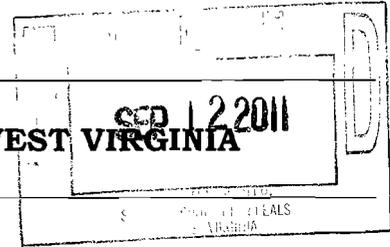


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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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**Docket No. 11-0386**

**ALICIA K. HALCOMB,**

**Defendant/Third-Party Plaintiff Below,  
Petitioner,**

**VS.**

**Appeal from a Final Order  
of the Circuit Court of Kanawha County  
(08-C-1152)**

**CHRISTOPHER G. SMITH,**

**Plaintiff Below,  
Respondent.**

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

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## **STATEMENT OF THE CASE**

On February 16, 2007, Christopher G. Smith (“Smith”) was a backseat guest passenger in an automobile being operated by Edward K. Withrow, Jr. (“Withrow”). Withrow was a Third-Party Defendant who settled with Withrow prior to the trial.

Smith will accept the statement of the case filed by Halcomb in this matter as it pertains to the procedural posture; however, pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, Smith must point out several glaring omissions in the facts as presented by Halcomb.

Withrow was traveling southbound through the intersection of Mountaineer and Southridge Boulevards in Kanawha County, West Virginia. This intersection is the three-way stop located just off Corridor G near the entrance to the Southridge Wal-Mart. He traveled through five and one-half lanes and was exiting the intersection when Alicia K. Halcomb (“Halcomb”) entered the same intersection from the west traveling in the far right lane when the right front of her vehicle collided with the right rear quarter panel of Withrow’s vehicle. As a direct and proximate result of this collision, Smith incurred serious injuries, including but not limited to, a mild/moderate traumatic brain injury with undisputed permanency and medical bills in excess of \$88,000.00.

There is nothing in the record that provides support for the proposition that Smith contributed to the accident. Halcomb quotes excerpts from Smith’s

trial testimony advising Withrow that “it’s clear, let’s go.” Halcomb cites this as evidence of the negligence of Smith and the reason that Smith should have been on the Verdict Form. Halcomb fails to point out that there was no evidence that this statement was a contributing factor to the accident or proximately caused the accident. In fact, the trial testimony of Withrow (Exhibit Y to the Appendix, Page 75) reveals that Withrow was asked about these statements made by Smith, and he responded as follows:

Q When you began to pull out, did you hear Chris Smith say anything?

A I don’t recall anything specifically. He was telling a joke or something and we were all laughing, but I don’t remember anything specifically that anybody said.

Q Specifically, did you hear Chris Smith tell you that it was free and clear to go?

A No.

Q What made your decision to go? What was it based upon?

A I assumed I could make it. The cars on the roadway were either stopped at a stop sign and I had a clear shot and I figured I could make it. It was my own decision.

There is no evidence to refute or rebut this testimony. There was no evidence that Withrow relied upon Smith’s statements or even heard such statements before making the decision to cross the intersection. Therefore, there was no evidence that Smith was a contributing factor and/or proximate cause of the accident.

In addition, on page 205 of Exhibit X of the Trial Transcript, Smith testified that before he stated the intersection was clear, it was clear, and the jury agreed. In addition, the accident occurred on the opposite side of the intersection from where Withrow started and this supports that statement. Therefore, there was no evidence to support placing Smith on the Verdict Form as being contributorily negligent.

It is Halcomb's contention in the Statement of Facts and throughout her Brief that Withrow's culpability and the extent of his contributory negligence was not evaluated by the jury in this case. This is untrue. Exhibit S is the Verdict Form. Question Four on the Verdict Form was:

With regard to Halcomb's Third-Party claim for property damage against Withrow, **do you find that Withrow was negligent in the operation of his motor vehicle on February 6, 2007?** [Emphasis Added]

The jury answered "No." Clearly the jury had an opportunity to evaluate Withrow's culpability and contributory negligence in this matter and concluded that he was not negligent in the operation of his vehicle. The jury was given the opportunity to apportion negligence between Halcomb and Withrow and the jury refused to apportion any negligence to Withrow.

Halcomb argues throughout her Brief that the settlement between Smith and Withrow was somehow collusive and not made in good faith. Halcomb cites certain discovery exhibits that were referred to in the Motion to Set Aside the Settlement Agreement filed by Halcomb. However, Halcomb fails to cite certain facts obtained during discovery that were beneficial for the Court in

deciding the issue of setting aside the settlement, all of which is contained in Plaintiff's Response to Motion to Challenge and Set Aside Settlement (Exhibit H of the Appendix). Page 11 of the deposition of Smith was an attachment to Smith's Response to the Motion to Set Aside the Settlement, and made clear that Withrow and Smith had a casual relationship and Smith had not seen or talked to Withrow since the accident. There was absolutely no evidence of collusion and Withrow testified in his deposition that he agreed to settle this case for \$100.00, even though he thought he was not liable, to avoid the hassle and expense of coming to trial in West Virginia. See Withrow's deposition at Pages 14 through 16. After reviewing the Verdict Form, it is apparent he settled for \$100.00 too much.

There clearly were no disputed facts presented to the jury as to any contributory negligence by Smith and there was no evidence that Smith's statement was relied upon by Withrow or contributed to the accident. Smith admits there were disputed facts presented at trial concerning the contributory negligence of Withrow; however, Withrow had settled in good faith at the time the jury's verdict was rendered. In addition, the jury was given the opportunity to evaluate his contributory negligence and concluded that he was not negligent.

## **SUMMARY OF ARGUMENT**

Halcomb, sets forth six assignments of error. This Brief will address them in the order presented. In that some of Halcomb's points are repetitious this response is also somewhat repetitious in order to comply with Rule 10(d).

The first assignment of error argues that the jury was not allowed to properly assess the comparative negligence of Withrow and Smith on the Verdict Form presented to the jury. Withrow should not have been placed on the Verdict Form for comparative negligence purposes as to the liability for the personal injury pursuant to West Virginia Code §55-7-24. This Section is abundantly clear and states that comparative negligence of the individuals involved in an accident should only be assessed by the jury for those who are parties "at the time the verdict is rendered." Halcomb attempts to have this Court interpret said Section differently than the clear and unambiguous language; however, a statute shouldn't be interpreted if it is clear and unambiguous. Since Withrow settled his case on a good faith basis, he should not have been included for comparative negligence purposes on the Verdict Form.

In addition, the jury was given the opportunity to evaluate Withrow's contributory negligence in this case and the jury concluded that Withrow was not negligent and assessed him zero comparative fault.

Smith should not have been placed on the Verdict Form because there was no evidence presented that Smith was contributorily negligent. In fact, the

unchallenged testimony of Withrow is that he did not rely upon Smith's statements in pulling into the intersection and, in fact, did not hear the same. Certainly Withrow's negligence cannot be attributed to Smith as the jury has already spoken and concluded that Withrow was not negligent. If the jury determined it was not negligent for Withrow to pull into the intersection, then Smith was correct when he said it was clear.

In addition, Price v. Hall, 177 W.Va. 592, 355 S.E.2d 380 (1987) cites the 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 a joint enterprise or venture, or master servant relationship. Restatement of Torts, Second, Section 876 requires that before a passenger can be liable for the acts of the driver they must know that the other's conduct is a breach of a duty and give substantial assistance to the other in accomplishing a tortious result.

The jury in this case has concluded that Withrow was not negligent. In Price, the Supreme Court said "there is no question that the passenger involvement in encouraging the driver must be substantial in order to affix Section 876 liability." There was no evidence in this case that Smith contributed to the accident or proximately caused the same. In addition, there was no negligence found by Withrow and no evidence that would support attributing the same to Smith or placing him on the Verdict Form.

Halcomb next argues that the Motion to Set Aside the Settlement Agreement between Smith and Withrow should have been granted. The problem with Halcomb's argument is there was never any evidence presented that Smith and Withrow operated collusively in any manner. Halcomb never provided evidence that even approached the standard as set out in Smith v. Monongahela Power Company, 189 W.Va. 237, 429 S.E.2d 643 (1993) that requires the non-settling tortfeasor to have been deprived of a fair trial because of **corrupt** behavior on the part of the Plaintiff and the settling tortfeasor before a settlement will be set aside. There was no evidence presented of this and the settlement was in good faith.

Halcomb argues that the Court misread and misapplied West Virginia Code §55-7-24; however, it is Halcomb that attempts to revise West Virginia Code §55-7-24. Out of thin air Halcomb argues that a comma should have been placed in the statute to create the meaning she desires; but no such comma was inserted by the legislature. West Virginia Code §55-7-24 excludes comparative negligence of individuals who are not parties at the time the jury verdict is rendered.

Halcomb argues that the Court erred in not presenting Halcomb's Proposed Jury Instruction No. 2. This jury instruction was duplicative in that it asked the jury to be instructed as to the burden of proof. An instruction as to the burden of proof was given elsewhere in the instructions.

Halcomb argues that the Trial Court erred when it refused Halcomb's Proposed Jury Instruction No. 6. This had to do with speculation of damages and was also addressed in another portion of the jury instructions.

Halcomb finally argues that the Court, in giving Smith's Jury Instruction No. 2 as to West Virginia Code §17C-6-1(a) was improper; however, the instruction came directly from the statute and was a proper instruction. If Halcomb wanted to offer another portion of the statute, and if relevant, the Court may have done so. However, such was never offered.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Smith does not agree that this case requires oral argument. This is a simple case of negligence and damages that are tried numerous times throughout the state each year. The insurer misjudged how this case would sell to a jury and now it begs this Court to bail it out.

#### **ARGUMENT**

##### **A. The Trial Court Did Not Err In Its Treatment Of Withrow And Smith The Verdict Form.**

Halcomb argues the jury was not given the opportunity to evaluate the comparative fault of Withrow on the Verdict Form and therefore, the Court erred in this regard. Halcomb is simply wrong.

##### **1. Withrow is statutorily excluded from the Verdict Form.**

West Virginia Code §55-7-24 requires the jury to determine proportionate fault of joint tortfeasors if the tortfeasor is a "party in the litigation at the time the verdict is rendered." West Virginia Code §55-7-24 was adopted effective

July 8, 2005. This new statute totally changed the law in West Virginia as to joint and several liability. It did not change the law as to whether a portion of the jury verdict could be attributed to a settling Defendant. It cannot. That is the reason for the language in the statute only allowing apportionment if a prospective tortfeasor is a party at the time the jury verdict is rendered. Halcomb attempts to argue that this statute should be interpreted in some manner other than by its clear and unambiguous language. In fact, Halcomb proposes a novel theory that a comma should be inserted in the statute as follows:

“Instruct the jury to deliberate, or, if there is no jury, find the total amount of damages sustained by the Claimant and the proportionate fault of each of the parties, at the time the verdict is rendered.

Unfortunately for Halcomb, there is no comma in this statute. The language is clear and unambiguous that an allocation of proportionate fault should only be made among those “parties at the time the verdict is rendered.” Halcomb may not like it, but Withrow was not a party “at the time the verdict was rendered” and therefore was exempt from proportionate fault allocation on the Verdict Form. The phrase “at the time the verdict is rendered” is unnecessary except to determine what parties to place on the verdict form.

A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the Courts but will be given full force and effect. State v. Epperly, 135 W.Va. 877, 65 S.E.2d 488 (1951). The statute is clear and unambiguous and Withrow’s comparative fault

should not have been assessed by the jury. Halcomb cites the following cases in an attempt to negate the proper effect of West Virginia Code §55-7-24(a)(1):

1. Louk v. Isuzu Motors, Inc., 198 W.Va. 250, 479 S.E.2d 911 (W.Va. 1935);
2. Bradley v. Appalachian Power Co., 163 W.Va.332, 256 S.E.2d 879;
3. Haba v. Big Arm Bar & Grill, Inc., 196 W.Va. 129, 468 S.E.2d 915 (W.Va. 1996); and
4. Cline v. White, 183 W.Va. 43, 393 S.E.2d 923 (W.Va. 1990).

It should be noted that each of these cases predates West Virginia Code §55-7-24(a)(1). In addition, the jury was instructed as to comparative negligence of Withrow and given the opportunity to evaluate this standard as applicable to the facts in this case. (See Appendix X, Trial Transcript, Page 282). The jury found Withrow not negligent.

**2. Any error is harmless.**

Harmless error occurs when a party suffers no prejudice by an erroneous instruction to a jury and/or an erroneous Verdict Form. See Holland v. Linger, 151 W.Va. 255, 151 S.E.2d 330 (1966) and Yates v. Mancary, 153 W.Va. 350, 168 S.E.2d 746 (1969). Smith believes that West Virginia Code §55-7-24 makes it clear that Withrow should not have been on the Verdict Form. However, even if that is incorrect, it is harmless error because the jury did evaluate Withrow's negligence. In fact, the jury got to evaluate whether Withrow was negligent and given the opportunity to apportion a percentage of negligence between he and Halcomb as to the property damage in this case.

The jury concluded that Withrow was not negligent in the operation of his vehicle and therefore Halcomb's arguments have no merit. We know exactly what the jury was thinking and what their conclusion was as to this issue. Therefore, Halcomb's continued argument as to Withrow not being on the Verdict Form is baseless. He was on it.

**3. Smith should not have been on the Verdict Form because there was no evidence that he was negligent in any fashion or that he owed a duty to the other parties involved in this case or that Withrow's negligence could be attributed to Smith.**

The entire argument presented by Halcomb in this case as to Smith not being placed on the Verdict Form is that there was evidence presented at trial as to Smith's negligence. The problem with this argument is that there is no evidence in this case that Smith was negligent in any fashion. Even if he was negligent, his negligence did not proximately cause the accident. In addition, there is no evidence in this case that would support Smith being attributed with Withrow's negligence as the jury already concluded there was no such negligence on the part of Withrow. Halcomb hinges her argument on the basis that Smith gave advice to Withrow and advised him that "it's clear, let's go." However, Withrow testified that he did not hear any such advice nor did he rely on the same. There is no evidence which refutes this. In addition, the jury in this matter concluded that Withrow was not negligent and therefore, there is no negligence of Withrow to be attributed to Smith.

The Court made a decision that no such evidence existed and the Court

was correct as the transcript in this matter does not provide any evidence that supports any negligence on the part of Smith and therefore, he should not have been placed on the Verdict Form. Price v. Halstead, 177 W.Va. 592, 355 S.E.2d 380 (1987) discussed the liability of guest passengers and stated the general rule is that a special relationship such as a joint enterprise or venture, or master-servant relationship must exist. Said case discussed the Restatement of Torts, Second, Section 876:

For harm resulting to a third person from the tortious conduct of another, one is subject to the liability if he a) does a tortious act in concert with the other or pursuant to a common design with him; or b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to conduct himself; or c) gives substantial assistance to the other and accomplishes a tortious result in his own conduct separately considered constitutes a breach of a duty to a third person.

Price v. Halstead stated there is no question that the passenger's involvement in encouraging the driver must be substantial in order to affix Section 876 liability. *Id.* 599 and 388. Plainly stated, none of the above-mentioned criteria are met in this case. Withrow did not rely on Smith and Smith did not do anything negligent. In short, there was no reasonable basis for Smith to be on the Verdict Form and therefore the Court did not err.

**B. The Trial Court Did Not Err In Denying Halcomb's Motion To Set Aside Settlement Agreement Between Smith And Withrow.**

Halcomb argues that Smith's settlement with Withrow, was not made in good faith. Unfortunately for Halcomb, she has no facts to support her

contention that the Court abused its discretion in refusing to set aside the settlement.

In Smith v. Monongahela Power Company, the West Virginia Supreme Court held as follows:

the determination of whether a settlement has been made in good faith rests in the sound discretion of the trial court. The focus of the trial court's determination is not whether the settlement fell within a "reasonable range" of the settling tortfeasor's proportional share of comparative liability, but whether the circumstances indicate that the non-settling tortfeasor was substantially deprived of a fair trial because of the corrupt behavior on the part of the plaintiff and the settling tortfeasor or tortfeasors. The determination of the trial court may be based on such evidence as it deems appropriate in the circumstances. In many (if not most) cases, a review of discovery documents and affidavits from counsel will be sufficient. Syl. Pt. 7, Smith v. Monongahela Power Company et al., 189 W.Va. 237, 429 S.E.2d 643 (1993)

The Smith Court further noted:

Settlements are presumptively made in good faith. A defendant seeking to establish that a settlement made by a plaintiff and a joint tortfeasor lacks good faith has the burden of doing so by clear and convincing evidence. Because the primary consideration is whether the settlement arrangement substantially impairs the ability of remaining defendants to receive a fair trial, a settlement lacks good faith only upon showing a corrupt intent by the settling plaintiff and joint tortfeasor, in that the settlement involved collusion, dishonesty, fraud or other tortious conduct. *Id.* at Syl. Pt. 5.

The Smith court identified the following factors that may be relevant to determining whether a settlement lacks good faith:

(1) the amount of the settlement in comparison to the potential liability of the settling tortfeasor at the time of

settlement, in view of such considerations as (a) a recognition that a tortfeasor should pay less in settlement than after an unfavorable trial verdict, (b) the expense of litigation, (c) the probability that the plaintiff would win at trial, and (d) the insurance limits and solvency of all joint tortfeasors;

(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 employer-employee relationship, naturally conducive to collusion. *Id.* at Syl. Pt. 6.

The Smith Court further noted that “under the standards we set forth today, if a defendant attempts to overcome the presumption that a settlement is in good faith by showing that the settlers were motivated by wrongful tactical gain, he pulls an exceptionally heavy oar.” *Id.* at fn. 13.

In this case, the majority of the witnesses’ testimony supports that Withrow stopped for the stop sign, waited until the lanes were clear to enter the intersection, and was struck by a speeding and distracted Alicia Halcomb as he exited the intersection. Smith did not sue Withrow and entered into a good faith settlement when Halcomb did.

After evaluation of the facts and potential liability in this case, the plaintiff was clearly entitled to enter into a settlement with Withrow and there is simply no evidence that this settlement was not made in good faith. Withrow had no insurance, limited income and no assets. While the payment of \$100.00 may seem minimal to Halcomb, it is unfair to characterize such a

payment as minimal to Withrow, or grossly unproportional, especially considering that the jury did not find him negligent.

Furthermore, contrary to Halcomb's assertions, there is no evidence that Smith and Withrow were attempting to circumvent W.Va. Code §55-7-24. Smith made a good faith settlement of his claim against Withrow based on his perception of liability and ability to pay. The jury found he was not negligent.

Halcomb also claims that Smith is not pursuing his case against Withrow due to friendship, which she claims is a relationship "naturally conducive to collusion." A review of the deposition testimony in this case reveals that Smith and Withrow barely knew each other and had met through sharing a mutual friend. As indicative from Withrow's testimony at his deposition he could not recall Smith's last name. The two have not spoken to or seen each other since the accident. The acquaintance of Smith and Withrow is hardly "naturally conducive to collusion," and had no bearing on Smith's decision to settle his claim against Withrow. Halcomb's statement in her Brief that this settlement resulted from Withrow and Smith's friendship is false and not supported by the evidence.

Lastly, Halcomb makes the conclusory argument that the settlement impairs her ability of receiving a fair trial because she might be forced to pay all of the damages if she is even found 1% liable for the accident. Halcomb's ability to receive a fair trial is not impaired by the Court's correct application of statutory law after the verdict. Furthermore, the Smith Court advised that the

focus of the trial court's determination is not whether the settlement fell within a reasonable range of the settling tortfeasor's proportional share of comparative liability, but rather was it in good faith.

There is no evidence of corrupt behavior, collusion, dishonesty, fraud or other improper conduct in regard to Smith's settlement with Withrow. The settlement was based on a review of the facts of the case, potential liability, and ability to collect. Halcomb failed to establish her burden by clear and convincing evidence and thus the Court did not abuse its discretion in approving the settlement.

**C. The Court Properly Applied West Virginia Code §55-7-24.**

Smith has addressed this issue in previous sections of this Brief. West Virginia Code §55-7-24 is abundantly clear and the Court did not misread or misapply the same. The proportionate fault of a tortfeasor should only be evaluated among those who are "parties in the litigation at the time the verdict is rendered." Halcomb wants to argue legislative intent; however, a plain, clear and unambiguous reading of the same makes it clear that the intent of the legislature was to encourage settlement. The whole purpose of said statutory language was to encourage resolution of cases. This Code Section was applied appropriately in that Withrow did, in fact, have a good faith settlement that should have excluded him from the Verdict Form pursuant to the clear language of the statute. Unless applied as read, the phrase "at the time the verdict is rendered" becomes unnecessary.

In addition, Withrow's comparative negligence was evaluated by the jury in this case. Halcomb's attempt to restate West Virginia Code §55-7-24 is an attempt to create a fiction by adding a comma to the statute when no such comma existed. West Virginia Code §55-7-24 simply eliminated consideration of settling Defendants from the Verdict Form. As it should be to encourage settlement. Halcomb attempts to argue that West Virginia Legislature Senate Bill 421 (2005) sheds light on the intent; however, a reading of this preamble does not mention the section in dispute and such argument is misplaced.

In addition, Halcomb is making way too much out of the interpretation of West Virginia Code §55-7-24 as it has already been stated the comparative fault of Withrow in this case has been established by the jury and further, there is no evidence that Smith was negligent, contributorily or otherwise.

Halcomb cited many cases for the proposition that a guest passenger should be evaluated for comparative fault purposes. See Oney v. Benford, 116 W.Va. 242, 180 S.E.2d 11 (1930); Frampton v. Consolidated Buslines, 134 W.Va. 815, 62 S.E.2d 126 (1950). However, these cases make clear that a guest passenger only be liable or have their contributory negligence evaluated if they have been guilty of some negligent act or omission of duty, which **proximately** contributed to said collision. See Frampton V. Consolidated Buslines, 134 W.Va. 815, 62 S.E.2d 126 (1950). There is no evidence that any injuries to Smith were proximately caused by his actions. The driver of the vehicle testified that he did not rely upon any statement of Smith. Further,

there is no evidence that Smith's statement that "it's clear, let's go" was negligence at all. Smith's comparative negligence should only be evaluated if there was, in fact, negligence and the Court properly concluded there was no evidence presented to place Smith on the Verdict Form.

Many of the cases cited by Halcomb do not apply to the present situation. Farmer v. Knight, 207 W.Va. 716, 536 S.E.2d 140 (2000) discussed whether the jury should be instructed as to whether a guest passenger was responsible for their own injuries because they took no action to prevent injury to him or herself. The facts of that case dealt with a driver who attempted to traverse an icy road. There was evidence that the passenger knew about and concurred with the decision to drive up the dangerous icy road. In other words, there was a conclusion that the driver was negligent and the driver's negligence was imputed to the guest passenger because he participated in the negligent decision.

Raines v. Lindsey, 188 W.Va. 137, 423 S.E.2d 376 (1992) dealt with a guest passenger in a vehicle driven by one who was under the influence of alcohol. There was evidence presented that the passenger knew the driver had been drinking and accepted the ride in the car anyhow. The Court stated that a guest passenger's comparative negligence should not be evaluated by the jury where the facts are undisputed and reasonable minds can draw but one inference from them.

In the case at hand, there is no negligence that can be attributed from Withrow to Smith in that the jury concluded that Withrow was not negligent. Secondly, there is no evidence that Smith contributed to Withrow's decision to cross the intersection. And third, there was no evidence that the same proximately caused the injuries. Therefore, the Court properly analyzed West Virginia Code §55-7-24 and rendered the appropriate conclusion as to the Verdict Form.

**D. The Content Of Halcomb's Jury Instruction No. 2 Was Addressed Elsewhere In The Court's Instructions And Therefore The Court's Refusal To Read The Same Was Not Error.**

Halcomb argues that the Court's failure to read her Jury Instruction No. 2 was error. Said proposed instruction to the jury stated that 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 Smith to prove any fault on the part of Halcomb. However, the refusal was not error by the Court because the burden of proof instruction was given to the jury in another instruction. Page 381 of the Trial Transcript Exhibit X states that Defendant's Instruction No. 1 was given as follows:

Now, just because an automobile collision occurred and someone is injured does not mean that the Defendant was negligent or guilty of fault. Proving the Defendant's negligence is the responsibility, as I have told you, of the Plaintiff. And unless you are satisfied from the greater weight of the evidence in my instruction so far that the Plaintiff has proven that Halcomb failed to exercise the degree of care and prudence expected of an ordinary and reasonable driver under the circumstances prevailing at the time in question, then you may find that the Plaintiff has failed to

satisfy his burden of proof and, of course, in that event you may then enter a verdict in favor of the Defendant.

All the elements that Halcomb requested in Instruction No. 2 were incorporated in the Court's jury charge. Therefore, it was not error for the Court to deny reading the duplicative instruction as tendered by Halcomb as Jury Instruction No. 2.

**E. Halcomb's Proposed Jury Instruction No. 6 Was Duplicative And Therefore It Was Not Error For The Court To Deny The Same.**

Halcomb complains that the Court should have read its proposed Jury Instruction No. 6. Said instruction addressed the issue of damages and that the same cannot be awarded for an injury where the evidence is speculative, conjectural or uncertain as to the amount of damages. The Court instructed the jury that injuries and damages that are purely speculative cannot be recovered. See Appendix Exhibit X, Trial Transcript, Page 389. Halcomb's Instruction No. 6 was covered elsewhere in the jury charge and the reading of it would have been duplicative. Therefore, the Trial Court did not abuse its discretion in refusing to give said jury instruction.

**F. The Reading Of Smith's Jury Instruction No. 2 Was Proper As It Was A Recitation Directly From W.Va. Code §17C-6-1(a).**

Smith's Jury Instruction No. 2 mirrors West Virginia Code §17C-6-1(a). Halcomb complains that West Virginia Code §17C-6-1(b) should also have been read. Smith has reviewed the Trial transcript (see Appendix X at Page 435 through 438) in which Halcomb placed her objections on the record as to the

jury instructions and Smith cannot find anywhere where Halcomb objected to the reading of this instruction. Further, no further instruction as to this issue was offered by Halcomb. Clearly, the Court did not abuse its discretion as to reading an instruction that came directly out of the statutory law. If Halcomb wanted to add other portions of the statute and those portions were relevant to the evidence, she could have offered it to the Court, but she did not.

### **CONCLUSION**

For all the foregoing reasons, Smith respectfully states that the jury has spoken in this matter. Halcomb is accurate in one aspect. The only party involved in this accident that had insurance was Halcomb. Halcomb's insurance company was given the opportunity to resolve this case within policy limits and refused to do so. They have now been hit with an excess verdict and are attempting to contort the law and ask this Court to bail it out. This Court should not set the judgment aside.

**THEREFORE**, Smith moves this Honorable Court to uphold the verdict and judgment in this matter and refuse to hear Halcomb's appeal.

**CHRISTOPHER G. SMITH**

**By Counsel,**

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**CERTIFICATE OF SERVICE**

I, Michael J. Del Giudice, do hereby certify that the foregoing **“Respondent, Christopher G. Smith’s Brief”** was served upon all parties of record by depositing a true and exact copy thereof, via the United States Mail, postage prepaid, by United States Mail and properly addressed as follows on this 12<sup>th</sup> day of September, 2011:

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