

No. 14-0158

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**MODULAR BUILDING CONSULTANTS OF WEST VIRGINIA, INC., and
BILLY JOE MCLAUGHLIN, Defendants/Third-Party Plaintiffs Below,**

Petitioners,

v.

POERIO, INC., Third-Party Defendant Below,

Respondent.

PETITIONERS' BRIEF

Appeal from the Circuit Court of Putnam County
Civil Action No. 11-C-277
(Judge Joseph K. Reeder)

Brent K. Kesner, Esq. (WV 2022)
Ernest G. Hentschel, II, Esq. (WV 6066)
KESNER, & KESNER, PLLC
Post Office Box 2587
Charleston, WV 25329
Phone: (304) 345-5200
Fax: (304) 345-5265

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ASSIGNMENTS OF ERROR

- (1) The Circuit Court below erred in finding in favor of Poerio on the Petitioners' breach of contract claims in light of the Jury's inconsistent finding that Poerio was negligent and 20% at fault for the subject accident when the only evidence before the Jury concerned conduct by Poerio which constituted a breach of its Lease Agreement with Modular.

- (2) The Circuit Court below erred in concluding that McLaughlin and Modular's claims for contribution were extinguished by their settlement with the Smiths because the Petitioners preserved their claims by also obtaining a release of the Smiths' claims against Poerio.

- (3) The Circuit Court below erred in permitting the jury to consider Jarrett Smith's negligence following the settlement of all of his claims by McLaughlin and Modular.

STATEMENT OF THE CASE

In this case, Jarrett L. Smith and his wife Sharon Smith sought to recover for injuries and damages sustained in an automobile accident which occurred on July 14, 2011, on West Virginia Route 36, in the area of Geary Elementary School, at or near Left Hand, West Virginia. (J.A. 1-2) The Smiths alleged that Billy Joe McLaughlin, an employee of Modular Building Consultants of West Virginia Inc. ("Modular"), negligently left part of his trailer in the roadway causing Jarrett Smith to strike the rear of the trailer while traveling along Route 36. (J.A. 2) At the time, McLaughlin was attempting to pick up a container unit which had been leased to Poerio Incorporated ("Poerio") for use in a construction project at the Geary Elementary School. (J.A. 9-

10) McLaughlin and Modular joined Poerio as a third-party defendant, seeking contribution and/or indemnification as well as damages for breach of the Lease Agreement between Modular and Poerio.

I. Procedural History

On September 28, 2011, the Smiths filed Civil Action No. 11-C-277, naming McLaughlin and Modular as defendants. (See their Complaint at J.A. 1-3 and the Docket Sheet at J.A. 1401) McLaughlin and Modular filed a third-party claim for contribution and indemnification against Poerio, based upon Poerio's failure to provide clear access to the container unit, and for breach of the Lease Agreement. (J.A. 9-15) McLaughlin and Modular also sought indemnification and a defense from Poerio under the terms of the Lease Agreement. (J.A. 9-15)

Prior to trial, McLaughlin and Modular entered into a settlement agreement with the Smiths for the entirety of their claims, and obtained a general release of the claims, including a release of any claims of the Smiths against Poerio. (J.A. 1407-1414) The case then proceeded to trial on April 15, 2013, solely with respect to the claims of McLaughlin and Modular against Poerio. Despite the settlement of the Smiths' claims, the Circuit Court below permitted the jury to consider the negligence of Jarrett Smith and, through its verdict form, permitted the jury to assign fault to Jarrett Smith as well as the remaining parties. (J.A. 1298-1299)

On April 18, 2013, the jury returned its verdict, and assigned negligence to Jarrett Smith, McLaughlin, Modular and Poerio. (J.A. 1298-1299) The jury found that McLaughlin and Poerio were each 20% at fault, and assigned 60% of the negligence to Jarrett Smith. Based upon this verdict, the Circuit Court below's Judgment Order was entered on July 16, 2013, in favor of Poerio with respect to both the contribution claim and the claim for breach of contract. (J.A. 1295-1297) While the Circuit Court below had allowed the Jury to consider the Petitioners' claims for contribution and the Jury found Poerio to be 20% at fault, it found in the Judgment Order that the

Petitioners' settlement with the Smiths had extinguished their right to contribution pursuant to *Jennings v. Farmers Mutual Insurance Company*, 224 W. Va. 636, 687 S.E.2d 574 (W. Va. 2009). (J.A. 1296-1297)

Because the Circuit Court below's finding in favor of Poerio was inconsistent with both the jury's findings and applicable law and because the jury should not have been permitted to consider any alleged negligence on the part of Jarrett Smith following the settlement of his claims, McLaughlin and Modular asked the Circuit Court below to alter or amend its July 16, 2013 Judgment Order and grant them judgment against Poerio as a matter of law or, in the alternative, to grant them a new trial. (J.A. 1300-1317) McLaughlin and Modular further requested that the Circuit Court below certify a question to this Court seeking an answer as to whether their settlement of the entirety of the Smiths' claims extinguished their claims for contribution against Poerio. (J.A. 1331-1343)

On December 12, 2013, the Circuit Court below entered its Order denying McLaughlin and Modular's Motion For Judgment As A Matter Of Law Or For A New Trial. (J.A. 1387-1400) McLaughlin and Modular now appeal that finding and ask that the Court reverse the Circuit Court below's decision and grant them a new trial and/or judgment as a matter of law.

II. Statement of Relevant Facts

In their Third-Party Complaint, McLaughlin and Modular sought both indemnification and contribution from Poerio (J.A. 9-15). Their claims were based, in part, upon the June 14, 2010 Lease Agreement whereby Poerio rented the container unit which McLaughlin was picking up on the day of the accident. The Lease Agreement provided, in pertinent part, as follows:

- (2) In addition to payment of rentals provided on the reverse side of the lease, lessee [Poerio] agrees that:

* * *

- (d) Lessee [Poerio] shall provide free and clear access for delivery and return of the Equipment by standard mobile transport vehicles. Lessee [Poerio] shall provide firm and level ground on no more than a six inch slope from one end to the other for safe and unobstructed installation for the Equipment. Site selection is the sole responsibility of Lessee [Poerio], and Lessor [MBC] shall have no responsibility for, nor liability for any inadequacy of any site or the set up of the Equipment for the site selected by Lessee [Poerio] or environment involves abnormal conditions.

* * *

- 5. Lessee [Poerio] hereby agrees to indemnify and hold Lessor [MBC] harmless from and against all loss and damages Lessor [MBC] may sustain or suffer because of collision, fire, lightning or theft, flood, windstorm or explosion or other casualty while in the custody, possession or control of Lessee [Poerio], and
 - (b) the death of or injury to, or damage to the property of any other person as a result of, in whole or in part, the use or condition of the equipment while in the custody, possession, or control of Lessee [Poerio].

* * *

- 10. Lessee [Poerio] shall not remove the Equipment from the location specified by Lessee [Poerio] without prior written approval from the Lessor [MBC].

* * *

- 14. Lessee [Poerio] shall indemnify and hold Lessor harmless from and against any loss, cost or expenses and from any liability to any person on account of any damage to person or property arising out of any failure of Lessee [Poerio] to comply in any respect with and perform any of the requirements and provisions of this Lease.

(J.A. 15-16) Thus, under the Lease Agreement, Poerio was obligated to “provide free and clear access for delivery and return of the [container unit] by standard mobile transport vehicles” and to defend and indemnify Modular Building for any “injury to, or damage to the property of any other person as a result of, in whole or in part, the use or condition of the equipment while in the custody, possession, or control of Lessee [Poerio]”

At trial, the evidence established that on the day the container unit was to be picked up, it was not at its original drop off location designated by Poerio. Instead, the unit had been moved adjacent and perpendicular to the roadway. (J.A. 612-613) In that regard, McLaughlin testified that Poerio had not complied with the terms of the Lease Agreement with respect to moving the container unit. He was asked:

Q. If you drag one of these units, can that cause damage to it?

A. Yes it can.

Q. Does that cause harm to Modular Building?

A. Yes, it does.

Q. Because of that risk of harm, does Modular Building impose a restriction upon its customers related to the movement of a unit once it has been dropped at the site selection solely at the responsibility of the customer, in this case Poerio?

A. Yes. We do.

Q. What do they have to do to move the unit?

A. They're entitled to call us and make arrangements to have it moved. If we authorize them to move it, we have to do it in writing.

Q. So, you'd have to provide written approval?

A. Yes.

Q. In this case did Modular Building ever provide written approval or authorization for Poerio to move this unit?

A. We did not.

(J.A. 606-607) He further testified that in this case, the container unit had been moved during the course of the construction project and was located near a new entrance to the school which Poerio had built as a construction entrance for the project. (J.A. 612-613) McLaughlin was asked:

Q. I'm interested in what you saw as you approached the entrance, first one, did you assess it as to whether it was open or not?

A. I did.

Q. From your assessment, your observation, was it open or not?

A. It was not.

Q. From your assessment, could you drive your toter and the trailer through that location to get to the other side?

* * *

A. From my observation I could not drive the toter and trailer through that entrance.

* * *

Q. In light of that observation, what did you do?

A. I proceeded to the second entrance where I could see the container.

(J.A. 620-621) Unfortunately, when McLaughlin attempted to enter this new entrance, he discovered that a white van obstructed his ability complete the turn off the roadway to reach the container unit. (J.A. 621-623) He was asked:

Q. Mr. McLaughlin, if the van wasn't there, what was your intent?

A. If the van wouldn't have been there, I would have proceeded into the construction site where I could have gotten back underneath the container itself.

Q. Was the roadway such that had the van not been present, could you have entered the work site to pick up the unit?

* * *

A. Yes, I could have entered the site if the van had not been there.

* * *

Q. How far into the site did you get?

A. 40 feet.

Q. How far into the site did you not get?

A. Eight to twelve feet.

(J.A. 623-624) When asked about the responsibility for providing clear access to the container unit, McLaughlin testified as follows:

Q. Mr. McLaughlin, on July 14, 2011, when you reached the Geary Elementary School, did the site exist in such a way that you had clear access to enter the site to retrieve Unit 1022 for pick up?

A. It did not. It was not.

Q. And whose obligation was it to provide that free access?

A. Poerio.

(J.A. 733) Thus, the Jury heard clear evidence that at the time of the accident, Poerio had breached the Lease Agreement by moving the container unit without permission and failing to provide free and clear access to it for Modular and McLaughlin.

Because his vision of approaching traffic was obstructed by the container unit, McLaughlin testified that he was forced to exit his vehicle to move the rear axles of his vehicle forward so the trailer could complete the turn. (J.A. 625-633) In particular, McLaughlin indicated that sliding the axles forward would shorten his turning radius (J.A. 632) and testified:

- Q. Why did you select that option?
- A. It was the fastest one to do.
- Q. Why did you pick the option that was the fastest ?
- A. So I could get out of the road, for safety purposes.
- Q. Once you picked your option that you've described, what did you do?
- A. I exited the vehicle. At that point in time the trailer that we used required the use of what we call a pony motor. I opened the lid on the compartment that holds the pony motor, I started the motor. I stepped back and grabbed a hold of the levers, slid the axle forward, turned to go back to the vehicle. At that point in time Mr. Smith had collided with the trailer.

(J.A. 632-633) Thus, the Jury also heard evidence that due to the obstruction at the entrance, McLaughlin's trailer was sticking out into the road where Mr. Smith struck it.

Based upon the evidence presented at trial, the jury concluded on its verdict form that Jarrett Smith was 60% at fault for his collision with the rear of the trailer. (J.A. 1298-1299) However, it also concluded that Poerio was negligent and found that it was 20% at fault for the accident. (J.A. 1298-1299) Because the Court's judgment in favor of Poerio was inconsistent with that finding, Defendants McLaughlin and Modular were entitled to judgment as a matter of law with respect to their claims or, in the alternative, a new trial in which the jury is not permitted to assign negligence to Jarrett Smith. The Circuit Court below denied their request for such relief (J.A. 1387-1400) and this appeal followed.

SUMMARY OF ARGUMENT

In this case, the Circuit Court below's judgment against the Petitioners on their contractual claims was inconsistent with the Jury's assignment of 20% of the total fault to Poerio. In that regard, the only evidence presented to the Jury regarding Poerio's conduct was the evidence that

it had moved the container unit and failed to maintain and provide an unobstructed entrance to the school through which McLaughlin could pick up the unit. That conduct was the basis for the Jury finding that Poerio was 20% at fault. Since such conduct constitutes a breach of the express terms of the Lease Agreement, it was inconsistent for the Court to find in favor of Poerio on Modular's breach of contract claims.

Next, the Circuit Court below erroneously concluded that the settlement entered into between the Smiths and the Petitioners extinguished McLaughlin and Modular's contribution claims. While such claims would have been extinguished if Poerio had remained potentially liable to the Smiths, the Petitioners also obtained a release for Poerio and settled all of the Smiths' claims arising from the subject accident. In that regard, the Circuit Court below's reliance upon *Jennings v. Farmers Mutual Insurance Company*, 224 W. Va. 636, 687 S.E.2d 574 (W. Va. 2009), for the principle that a settlement extinguishes a joint tortfeasor's right to seek contribution is misplaced because the settling tortfeasor in *Jennings* did not obtain a release for the remaining tortfeasor. Here, unlike the settling defendant in *Jennings*, McLaughlin and Modular obtained a general release, discharging the Smiths' claims against all parties, including Poerio. Thereby, the Petitioners maintained their right to seek contribution for any amounts paid in excess of their pro-tanto share under general principles of contribution.

Finally, because Jarrett Smith was no longer a party to the action and his comparative fault was no longer at issue, the Circuit Court below erred in allowing the Jury to consider it and make a finding with respect to what percentage of fault it attributed to him. *W. Va. Code §55-7-24* governs the apportionment of damages in tort cases, and provides that the Jury is to determine "the proportionate fault of each of the parties in the litigation at the time the verdict is rendered." Since Smith was no longer a party and his comparative fault was not at issue, the jury should not have

been permitted to consider it. In light of these errors, McLaughlin and Modular are entitled to a new trial and/or judgment as a matter of law.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioners represent that oral argument is necessary pursuant to the criteria contained in Rule 18(a) of the Rules of Appellate Procedure for the Supreme Court of Appeals of West Virginia, because the parties have not agreed to waive oral argument; the petition is not frivolous; and the dispositive issues have not previously been authoritatively decided by this Court. The Petitioners further represent, pursuant to Rule 20(a) of this Court's Rules of Appellate Procedure, that oral argument is necessary because this case involves issues of both first impression and fundamental public importance.

ARGUMENT

I. The Court's judgment in favor of Poerio on the breach of contract claims is inconsistent with the jury's finding that Poerio was negligent.

In this case, neither the Smiths nor McLaughlin and Modular alleged that Poerio was operating the trailer which was struck by the Plaintiff. (J.A. 1-3 and 9-11) Nor was Poerio alleged to have directed McLaughlin to park his vehicle and trailer at the second entrance where it was struck by Smith. (J.A. 1-3 and 9-11) Instead, Poerio's only alleged involvement in the accident was as the contractor in control of the job site that had failed to provide free and clear access to the container unit and had moved the unit without authorization. (J.A. 9-11) Therefore, when the Jury decided that Poerio was negligent and 20% at fault on the Verdict Form (J.A. 1298-1299), the only possible negligent acts Poerio could have committed were its failure to maintain and provide an unobstructed entrance to the school through which McLaughlin could pick up the container unit and/or its movement of the unit to a location perpendicular and adjacent to the roadway where

access was restricted. Poerio had no other alleged involvement in the accident and no other evidence was presented to support the Jury's finding of fault of Poerio. In that regard, this Court has found that:

Negligence is the violation of the duty of taking care under the given circumstances. It is not absolute, but is always relative to some circumstance of time, place, manner, or person.

Syl. Pt. 7, *Strahin v. Cleavenger*, 216 W. Va. 175, 603 S.E.2d 197 (W. Va. 2004) Since the Jury had to have found that Poerio breached some duty in order to find it 20% at fault and the only duty at issue in this case was Poerio's contractual duty to maintain and provide free and clear access to the container unit, the Jury's finding of a breach of that duty necessary constitutes a finding that Poerio breached its contract. Nevertheless, the Jury also found on its Verdict Form that Poerio had not breached the Lease Agreement. (J.A. 1298) Because those two findings were inconsistent, the Circuit Court below should have found in the Petitioners' favor with respect to their breach of contract claims, but did not do so. Instead, the Circuit Court below found in favor of Poerio in its Judgment Order. (J.A. 1295-1297)

Poerio's failure to maintain and provide unobstructed access to the container unit formed the basis for McLaughlin and Modular's breach of contract claims against Poerio. The jury clearly agreed that Poerio was negligent in failing to maintain and provide such unobstructed access, inasmuch as it found Poerio to be negligent and 20% at fault for the accident. (J.A. 1298-1299) Nevertheless, the Circuit Court below's July 16, 2013 Order entered judgment in favor of Poerio on the Petitioners' breach of contract claims. (J.A. 1295-1297) Because such a judgment is inconsistent with the fact that Poerio was found to have been negligent in failing to maintain and provide unobstructed access to the container unit, the Circuit Court below should have found in favor of McLaughlin and Modular on this issue.

The Circuit Court below's Judgment in favor of Poerio is also inconsistent with the undisputed fact that Poerio refused to defend or indemnify McLaughlin and Modular Building. Under the express terms of the Lease Agreement, Poerio was required to indemnify Modular against loss and damages to any other person, including the Plaintiffs, arising from or as a result of Poerio's use of the container unit while in its custody, possession and control. (J.A. 15-16) Since the jury found that Poerio was negligent and the only way it could have been negligent was by how it maintained and provided access to the container unit and/or its placement of that unit, it necessarily follows that Poerio's negligent use or placement of the container unit while in its custody, possession and control was, at a minimum, at least one proximate cause of the Smiths' underlying claims. Therefore, under the express terms of the Lease Agreement, Poerio was obligated to defend and indemnify McLaughlin and Modular in this case. (J.A. 15-16) Since it is undisputed that Poerio did not do so, a finding that Poerio breached the terms of the Lease Agreement was necessary based upon the Jury's finding that Poerio was negligent in connection with its use and placement of the container unit.

In response to the Petitioners' request for a new trial on this issue, Poerio suggested that the jury could have based its decision to attribute 20% of the fault in this case to it on a number of factual scenarios that would not constitute a breach of the Lease Agreement with Modular. (J.A. 1320) By way of example, Poerio suggested that the jury could have determined that Poerio was negligent for failing to send out its workers to help flag traffic while the trailer was in the roadway. However, Poerio could not point to any evidence or argument that was presented to the jury regarding either a duty to provide such flagging on the part of Poerio or how the failure to provide such flagging lead to the accident. Instead, the only evidence and arguments the jury heard concerning Poerio's alleged negligence involved either its failure to maintain and provide an

unobstructed entrance to the school through which McLaughlin could pick up the container unit or its movement of the unit to a location perpendicular and adjacent to the roadway, where it obstructed vision. (J.A. 621-623 and 733) Because the jury heard evidence about Poerio's failure to maintain and provide an unobstructed entrance, but did not hear any evidence to support any other theory of negligence, the Jury could not have based its decision to attribute 20% fault to Poerio upon any conduct that would not also constitute a breach of the Lease Agreement. Therefore, the Circuit Court below's judgment in favor of Poerio on the Petitioners' breach of contract claims was inconsistent with the Jury's findings at trial.

II. Defendants McLaughlin and Modular Buildings' claims for contribution were not extinguished by its settlement with the Plaintiffs because they also obtained a release for the claims against Poerio.

In its July 16, 2013 Judgment Order, the Circuit Court below indicated that its finding in favor of Poerio was based upon this Court's holding in *Jennings v. Farmers Mutual Insurance Company*, 224 W. Va. 636, 687 S.E.2d 574 (W. Va. 2009). (J.A. 1295-1297) In particular, the Circuit Court below noted that in *Jennings*, this Court had found that it would be unfair to permit a settling defendant to pursue a claim of contribution against a non-settling defendant while simultaneously precluding the non-settling defendant from seeking contribution for the settling defendant. (J.A. 1297) However, the principles upon which *Jennings* was decided are not applicable in this case because, unlike the settling defendant in *Jennings*, McLaughlin and Modular obtained a general release, discharging the Smiths' claims against all entities, including Poerio.

Farmers Mutual, the settling defendant in the *Jennings* case, only obtained a release for the plaintiff's claims against it and, rather than obtain a release for the non-settling defendant, Kevin Fike, actually took an assignment of the plaintiff's claims against him. That distinction is important

because of the effect it had upon Fike's right of contribution with respect to any verdict. In *Syllabus Pt. 3 of Mackey v. Irisari*, 191 W. Va. 355, 445 S.E.2d 742 (W. Va. 1994), this Court noted:

The doctrine of contribution has its roots in equitable principles. **The right to contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his *pro tanto* share of the obligation.** One of the essential differences between indemnity and contribution is that contribution does not permit a full recovery of all damages paid by the party seeking contribution. Recovery can only be obtained for the excess that such party has paid over his own share.

(Quoting *Sydenstricker v. Unipunch Products, Inc.*, 169 W. Va. 440, 288 S.E.2d 511 (W. Va. 1982) (Emphasis added.) The settlement in *Jennings* left Fike exposed to a judgment in excess of his *pro tanto* share of the liability, without the equitable protection of his own right of contribution against Farmers Mutual. This Court in *Jennings* found that such an outcome would be unfair based upon the principles of "inchoate contribution" set forth in *Board of Educ. v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (W.Va. 1990) (See *Jennings* at 640, 578.

At *Syl. Pt. 2 of Zando, Martin & Milstead, Inc.*, this Court found that:

A defendant in a civil action has a right in advance of judgment to join a joint tortfeasor based on a cause of action for contribution. This is termed an "inchoate right to contribution" in order to distinguish it from the statutory right of contribution after a joint judgment conferred by W.Va. Code, 55-7-13 (1923).

This Court then found that while this right of contribution is extinguished when one joint tortfeasor settles, the remaining joint tortfeasors receive a credit for the amount of that settlement which offsets their own liability to the claimant. This Court noted:

Where a payment is made, and release obtained, by one joint tortfeasor, the other joint tort-feasors shall be given credit for the amount of such payment in the satisfaction of the wrong.

Zando, Martin & Milstead, Inc., at *Syl Pt. 5*. Accordingly, under *Zando, Martin & Milstead, Inc.*, remaining joint-tortfeasors remain exposed to a verdict but have the amount they ultimately must pay reduced by the amount paid by the settling tortfeasor and their claims for contribution against that tortfeasor are extinguished. This Court noted that such an arrangement was equitable because it “(1) encourages the plaintiff to settle by guaranteeing that the portion of the verdict not paid by the settling defendant will be chargeable to the defendant against whom the verdict is returned and (2), at the same time, clearly furthers the strong public policy against the plaintiff recovering more than one complete satisfaction.” *Zando, Martin & Milstead, Inc.*, at 606, 805. Likewise, this Court found that it was necessary to extinguish the non-settling joint-tortfeasor’s right of contribution because “such a rule furthers the strong public policy favoring out-of-court resolution of disputes,” *Zando, Martin & Milstead, Inc.*, at 604, 803, and noted that “[n]o defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he will not be a party.” *Id.* at 605, 804. In this case, Poerio did not remain exposed after the settlement and, thus, no longer had an independent right of contribution. Instead, McLaughlin and Modular Building were forced to pay more than their pro tanto share in order to obtain a resolution of the Smiths’ claims and have been unfairly denied their ability to recover the amount they paid in excess of their actual degree of fault.¹

The important distinction between settlements that leave the non-settling tortfeasors exposed to liability and those that extinguish the liability of all defendants was recognized by the Supreme

¹ McLaughlin and Modular actually sought to recover the entire amount paid based upon Poerio’s breach of contract and the indemnity provisions of the Lease Agreement. For simplicity, their argument here has been limited to the contribution issue.

Court of Nebraska in *Estate of Powell v. Montange*, 277 Neb. 846, 765 N.W.2d 496 (Neb. 2009),

where the Court noted:

The basis for an action for contribution is the discharge of a common liability caused by joint tort-feasors in which one tort-feasor has paid more than his or her proportionate share. . . . Under equitable principles, the discharge of such liability is a benefit to the tort-feasor from whom contribution is sought. However, without such discharge, the other tort-feasor may remain liable to the injured party and the tort-feasor seeking contribution will not have fixed the amount of liability for which contribution is sought. **A settlement by one tort-feasor that does not extinguish the common liability does not confer a benefit upon which a claim for contribution may be asserted. . . . If the common burden is to be shared, the discharge of liability from such burden must also be shared. Thus a right of contribution among joint tortfeasors is not established if the tort-feasor seeking contribution extinguishes only his or her liability and does not extinguish the liability of the other joint tort-feasors from whom contribution is sought.** The reciprocal also applies. A joint tort-feasor who settles without extinguishing the entire liability, and whose payment later turns out to be less than his fair share, is not subject to actions for contribution to others.

Estate of Powell at 856-857, 504. (Citations omitted.)(Emphasis supplied.)

Other Courts have also recognized that equity favors allowing a settling tortfeasor to pursue contribution in order to properly apportion the liability among all at fault parties. For example, in *Sears, Roebuck & Co. v. International Harvester Co.*, 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (Cal. App. 1978), the Court noted:

In no way does a rule permitting assertion by a settling defendant of his right of comparative indemnity impinge upon the maximization of recovery to the injured person. Permitting the recovery encourages settlement. **If recovery were barred, a named defendant would be inhibited in effectuating a settlement where he believes that he has a right of indemnity against a solvent person or corporation, particularly where the potential indemnitor is not named as a defendant by the plaintiff. Allowing the settling defendant to assert his right of contribution against other concurrent tortfeasors effectuates the policy of equitable apportionment of the loss among them.**

Sears, Roebuck & Co. at 496, 264. (Emphasis added.) Similarly, in *Bolamperti v. Larco Mfg.*, 164 Cal. App. 3d 249, 210 Cal. Rptr. 155 (Cal. App. 1985), the Court explained:

To decide otherwise would inhibit a tortfeasor from settling if he should, by doing so, lose his right to pursue indemnity against the order[sic] tortfeasor. Then too, other tortfeasors would be encouraged to settle themselves, knowing that by so doing they could insulate themselves against cross-claims from settling tortfeasors. Nor can we think of any policy reason to deny a settling tortfeasor the right to pursue his claim for indemnification against nonsettling tortfeasors.

Bolamperti at 255, 159. Here, allowing a non-settling tortfeasor to escape liability for contribution when the settling tortfeasor has obtained a complete release for all at-fault parties would actually discourage settlements and would require defendants to run the risk of trial if they wish to preserve their right to contribution.

III. The Jury should not have been permitted to consider Jarrett Smith's comparative negligence following the settlement of their claims by McLaughlin and Modular.

While Poerio may assert that the Petitioner's claims for contribution are improper because the jury found Jarrett Smith to be 60% at fault, such a finding should not have been permitted in light of the settlement of the Smiths' claims. In that regard, *W.Va. Code §55-7-24* governs the apportionment of damages and provides, in relevant part:

- (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 proportionate fault of each of the parties in the litigation at the time the verdict is rendered;**

(Emphasis added.) Because Jarrett Smith was not a party in the litigation at the time the verdict was rendered, McLaughlin and Modular made a timely objection to his inclusion on the verdict form

submitted to the jury. (J.A. 188-189) The Circuit Court below overruled that objection and incorrectly permitted the jury to attribute fault to an individual who was not a party at the time the jury's verdict was rendered. (J.A. 1299)

In *Groves v. Compton*, 167 W. Va. 873, 280 S.E.2d 708 (W. Va. 1981), this Court indicated:

We also recognized, as have other courts, that it is improper for counsel to argue to the jury why a party has not been brought into the lawsuit or that an absent party is solely responsible for the accident since the evidence surrounding such absent party's liability has not been fully developed.

Groves at 879, 712. Here, it is undisputed that after the settlement, the Smiths were not parties at the trial and did not put on their expert witnesses or otherwise argue the issues.² Therefore, the evidence surrounding Mr. Smith's degree of comparative fault was never fully developed and should not have been before the Jury. See also *Doe v. Wal-Mart Stores, Inc.*, 558 S.E.2d 663 at 672-673 (W. Va. 2001) (Counsel for defendant violated *Groves* by asking the jury to speculate regarding the liability of a party that settled prior to trial.) Because the Smiths were no longer parties at the time of trial, and Mr. Smith's degree of comparative fault was no longer at issue, the Jury should not have been asked to assign a degree of fault to Mr. Smith in connection with the dispute between the Petitioners and Poerio.

Permitting Poerio to escape liability for contribution based upon the Jury's apportionment of fault to Jarrett Smith after a settlement also violates the strong public policy in favor of out of court settlements discussed in *Zando, Martin & Milstead, Inc.*, supra. at 604, 803. In that regard,

² While Jarrett Smith did testify at trial (J.A. 576-593), he did not have counsel arguing the case, putting on witnesses or otherwise seeking to minimize his comparative negligence. Further, because of his injuries, Mr. Smith had no memory of the accident (J.A. 583).

McLaughlin and Modular examined the amount of damages at issue in this case and determined that it would be better to avoid the risk of a substantial verdict in favor of the Smiths by settling their claims before trial. In order to preserve their right of contribution, the Petitioners obtained a release of all of the Smiths' claims, including their claims against Poerio, and proceeded to trial only to determine the relative degree of fault between the remaining parties. If Petitioner's right of contribution was extinguished by entering into such a settlement, what motive would any defendant have to cap their potential exposure by settling with a badly injured plaintiff. Instead, such defendants would be better off "rolling the dice" and hoping that the jury would favor them by attributing more fault to the plaintiff or a joint-tortfeasor. Moreover, since it is undisputed that McLaughlin and Modular entered into their settlement with the Smiths in good faith, the fact that the jury eventually assigned 60% fault to Jarrett Smith should not be used in hindsight to extinguish Petitioner's claims. Under similar principles, this Court in *Zando, Martin & Milstead, Inc.* recognized that a non-settling tortfeasor's right of contribution would be extinguished even though the amount of the settlement might not reflect the amount of fault which ultimately would have been attributed to the settling tortfeasor, so long as the settlement was made in good faith, noting:

Since damages are often speculative and liability uncertain, the amount of a settlement legitimately might be far different from a damage award which results from full litigation. . . . An ensuing jury verdict is not necessarily an accurate measure of good faith in a settlement made prior to trial; at the time of the settlement, it is an unknown factor, so that any analysis based on the subsequent verdict necessarily relies on hindsight.

Zando, Martin & Milstead, Inc. at 605, 804. If Poerio is permitted to escape liability for contribution by calling into question the wisdom of the settlement based upon the jury's ultimate

attribution of fault to a party who was no longer present and participating in the case at trial due to settlement, the public policy in favor of the settlement will be frustrated.³

While it can be argued in hindsight that because the jury ultimately found Jarrett Smith to be 60% at fault, it was proper for the Jury to consider Smith's degree of fault, such hindsight is not a valid basis for depriving McLaughlin and Modular of the benefit of their settlement with the Smiths. As discussed in *Zando*, when a tortfeasor settles with a claimant, all claims for contribution against him are extinguished and the remaining tortfeasors get a dollar for dollar credit for the amount of the settlement against any verdict later rendered against them. *Zando* at 606, 805. They do not, however, get to have the jury consider that settling tortfeasor's degree of fault and have their own degree of fault reduced accordingly regardless of the amount of the settlement. The Court noted:

We recognize that this model for verdict reduction does not take into account the settling party's actual degree of fault. However, the importance and accuracy of the jury's allocation of liability is necessarily undermined by the fact that the settling party, who is out of the case, is not present to defend himself.

Zando at 607, 806. Poerio would have this Court turn these principles on their head and find that the Jury should still consider the degree of fault of settling parties since hindsight may reveal that one party paid too much or another did not pay enough. While such an approach would clearly assist non-settling tortfeasors by allowing them to gamble with another party's settlement funds, it would obstruct the strong public policy favoring settlement. In effect, tortfeasors such as Poerio

³ Obviously, the outcome at trial would likely have been different if the Smiths had participated at trial and offered the opinions of their own expert regarding the cause of the accident, showing why Smith was unable to see the trailer in the road. McLaughlin and Modular could not offer such testimony (since they could not utilize the Smiths' expert at trial), and the jury never heard the Smiths' evidence before attributing 60% fault to Jarrett Smith.

would be free to bet that they could prove comparative fault without the risk of a large verdict if they lose. Moreover, since such tortfeasors would also be immune to contribution claims from the defendants who stepped up and paid more than their fair share, their refusal to settle would be rewarded.

CONCLUSION

In this case, the jury should not have been permitted to consider the degree of fault attributable to Jarrett Smith since he was not a party at the time of trial. Moreover, the fact that the jury attributed 20% negligence to Poerio at trial means that McLaughlin and Modular were entitled to recover on their claims for breach of contract and contribution as a matter of law. Therefore, for all of the foregoing reasons, this Court should reverse the decision of the Circuit Court below and grant the Petitioners a new trial and/or judgment as a matter of law.

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

By Counsel



Brent K. Kesner, Esq. (WV 2022)
Ernest G. Hentschel, II, Esq. (WV 6066)
KESNER, & KESNER, PLLC
Post Office Box 2587
Charleston, WV 25329
Phone: (304) 345-5200
Fax: (304) 345-5265

No. 14-0158

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MODULAR BUILDING CONSULTANTS OF WEST VIRGINIA, INC., and
BILLY JOE MCLAUGHLIN, Defendants/Third-Party Plaintiffs Below,

Petitioners,

v.

POERIO, INC., Third-Party Defendant Below,

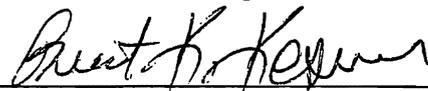
Respondent.

CERTIFICATE OF SERVICE

I, Brent K. Kesner, do hereby certify that a true copy of the foregoing **PETITIONERS'**
BRIEF were served upon counsel of record:

Benjamin T. Hughes, Esq.
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
JamesMark Building
901 Quarrier Street
Charleston, WV 25301

by placing the same in an envelope, properly addressed with postage fully paid and depositing the
same in the U.S. Mail, on this the 14th day of April, 2014.



Brent K. Kesner, Esq. (WVSB #2022)
Kesner, Kesner & Bramble, PLLC
112 Capitol Street
P.O. Box 2587
Charleston, WV 25329
Phone: (304) 345-5200
Fax: (304) 345-5265