves a situation where a Plaintiff sues both a defendant driver and a defendant guest passenger, and the question becomes whether the guest passenger should be liable to the Plaintiff for his negligence in providing the defendant driver with drugs and alcohol. This can be distinguished from the facts in the case at bar. In the case at bar, it is the guest passenger that is bringing a suit for damages. The cases cited in Petitioner's brief contain similar factual scenarios to the case at bar, where it is the guest passenger bringing a suit for damages or claim against either the driver of the vehicle in which he/she is riding or against another party. Again, the cases cited by Petitioner make clear that the issue of a guest passenger's actions / inactions in causing or contributing to the accident which results in injuries and damages to the guest passenger should be weighed by a jury for negligence purposes in considering a guest passenger's claim for damages against the driver of his vehicle or against another party.

As such, 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 the subject accident and resultant injuries and damages alleged by Chris Smith on the jury verdict form.

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.

Respondent argues that "since Withrow settled his case on a good faith basis, he should not have been included for comparative negligence purposes on the Verdict Form." *See* Respondent's Brief, p. 8. Petitioner believes that she set forth ample evidence in her brief to show that the subject settlement was not made in good faith, in accordance with the factors set forth in *Smith v. Monongahela Power Company*, 189 W. Va. 237, 429 S.E.2d 643 (W. Va. 1993). 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. Additionally, Mr. Smith alleged a large amount of damages in this case. In fact, the jury verdict in this case was for a total amount of \$569,001.10, plus interest. Mr. Withrow's settlement 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 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.

Further, the friendship that exists between Mr. Smith and Mr. Withrow is naturally conducive to collusion.

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. The motivation of Chris Smith and 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 provisions and equitable intent of the apportionment statute embodied in W. Va. Code § 55-7-24 in order to proceed against the only insured defendant in this case, Alicia Halcomb, for his damages. Respondent's actions are clearly in contradiction to the equitable purpose of W. Va. Code § 55-7-24.

Furthermore, Respondent asserts that that the trial court correctly applied W. Va. Code § 55-7-24 in this matter. Petitioner responds that the Court erred in its application of this statute.

The Trial Court erred 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). 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.*

Once a civil action involves the tortuous 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.

Respondent further argues that W. Va. Code § 55-7-24 somehow overrules the law in West Virginia that permits the comparative negligence of all joint tortfeasors, whether parties to the lawsuit or not, to be assessed by the jury, contained in *Louk v. Isuzu Motors, Inc.*, 198, W. Va. 250, 479 S.E.2d 911; *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979); *Haba v. Big Arm Bar & Grill, Inc.*, 196 W. Va. 129, 468 S.E.2d 915 (1996); *Cline v. White*, 183 W.Va. 43, 45, 393 S.E.2d 923, 925 (1990). These cases are still good law in West Virginia. “It is for the jury to decide whether and to what extent the negligence of [all defendants] and the [settling defendant],

if any, contributed to the collision. . . . 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.” *Louk v. Isuzu Motors, Inc.*, 198 W. Va. 250, 266, 479 S.E.2d 911, 927.

Respondent also argues that it was somehow harmless error not to have Chris Smith and Edward Withrow on the jury verdict form for accident liability assessment. It is hard to envision a verdict form more prejudicial to Ms. Halcomb than to have her name as the only person listed for accident liability assessment in this matter on the jury verdict form.

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

Respondent asserts that Petitioner’s jury instruction number 2 was duplicative in that it asked the jury to be instructed as to the burden of proof, which was given elsewhere. However, this instruction was not duplicative, in that it would have 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. All of this information was not given elsewhere in any instructions given to the jury. As such, 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

Respondent asserts that Petitioner’s jury instruction number 6 was duplicative in that it had to do with speculation of damages which was given elsewhere. However, this instruction was not duplicative, in that it would have 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. All of this information was not given elsewhere in any instructions given to the jury. As such, 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 asserts that Respondent's jury instruction number 2 was properly given to the jury. However, 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.

As such, 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 and remand this case for further proceedings. and award the Petitioner a new trial.

ALICIA K. HALCOMB

By Counsel,

A handwritten signature in black ink, appearing to read "Gary E. Pullin", written over a horizontal line.

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CHARLESTON, WEST VIRGINIA

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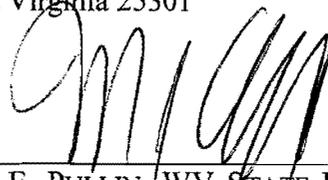
No. 11-0386

CHRISTOPHER G. SMITH, Plaintiff Below,
Respondent.

CERTIFICATE OF SERVICE

The undersigned, counsel for Defendant/Third-Party Plaintiff Below, Petitioner, Alicia K. Halcomb, does hereby certify on this 3rd day of October, 2011, that a true copy of the foregoing "*Petitioner Alicia K. Halcomb's Reply to Respondent Christopher G. Smith's Brief*" was served upon opposing counsel by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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