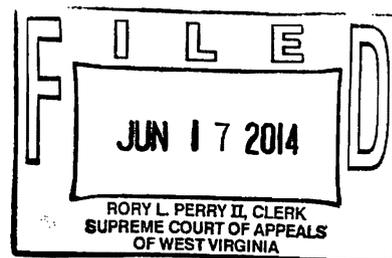


No. 14-0158



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' REPLY BRIEF

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

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STATEMENT OF THE CASE

In this case, the Court is being asked to resolve the question of whether Petitioners Billy Joe McLaughlin (“McLaughlin”) and Modular Building Consultants of West Virginia Inc. (“Modular”) had to give up their claims for contribution from Respondent Poerio Incorporated (“Poerio”) if they wished to avoid the risk of a larger verdict by settling with the Plaintiffs below prior to trial. Plaintiffs below, Jarrett and Sharon Smith, chose to name only McLaughlin and Modular in their action for personal injuries arising from a July 14, 2011 automobile accident in which Jarrett Smith struck the rear of a trailer stopped in the entrance to a school. (J.A. 1-2) Plaintiffs alleged that McLaughlin, an employee of Modular, was negligent when he left part of his trailer in the roadway when arriving to pick up a Modular container unit which had been leased to Poerio for use in a construction project at the school. (J.A. 2 and 9-10) McLaughlin and Modular brought a third-party claim for contribution and/or indemnification against Poerio based upon Poerio’s negligent failure to provide clear access to the container unit and its breach of the lease agreement which required that Poerio provide such access. (J.A. 9-15)

In order to avoid the risk of a large verdict, McLaughlin and Modular decided to enter into a settlement agreement with the Plaintiffs below prior to trial. (J.A. 1407-1414) Poerio was unwilling to participate in that settlement and maintained that it had no obligation to pay any damages to either the Plaintiffs below or McLaughlin and Modular. Therefore, McLaughlin and Modular settled all of the Plaintiffs’ claims and obtained a general release of all tortfeasors while retaining their claims against Poerio. (J.A. 1407-1414) The case then proceeded to trial solely with respect to the claims of McLaughlin and Modular against Poerio. During trial, the Court permitted the jury to also consider the negligence of Jarrett Smith, and the verdict form provided for the jury to assign fault to Smith, who had settled, as well as the parties to this appeal. The jury did so, and

assigned 60% negligence to Jarrett Smith, while finding that McLaughlin and Poerio were each 20% at fault. (J.A. 1298-1299) The Court then entered its July 16, 2013 Judgment Order in favor of Poerio with respect to both the contribution claim and the claim for breach of contract. (J.A. 1295-1297) Because the jury should not have been permitted to consider any alleged negligence on the part of Jarrett Smith following the settlement of Plaintiffs' claims, and because the Circuit Court below's finding in favor of Poerio was inconsistent with both the jury's findings and applicable law, McLaughlin and Modular have now brought this appeal.

ARGUMENT

I. The Jury's finding that Poerio was negligent was inconsistent with its finding that Poerio did not breach the subject contract because the only evidence of negligence presented at trial concerned Poerio's failure to provide unobstructed access to the subject container unit.

Poerio begins its arguments by suggesting that the jury could have found it to be negligent and 20% at fault without necessarily finding that it breached the subject lease agreement. That assertion ignores the basis of the Petitioner's contractual claims.

In its *Brief*, Poerio correctly points out that the theory upon which Modular based its breach of contract claims was Poerio's failure to provide "free and clear access" to the subject container unit and not the mere fact that it moved the unit without permission in violation of Paragraph 10 of the lease agreement (see Paragraph 10 at J.A. 119). However, Poerio fails to recognize that moving the container unit to an area where access was restricted constitutes a breach of the contractual requirement to provide "free and clear access" to the unit. (See Paragraph 3d. at J.A. 119 which requires such free and clear access.) Poerio then suggests that Petitioner's counsel agreed that merely moving the unit was not the basis of the Petitioners' claims quoting Counsel's

arguments at J.A. 744-745. However, in the very quote set forth in the Respondent's Brief at pg. 8, Petitioner's counsel clearly indicated:

. . . But I do not want there to be any confusion that the fact that they moved it from where they did, to where they moved it to, was a contributing circumstance of this accident, because it partially, together with the van, totally obstructed access, so no clear ingress . . .

(J.A. 744-745) Thus, it was Poerio moving the unit to an area with restricted access and not the mere act of moving it that formed the basis of the Petitioner's claims.

Poerio next argues that the testimony of three witnesses, Todd Sawicky, Chris Cantelmi and Roland Fero, established that the first entrance to school was open and "unobstructed" refuting the Petitioners' theory as to the cause of the accident. (See the testimony quoted from J.A. 782, 835 and 911-912.) However, this argument ignores the fact that the Jury also heard evidence from McLaughlin that access was restricted at the first entrance, (J.A. 620-621) and evidence from Chris Cantelmi that it was usual and customary for contractors and heavy equipment to access the site by use of the second "construction" entrance where the accident occurred. (J.A. 900-901) In addition, the jury heard testimony from McLaughlin that no representative of Poerio advised him to access the unit for pick up through the first entrance. Instead, McLaughlin was specifically told that "the unit had been moved to the entranceway of the construction road" and that it would be easy to get to. (J.A. 613) Since the Jury found Poerio to be negligent and 20% at fault, the real question here is what conduct could have constituted that negligence by Poerio other than Poerio either failing to provide clear access to the unit or moving it to a location where access was restricted. In that regard, the only evidence and arguments the jury heard concerning Poerio's alleged negligence involved either its failure to maintain an unobstructed entrance to the school through which McLaughlin could pick up the container unit and Poerio's movement of the unit to a location that did not have

unobstructed access. Such conduct clearly constitutes a breach of Poerio's contractual duty to provide free and clear access, as well as negligence.

In its *Brief*, Poerio is unable to point to any alternative example of possible negligent conduct heard by the Jury that would not also constitute a breach of the lease agreement. For example, in Footnote 2 of its *Brief*, Poerio suggests that there were "several other ways and theories" the jury could have found Poerio to be nominally negligent. It then suggests that the jury could have concluded that it was negligent because it failed to send out its workers to help flag traffic while the trailer was in the roadway. However, Poerio cannot identify 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. Moreover, the Circuit Court below provided no instructions on any such duty to the jury. Therefore, Poerio is simply inviting the Court to speculate that any number of factual scenarios could have lead to the jury's decision without citing any evidence to support such speculation.

In this case, the jury heard evidence about Poerio's failure to maintain an unobstructed entrance to the school and evidence that its movement of the unit to a location near and perpendicular to the roadway blocked Defendant McLaughlin's view. (J.A. 620-621) The jury heard argument that such conduct was both negligent and a breach of the lease agreement. (J.A. 1123-1124) Importantly, the jury did not hear anything about any of the other "factual scenarios" upon which Poerio now relies and, therefore, could not have based its decision to attribute 20% fault to Poerio upon them. Since a finding that Poerio was 20% at fault is inconsistent with a finding that Poerio did not breach the lease agreement, the jury's finding in favor of Poerio on that issue and the Circuit Court below's Judgment Order were inconsistent with the evidence presented at trial.

II. The fact that the Plaintiffs below did not directly sue Poerio is irrelevant since Poerio became exposed to liability once McLaughlin and Modular brought their third-party claims for contribution.

Throughout its *Brief*, Poerio makes much of the fact that the Smiths exercised their right to sue less than all potential joint tortfeasors¹ and that Poerio was only in the case because McLaughlin and Modular exercised their right to pursue a third-party claim against it under *Rule 14* of the *West Virginia Rules of Civil Procedure*. Poerio asserts that because it was never sued directly, it could not have been exposed to a substantial verdict even if the Petitioners had not settled. (See the Respondent's *Brief* at pg. 16.) That argument is simply preposterous.

As a third-party defendant, Poerio was clearly exposed to liability if the Petitioners had not settled and the case had proceeded to trial. Had the Petitioners not settled, Poerio would have been subject to having its percentage of fault determined pursuant to *West Virginia Code §55-7-24* and, if found to be at fault, would have faced joint and several liability for some or all of the Smith's alleged damages. To suggest otherwise ignores the plain language of *West Virginia Code §55-7-24* regarding the apportionment of fault and *Rule 14* which allows the joinder of third parties who may be liable for part of the damages. It was only through the settlement by the Petitioners that Poerio avoided such exposure.

Poerio also suggests that McLaughlin and Modular's claims for contribution were extinguished by their settlement regardless of the fact that Petitioners obtained a general release for all of the Smiths' claims arising from the accident. In effect, Poerio is asserting that if one joint tortfeasor is not sued directly by the injured party, a tortfeasor that was sued cannot settle without

¹ In Syl. Pt. 3 of *Board of Education v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 390 S.E.2d 796 (1990), this Court explained that "[a] plaintiff may elect to sue any or all of those responsible for his injuries and collect his damages from whomever is able to pay, irrespective of their percentage of fault."

giving up his or her right to contribution. Such a result would be patently unfair and impose an inequitable burden upon defendants who wish to settle.

Poerio's arguments are apparently based upon the suggestion that when one tortfeasor settles with a claimant, that settlement eliminates all claims for contribution and indemnification the settling tortfeasor might have against any other at-fault party. A review of applicable case law reveals that this premise is simply incorrect when the settling defendant obtains a general release for all at-fault parties. For example, Poerio directs the Court to its holding in *Jennings v. Farmers Mutual Insurance Company*, 224 W. Va. 636, 687 S.E.2d 574 (2009), and makes much of the fact that this Court found in *Jennings* 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 from the settling defendant. Poerio fails to recognize that the principles upon which *Jennings* was decided are not applicable here because, unlike the settling defendant in *Jennings*, McLaughlin and Modular obtained a general release, discharging the Smith's claims against all alleged tortfeasors, including Poerio.

In *Jennings*, the settling defendant, Farmers Mutual, only obtained a release of 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 exposed Fike 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. Here, Poerio was still free to assert at trial that its negligence was zero, thereby defeating the McLaughlin/Modular claim for contribution. Poerio's right to assert the comparative negligence of McLaughlin and Modular was not impaired and it suffered no unfair restriction on its ability to have the jury assign a percentage of fault among all alleged tortfeasors. Likewise, Poerio's assertion that the Petitioners did not have to pay more than

their pro tanto share ignores the fact that the Jury assigned an equal percentage of fault to Poerio but Poerio paid nothing for the settlement of the Smiths' claims. While Poerio may feel that it was not equally at fault or that the Petitioners paid too much, the jury assigned an equal percentage of fault and never considered the Smiths' damages.

Poerio also relies upon *Smith v. Monogahela Power*, 189 W. Va. 237, 429 S.E.2d 643 (1993), and *Board of Education v. Zando, Martin & Milstead, Inc.* 182 W. Va. 597, 390 S.E.2d 796 (1990). However, neither case addresses the situation where a joint tortfeasor obtains a general release of all claims which releases all other tortfeasors, and then seeks contribution. Instead, both cases merely confirm that a joint tortfeasor who settles prior to trial can no longer be held liable for contribution. For example, in Syl. Pt. 4 of *Smith*, the Court held:

If a plaintiff enters into a settlement with a non-party against whom it has not directly asserted a cause of action, and the settlement occurs before a judicial determination of liability, the settlement relieves the non-party of all further obligations to the plaintiff and all liability for contribution to the non-party's joint tortfeasor[.]

Here, Poerio never entered into any settlement with the Plaintiffs below and is not entitled to the benefit of having any claims against it extinguished under *Smith*. Instead, Poerio refused to settle and McLaughlin and Modular were forced to pay more than their pro tanto share in order to obtain a general release for all potential tortfeasors. That situation is addressed in Syl. Pt. 1 of *Zando*, which provides:

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.

In this case, Poerio is suggesting that McLaughlin and Modular had the choice of either proceeding to trial and risking an excessively large verdict or settle and give up their right of

contribution. In effect, Poerio would have the Court create a dis-incentive to compromising claims by finding that such a settlement extinguishes the right of contribution, even though Poerio paid nothing for the release which relieved it from any potential liability to the Smiths. Such a finding would be inherently unfair and discourage defendants from settling cases.

III. McLaughlin and Modular only introduced the testimony of Jarrett Smith after the Circuit Court below incorrectly ruled that the Jury should consider his comparative negligence.

With respect to the Jury's consideration of the negligence of Jarrett Smith, Poerio argues at page 23 of its *Brief* that the Petitioners placed his negligence into controversy when they called him to testify at trial. However, that argument ignores the fact that the Circuit Court below had already ruled that the Jury would be allowed to consider his proportionate degree of fault in connection with the contribution issue. (J.A. 199) Under those circumstances, the Petitioners had no choice but to offer his testimony since doing otherwise would have allowed Poerio to point to the "empty chair" and argue Jarrett Smith's negligence without rebuttal.² Far from "opening the door," the Petitioners specifically argued prior to trial that the jury should not be allowed to consider Jarrett Smith's negligence in light of the settlement. (J.A. 188-189)

Poerio also argues that consideration of Jarrett Smith's negligence was necessary because it had asserted the affirmative defense of comparative negligence. However, Poerio's argument ignores the requirements of *W. Va. Code §55-7-24*, which provides in relevant part:

(a) In any cause of action involving the tortious conduct of more than one defendant, the trial court shall:

² Inasmuch as Mr. Smith sustained a significant head injury and had no memory of the accident, his ability to address the issue of his own negligence was limited in any event. (J.A. 583) More significant was the absence of any expert testimony on his behalf to rebut the existence of comparative negligence.

(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.) While Poerio asserts that *W. Va. Code § 55-7-24* is inapplicable where a plaintiff's percentage of fault has not been determined, it cites no authority for that proposition. Moreover, it fails to recognize that after the settlement, this case was proceeding to trial solely in order to resolve the comparative fault of the alleged tortfeasors. If, for example, there had been another non-party alleged to have been at fault who had settled with the Smiths prior to trial, the jury would not have considered that tortfeasor's negligence under Syl. Pt. 4 of *Smith* regardless of what percentage of fault the jury might have ultimately assigned to them. Only the comparative fault of the parties to the litigation was properly at issue.

Here, the Petitioners' settlement removed Jarrett Smith as a party to the case. In both *Zando* and *Smith*, this Court recognized that a good faith settlement extinguishes claims for contribution even though the amount of such a settlement may be quite different than the damages attributed to the settling tortfeasor at trial. For example, in *Zando*, this Court noted:

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 at 605 (citations omitted). For that reason, the Court in both *Zando* and *Smith* found that so long as a settlement was made in good faith, it would conclusively resolve the issue of the settling party's percentage of fault. The Court in *Zando* explained:

The good faith test carries its own safeguards. It is highly unlikely that a plaintiff will make a minimal settlement with a defendant who

has the financial ability to pay and whose liability is substantial. We, therefore, conclude that a party in a civil action who has made a good faith settlement with the plaintiff prior to a judicial determination of liability is relieved from any liability for contribution.

Zando at 606. The Court also noted “[s]uch a rule furthers the strong public policy favoring out-of-court resolution of disputes.” Because the Petitioners made a good faith settlement of the Smiths’ claims here, the extent of Jarrett Smith’s fault was no longer relevant for the jury’s consideration

Poerio also argues that because the jury ultimately found Jarrett Smith to be 60% at fault, the Court should conclude in hindsight that it was proper for the jury to consider his degree of fault. However, hindsight is not a valid basis for depriving McLaughlin and Modular of the benefit of their settlement with the Plaintiffs. 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. 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 606-607. Poerio would have the 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 settlements. In effect, tortfeasors such as Poerio

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.

In this case, Jarrett Smith was not a party in the litigation at the time this case proceeded to trial and the jury should not have been permitted to consider his degree of fault. When the Petitioners entered into a good faith settlement of the Smiths' claims, the fault attributable to Jarrett Smith was set for purposes of the remaining litigation in the same fashion as the fault of a settling tortfeasor is set for purposes of contribution after a partial settlement. While such an outcome may ignore the settling party's actual degree of fault, to do otherwise is contrary to *Zando* and would frustrate the strong public policy in favor of settlements.

CONCLUSION

Here, 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 or judgment as a matter of law.

**PETITIONERS, MODULAR BUILDING
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and BILLY JOE MCLAUGHLIN,**

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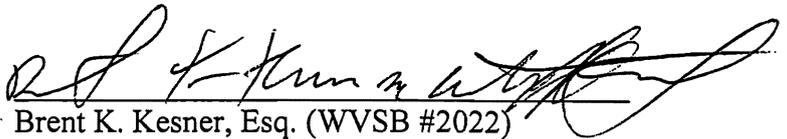
Respondent.

CERTIFICATE OF SERVICE

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

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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 17th day of June, 2014.



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