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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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.

RESPONDENT'S BRIEF

Appeal from the Circuit Court of Putnam County
Civil Action No. 11-C-277

(Judge Joseph K. Reeder)

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 1

STATEMENT OF THE CASE 1

I. Procedural History 1

II. Statement of Relevant Facts 4

SUMMARY OF ARGUMENT 8

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 9

ARGUMENT 10

A. The Court's judgment in favor of Poerio on the breach of contract claim is consistent with the jury's finding that Poerio was 20% at fault. 10

B. Petitioners' claims for contribution were extinguished by their settlement with Plaintiffs regardless of the release obtained. 13

C. The jury properly considered the negligence of each of the parties, including Plaintiff Jarrett Smith, in its deliberations 20

CONCLUSION 26

CERTIFICATE OF SERVICE 28

TABLE OF AUTHORITIES

Board of Education v. Zando, Martin & Milstead, 390 S.E.2d 796 (W. Va. 1990).....9, 16, 17, 19

CJH, Inc. v. Quadruple S Farms, LLC, 2013 W. Va. LEXIS 640 (W. Va. June 7, 2013).....23

Doe v. Wal-Mart Stores, Inc., 558 S.E.2d 663 (W. Va. 2001) 23

Jennings v. Farmers Mutual Insurance Company,
687 S.E.2d 574, 578 (W. Va. 2009).....9, 18, 19, 20, 23

Mackey v. Irisari, Syl. Pt. 3, 445 S.E.2d 742.....15

Neely v. Belk Inc., 668 S.E.2d 189, 200 (W. Va. 2008).....12

Reager v. Anderson, 371 S.E.2d 619 (W. Va. 1988) 21, 24

Roberts v. Consolidation Coal Co., 539 S.E.2d 478, 485, 486 (W. Va. 2000) 23, 24

Rowe v. Sisters of the Pallottine Missionary Society,
560 S.E.2d 491, 496, 499 (W. Va. 2001).....21

Smith v. Monongahela Power, 429 S.E.2d 643, 805 (W. Va. 1993) 9, 17, 18

Stenger v. Hope Natural Gas Co., 90 S.E.2d 261 (W. Va. 1955).....24

Walker v. Monongahela Power Co., 131 S.E.2d 736 24

ASSIGNMENTS OF ERROR MADE BY PETITIONERS

1. Whether it was the proper province of the jury to rule in favor of Poerio on Petitioners' breach of contract claim based upon the preponderance of the evidence presented at trial.

2. Whether the Circuit Court properly ruled that Petitioners' claims for contribution were extinguished upon settlement with Plaintiff, who never sued Poerio.

3. Whether the Circuit Court committed harmless error by allowing the jury to consider Jarrett Smith's negligence after hearing his trial testimony.

STATEMENT OF THE CASE

Respondent agrees with Petitioners' general statement of the case as provided on the first page of Petitioners' brief. However, additional commentary and explanation are required to resolve certain characterizations of the trial testimony and facts which were omitted from the Procedural History and Statement of Relevant Fact sections of Petitioners' brief.

I. Procedural History

First, this Court should be aware that Plaintiffs, Jarrett Smith and Sharon Smith, never sued Poerio. Poerio, who was the General Contractor working on the construction of Geary Elementary School at the time of this accident on July 14, 2011, only became involved in this civil action as a result of the Third-Party Complaint filed by Modular Building Consultants of West Virginia, Inc. (hereinafter "Modular"), and Billy McLaughlin seeking contractual indemnification and contribution. Even after Modular and McLaughlin filed their Third-Party Complaint, Plaintiffs never asserted a direct cause of action against Poerio.

With regard to the settlement reached amongst the parties to the litigation, Poerio was not made aware of the ongoing settlement negotiations and did not participate in the same with

Plaintiffs beyond what occurred at mediation. (J.A. 196-197) Settlement between Modular/McLaughlin and Plaintiffs was consummated approximately two weeks prior to start of trial, without any notice or knowledge to Poerio.[1] Modular and McLaughlin then attempted to preserve their claims for contribution in the settlement agreement. Once Poerio learned of the settlement between Modular, McLaughlin, and Plaintiffs, Poerio argued vehemently to the Circuit Court prior to the start of trial that Modular's claim for contribution against Poerio had been extinguished based upon the way the settlement with Plaintiff Smith came about and upon this Court's prior holdings in the cases discussed at length, *infra*. (J.A. 189-199). Poerio repeated its arguments that Modular's contribution claim was extinguished at the beginning of the second day of trial, after the close of Modular and McLaughlin's case in chief, and again at the close of Poerio's case in chief. (J.A. 742-750; 1075-1083; 1091-1092). Ultimately, as a result of Modular and McLaughlin's attempt to preserve the contribution claim in the settlement documents with Plaintiffs, the issues of contribution and negligence of all of the parties were permitted to go to the jury. (J.A. 1082).

Petitioners correctly note that the Circuit Court permitted the jury to assign negligence to Petitioners, Respondent, and Plaintiff Jarrett Smith on the verdict form. Accordingly, Poerio contends it would have been improper for a jury to evaluate only the negligence of Modular, McLaughlin, and Poerio after hearing testimony by Plaintiff Jarrett Smith regarding his own contributory negligence when he was called to testify by counsel for Modular and McLaughlin.

[1] At mediation, Petitioners made a straight "take it or leave it" offer to Respondent to pay one-half of $380,000 to extinguish both the contractual indemnification claim and contribution claim against Respondent. Due primarily to the clear evidence of Plaintiff Smith's comparative fault, in addition to Respondent's confidence in defending Petitioners' breach of contract claim, this "offer" was declined. (J.A. 197). Petitioners then consummated their secret deal with Plaintiffs for $380,000 and put Poerio on the Release, all without Poerio's knowledge or consent. (J.A. 196-197) If Respondent knew then that Petitioners were going to argue that putting it on the Release with Plaintiff would allow them to somehow legitimately retain their contribution claim for trial, then Respondent would not have consented to that.

Based upon that testimony, as well as the testimony of the other witnesses, the jury found that Plaintiff Jarrett Smith was 60% at fault for the accident, and assigned 20% fault to each McLaughlin and Poerio. (J.A. 1298-99). In addition to the findings of negligence against Plaintiff Jarrett Smith, McLaughlin, and Poerio, the jury answered the most important interrogatory on the verdict form (and the only one that should have been submitted for jury consideration) as follows:

"1. Do you find that Poerio Incorporated breached its Lease Agreement with Modular Building Consultants and that the breach was a proximate cause of the accident on July 14, 2011?

Yes_____ No __X_____"

Id.

The Circuit Court reviewed the findings of the jury and entered a Judgment Order on July 16, 2013, finding in favor of Poerio with respect to the contribution claim and the claim for breach of contract. Despite the Order based upon the proper decision of the jury and the Circuit Court's correct interpretation of West Virginia law with regard to contribution, Petitioners allege that the jury verdict was "inconsistent." Poerio disagrees and asserts that Modular and McLaughlin created the circumstances through which the jury had to determine both a contract/indemnity claim, as well as the contribution claim, by attempting to preserve the same in its settlement agreement with Plaintiffs and then arguing that it should go before the jury at trial. Poerio still maintains that it was improper for the jury to consider the contribution claim made by Modular – a problem created by the Petitioners by insisting that claim should go to the jury - as the contribution claim was extinguished through settlement, leaving only the breach of contract claim to be decided by the jury.

Finally, Petitioners state that they sought to have the Circuit Court certify a question to this Court seeking an answer as to whether the contribution claim was extinguished. This request was not made until Petitioners filed their Reply to Poerio's Response to Modular and McLaughlin's Motion for Judgment as a Matter of Law or for New Trial. (J.A. 1339). At that stage, the Circuit Court found that it would be procedurally improper to certify a question to this Court as the jury had already made its determination in the trial of this matter, and Respondent agrees. (J.A. 1398).

II. Statement of Relevant Facts

In passing, Petitioners briefly mentioned in footnote 2 of their brief that Plaintiff Jarrett Smith testified at trial, Respondent believes it important for this Court to know the substance of that testimony, upon which the jury based its decision to award 60% liability against Plaintiff Smith. At the trial of this matter, Jarrett Smith testified:

> Q. And you would agree with me that you had driven by that site while the construction was going on several times a week probably?
> A. Oh, yes.
> Q. And you'd also agree with me that when you go by whether you were headed towards Clendenin or away from Clendenin towards Newton, either way, you would periodically look over just to check on the status of the project?
> A. I'm sure I did. I don't know for sure, but I'm sure I did.
> . . .
> Q. So you would drive by and look over periodically just to check the status of what the construction was doing?
> A. Yeah.
> Q. Okay. Now, if a witness came in to trial today and testified that right before this accident, before you ran into the trailer, that you were driving forward but yet had your head turned looking into the site, you wouldn't dispute that, would you?
> A. I wouldn't be able to, no.
> Q. But you would agree with me that that could have very easily happened?
> A. It could have happened, yeah.
> Q. Because again, you would drive by to check on the status of it periodically anyway, right?
> A. Yeah.

(J.A. 591:22-25, 592:1-7, 593:1-16). In fact, later in the trial, an eyewitness, Todd Sawicky, testified that he saw the red truck driven by Plaintiff Jarrett Smith as it approached the job site and Plaintiff Jarrett Smith was "looking into the job site" as the crash occurred. (J.A. 661).

The Court will further note that, although Petitioners assert that the jury's finding that Poerio did not breach the lease agreement is inconsistent with the evidence and assignment of negligence, Petitioners do not cite to any evidence established by Poerio upon which the jury found that Poerio did not breach the lease agreement. To be clear, the main issue in this matter was the contract claim asserted by Modular against Poerio, as it would have allowed for complete indemnification and defense of Modular, including attorney's fees and costs, if Modular would have prevailed. The theory upon which Modular based its breach of contract case is that Poerio did not provide "free and clear access" to the construction site when McLaughlin arrived to retrieve the storage unit. This was the only scenario upon which the jury was instructed by the Court that it could find that Poerio breached the lease agreement. (J.A. 1108:17-22).

With regard to the evidence established by Poerio that it did not breach the lease agreement, Poerio presented testimony of three individuals working on site on the day of the accident for Poerio Incorporated - Todd Sawicky, Chris Cantelmi, and Roland Fero. Both Mr. Fero and Mr. Sawicky testified that the "first entrance" to the school/construction site (there were two entrances – the truck driver McLaughlin tried to enter at the "second entrance") was kept open on the day of the accident because it was used for deliveries. (J.A. 782, 843). Specifically, Mr. Fero testified:

> Q. At any time during the afternoon, and again, let's start at noon, July 14, 2011, did you see trucks or any equipment that blocked the entrance to Entrance 1?
> A. No.

Q. And why do you know that?
A. Because we always kept it open for our deliveries and deliveries for the school.

(J.A. 782:13-20). Mr. Sawicky then testified:

Q. Was this entrance open?
A. Yes.
Q. Were there any trucks in this entrance the day of the accident?
A. No.

(J.A. 835:5-9). Finally, Mr. Cantelmi testified:

Q. Okay. His testimony was that he drove by the first entrance here and there were trucks parked right where he's got that blocked, do you see that?
A. Yes.
Q. Okay. What's your recollection of that entrance?
A. That entrance was not blocked.
Q. And I want to know on that date, that's all I want to know, is on that date was it blocked?
A. On that date that entrance was not blocked.
Q. Were there any trucks parked in that entrance way?
A. In this area where you have it drawn?
Q. Correct?
A. No.

(J.A. 911:14-25, 912:1).

Despite testimony that the first entrance was open at the time of the accident, Mr. McLaughlin testified that he utilized the second entrance to the school, but was unable to pull his vehicle completely out of Route 36, thereby causing his truck bed to stick out into the road. (J.A. 620-623). Mr. Sawicky, Mr. Cantelmi, and Mr. Fero testified unequivocally that the first entrance was open when Mr. McLaughlin arrived on site to retrieve the storage unit, and that it was accessible to his vehicle. (J.A. 782, 835, 911).

Additionally, the Court also heard testimony from Mr. Cantelmi and Mr. Sawicky that contradicted testimony that Mr. McLaughlin chose the "fastest" option in attempting to move his

axles forward. *See Petitioners' Brief*, 8. Rather, Mr. Cantelmi testified that he and Mr. McLaughlin had a conversation and Mr. Cantelmi had enough time after the conversation to speak to someone about moving the van obstructing the second entrance and then make it all the way back to his office inside the school. (J.A. 926-929). Mr. Sawicky further testified that in addition to seeing Mr. McLaughlin talk to others on the construction site, he also saw him take time to use the restroom before returning to his truck to adjust the axles. (J.A. 837). Thus, it was left to the province of the jury to determine which testimony was more believable.

After being instructed by the Circuit Court as to the meaning of "preponderance of the evidence" and the jury's role as the "judges of the credibility of the witnesses and the weight of the evidence," the jury returned its verdict in favor of Poerio in regard to the contract claim asserted by Modular based upon the evidence presented throughout the trial, including the testimony by Mr. Sawicky, Mr. Cantelmi, and Mr. Fero. (J.A. 1104-1106).

Petitioners correctly quoted the language from the lease agreement between Poerio and Modular. However, Petitioners mischaracterized the testimony elicited in this matter as Modular never asserted that Poerio breached the lease agreement based upon moving the storage unit within the construction site, and the jury was never provided any instruction in this regard. *See Petitioners' Brief*, 7; (J.A. 971-972). Paragraph 10 of the lease states, "Lessee shall not **remove** the Equipment from the location specified by Lessee. . ." (J.A. 15-16). While Paragraph 14 states, "Lessee 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 to comply in any respect with and perform any of the requirements and provisions of this Lease." (J.A. 15-16).

Pursuant to the language of the lease agreement and the testimony of McLaughlin, Petitioners argued to the Circuit Court at trial:

> **Mr. Kesner:** He [Mr. McLaughlin] did say that the move and location of the unit by itself did not cause this accident. And by itself, that is precisely true. . . .
>
> I'm not arguing that their breach of the lease agreement by moving it without written authorization supports indemnification. 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, and it was absolutely unsafe because it was perpendicular to the road and vehicles then that turned in were obstructed in terms of their vision of the southbound traffic on Route 36.
>
> So, I'm not going to argue to this jury and I'm not presenting any instructions or otherwise that if they find that a breach of the lease occurred with respect to [paragraph] 10, then we just win. That has not been our argument, we've never made that argument.

(J.A. 744-745). Therefore, it would be improper for Petitioners to now argue to this Court that the decision of the jury in regard to the breach of contract claim asserted by Petitioners was based upon any evidence related to the movement within the construction site of the rented storage unit as Petitioners' counsel argued, "we've never made that argument." (J.A. 745).

SUMMARY OF ARGUMENT

With regard to each of the three assignments of error asserted by Petitioners, Respondent contends that none of the three are meritorious. First, the decision of the jury on the contract claim presented is mutually exclusive of the negligence claim asserted by Modular. To that end, Modular's own counsel argued to the Court and the jury throughout the trial that while Poerio's movement of the storage container constituted negligence, it did not constitute a breach of contract. As a result, the jury's determination that Poerio did not breach its contract with

Modular, while also finding Poerio 20% negligent is totally consistent with the evidence presented at trial.

Second, the law in West Virginia under *Jennings v. Farmers Mutual Insurance Company,* 687 S.E.2d 574 (W. Va. 2009), and the cases leading up to it, *Board of Education v. Zando, Martin & Milstead,* 390 S.E.2d 796 (W. Va. 1990) and *Smith v. Monongahela Power,* 429 S.E.2d 643 (W. Va. 1993), provide that a settling tortfeasor's right of contribution is extinguished upon settlement with the plaintiff. As a result, it was improper for Petitioners' claim for contribution to be considered by the jury, despite the requests by Petitioners. However, the Circuit Court properly ruled that the claim was extinguished and denied recovery under the same.

Third, the jury properly considered Plaintiff Jarrett Smith's negligence, as Petitioners and Respondent both asserted the affirmative defense of contributory negligence. Further, Petitioners placed the contributory negligence of Plaintiff Jarrett Smith into controversy by calling him to testify at the trial about how the accident occurred. As a result, the jury had sufficient evidence and information to make its determination as to the fault of all parties involved in the subject accident. Finally, the joint and several liability statute is inapplicable to this case as there were no joint tortfeasors who were parties to the case at the time of the jury verdict.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent agrees that oral argument is necessary pursuant to the criteria in Rule 18(a) of the Rules of Appellate Procedure for the Supreme Court of Appeals of West Virginia. Additionally, Respondent agrees that oral argument pursuant to Rule 20(a) is appropriate as this case involves issues of first impression and fundamental public importance.

ARGUMENT AND CITATION OF AUTHORITY

A. THE COURT'S JUDGMENT IN FAVOR OF POERIO ON THE BREACH OF CONTRACT CLAIM IS CONSISTENT WITH THE JURY'S FINDING THAT POERIO WAS 20% AT FAULT FOR THE ACCIDENT.

Petitioners claim that because the only way they could prevail on their contract claim would be to prove that the entrances to the school were obstructed, e.g., that Poerio did not provide "free and clear access" to the container for pick up, that they must then also be able to only prove their negligence claim against Poerio in the same manner. Petitioners assert in their brief that "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 the location perpendicular and adjacent to the roadway where access was restricted." *See Petitioners' Brief*, 10-11.

By these assertions, Petitioners have identified the basis upon which the jury could have found Poerio to be negligent. As explained in the fact section, *supra*, Petitioners "never made the argument" that moving the storage container on site constituted a breach of the lease. Petitioners specifically stated that they had no intention to offer any instructions on that issue to the jury, and, in fact, no such instructions were provided to the jury. Rather, Petitioners wanted the issue of moving the container unit to be brought before the jury to show

> 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, and it was absolutely unsafe because it was perpendicular to the road and vehicles then that turned in were obstructed in terms of their vision of the southbound traffic on Route 36.

(J.A. 744-745). This evidence was heard at the insistence of Petitioners and was introduced through the trial testimony of Mr. McLaughlin. (J.A. 606-613). Considering this evidence,

contrary to Petitioners' assertion, the jury clearly did not agree that Poerio was negligent for failing to provide unobstructed access. And, although it would be imprudent to attempt to assume we know what the jury was thinking when it determined that Poerio was 20% at fault for the accident, Petitioners themselves have provided the most logical basis for the jury's decision.[2]

In regard to the contractual claim, what Petitioners are missing is the key contractual language that would require Poerio to owe defense and indemnity: Paragraph 14 states, "Lessee 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 to comply in any respect with and perform any of the requirements and provisions of this Lease.*" *See lease agreement*, at ¶ 14 (emphasis added) (J.A. 47-48). This provision of the lease agreement does not mention negligence because it pertains only to a contractual performance, which is a completely separate issue. The jury was provided with this lease language *ad nauseum* during the trial of this matter, and the jury found that Poerio did not breach the lease agreement.

The circular reasoning exercised by Petitioners with regard to the jury's findings of negligence and no breach of contract is simply illogical based upon the evidence presented and jury instructions given in this matter. The jury clearly found that Poerio did not breach the contract with Modular, which has no bearing on whether Poerio might have committed negligence in some other fashion. The Circuit Court specifically instructed the jury:

[2] In addition, there were several other ways and theories the jury could have found Poerio minimally negligent in causing this accident that had nothing to do with the location of the storage container. One such way would be the jury could have felt that the men working for Poerio on the job site should have ran out and warned oncoming traffic that McLaughlin's truck was sticking out in the roadway. No evidence was presented that the construction workers did so, thus a potential finding of negligence on Poerio's part, one of many potential scenarios that the jury could have considered.

> The Court instructs the jury that your deliberations whether Poerio, Incorporated breached its lease agreement with Modular Building Consultants may not be influenced by your deliberations regarding whether Modular Building Consultants or Poerio, Incorporated were negligent. Likewise, your deliberations regarding whether Poerio, Incorporated was negligent may not be influenced by your deliberations regarding whether Poerio, Incorporated breached its lease agreement with Modular Building Consultants.

(J.A. 1109). The Circuit Court then went on to explain what constitutes negligence, and stated that "in this case the plaintiffs have asserted that Poerio, Incorporated was negligent. That is, that it breached its duty to exercise ordinary and due care, and that its negligence was a proximate cause of the accident of July 14, 2011." (J.A. 1110).

Petitioners seek to have the decision of the jury overturned on the theory that it is inconsistent with the evidence presented and instructions provided by the Circuit Court. However, Petitioners fail to recognize that this Court has

> consistently held that the function of the jury is to weigh the evidence with which it is presented and to arrive at a conclusion regarding damages and liability. As an element of that vital task, the jury must analyze the evidence and determine the credibility to be assigned to various components of that evidence. Likewise, [this Court has] invariably maintained that '[i]t is the peculiar and exclusive province of the jury to weigh the evidence and to resolve questions of fact when the testimony is conflicting.'

Neely v. Belk Inc., 668 S.E.2d 189, 200 (W. Va. 2008) (internal citations omitted). With the province of the jury in mind, this Court has unfailingly held that jury verdicts will not be overturned "where it appears that the case, as a whole, was fairly tried and no error prejudicial to the losing party was committed during the trial." *Id.* at 196.

Therefore, based upon the assertions by Petitioners that Poerio acted negligently, coupled with the Circuit Court's instructions to consider negligence and contractual claims independently, the jury had no option other than to make its determinations on these issues based upon a fair weighing of the facts and the strict instructions of the Circuit Court as they applied to

the claims made in this matter. As a result, Poerio clearly does not owe Modular indemnification and defense as the jury's findings were consistent with the instructions given and the evidence adduced.

B. PETITIONERS' CLAIMS FOR CONTRIBUTION WERE EXTINGUISHED BY THEIR SETTLEMENT WITH PLAINTIFFS REGARDLESS OF THE RELEASE OBTAINED.

Simply put, the position Petitioners have put themselves in is a clear cut case of "buyer's remorse." Petitioners anticipated a potentially large jury verdict against them due to the fact that the driver for Modular, Billy Joe McLaughlin, left his truck stranded in the middle of the road for several minutes, allowing the Plaintiff Jarrett Smith to drive straight into it. Plaintiff Smith's injuries were extensive (broken ribs, busted spleen, concussion, collapsed lung, compression fracture of spine) and medical bills were significant, in the range of $300,000. (J.A. 587, 1355) To cap off a potentially large verdict against them, Petitioners settled with the Plaintiffs, without Respondent's knowledge or approval, for $380,000 with knowledge that they could still seek contractual indemnification from Poerio at trial on the breach of the lease agreement to recoup the entire amount, and more, back from Respondent Poerio. The Petitioners got greedy, for lack of a better term, and also tried to seek common law contribution from Poerio without any legal support under West Virginia law.

Petitioners created, and compounded, their mistake by insisting that the contribution claim should be considered by the jury along with the indemnification claim, but it ended up being "harmless error" because the jury also rightly considered, and rejected, the contractual indemnification claim. Assuming, *arguendo*, that the contribution claim *was* a proper claim for the jury's consideration, the finding that the Plaintiff Smith was 60% negligent and the

Petitioners and Respondent both 20% negligent in causing this accident would surely eliminate any monetary recovery from Modular/McLaughlin against Poerio.[3]

Petitioners argument that they 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" is ludicrous. *See Petitioners' Brief*, 15. Petitioners bought protection from a potentially large verdict against them, while still maintaining a contract claim against Respondent that would recoup, if they prevailed, not only the entire settlement amount but attorney's fees and costs as well. Petitioners admit that they examined the amount of damages at issue 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." *See Petitioners' Brief*, 19. What Petitioners conveniently leave out is that the evidence *did not* point to a substantial verdict against *Poerio*, but only against Modular/McLaughlin. The Plaintiffs never sued Poerio, even when Poerio was brought into the case by Modular and McLaughlin. There was nothing "forced" about the settlement Petitioners made with Plaintiffs. Petitioners are now simply crying foul because: a) the jury found the Plaintiff Jarrett Smith to be primarily at fault in causing his own accident; and b) the Petitioners lost on their breach of contract claim.

Petitioners argue that because they settled Plaintiffs' claims on behalf of themselves and Poerio, and then attempted to preserve their contribution claims against Poerio in the settlement documents, Petitioners are entitled to contribution from Poerio for the total amount of the

[3] Principles of equity alone would dictate that Modular and McLaughlin had their "day in court," and then some, and simply lost. They did, however, by settling with the Plaintiff before trial prevent an even larger verdict against them had they taken their case to trial against Plaintiff and Poerio, due to the severity of injuries and large amount of damages Plaintiff would have presented at trial. Counsel for Respondents theorized the verdict could have potentially been $600,000 to $750,000 in a "conservative jurisdiction," and with a "jury that's sympathetic and doesn't find comparative fault, could be seven figures." (J.A. 1355)

settlement based upon the jury's verdict. Despite their assertions, the law in West Virginia clearly indicates that Petitioners' contribution claim against Poerio was extinguished by their settlement on behalf of themselves and Poerio with Plaintiffs.

Upon reading Petitioners' Brief, it appears that they wish to have it both ways – to argue that any liability against Poerio by Plaintiffs was accounted for in the global settlement, but then Poerio also remained in the litigation as a potential joint tortfeasor because Poerio did not really settle with Plaintiffs. This line of argument simply does not work. First, Petitioners cite to *Mackey v. Irisari, Syl. Pt. 3*, 445 S.E.2d 742, for the proposition that Petitioners were "forced to pay more than [their] *pro tanto* share of the obligation." *See Petitioners' Brief*, 14. Poerio certainly did not force Petitioners to pay more than their fair share of the damages to Plaintiffs. Petitioners willingly and voluntarily entered into the settlement with Plaintiffs without consulting with Poerio. Although public policy may favor settlement, no mandate exists to require it. Petitioners are correct in that the "doctrine of contribution has its roots in equitable principles," as stated in *Mackey;* however, there is nothing "equitable" about what the Petitioners are attempting to do here. *See Petitioners' Brief*, 14.

Second, by entering into the settlement with Plaintiffs, the case law is clear that "the remaining joint tortfeasors receive a credit for the amount of the settlement which offsets their own liability to the claimant," *Id.* By virtue of the settlement reached between Plaintiffs, Petitioners, and Poerio, there remained no additional joint tortfeasors in the litigation to receive a credit for the settlement monies paid by Petitioners as that element of the case had been resolved. There could be no verdict against Poerio which would call into play a credit to be applied as Poerio could not be found to be directly liable to Plaintiffs under any theory or set of facts in this matter, as Plaintiffs never sued Poerio.

Third, Petitioners contend that if they had not settled for Poerio, Poerio could have somehow been exposed to a substantial verdict rendered in favor of Plaintiffs. That would simply be impossible. If Plaintiffs wanted to bring suit against Poerio, they had to do so in this litigation and prior to the trial, otherwise they would be estopped pursuant to *res judicata*. Further, Poerio could not remain exposed to any verdicts as Poerio was never sued by Plaintiffs. Simply put, Petitioners did not do Poerio any favors in including it in the settlement agreement with Plaintiffs. This act was simply a means for Petitioners to argue that they should get two bites at the apple against Poerio at trial – contribution and contract.

Finally, as the Circuit Court properly pointed out below at the hearing on Modular and McLaughlin's *Motion for Judgment as a Matter of Law or for New Trial*, Petitioners essentially asserted that because they were the defendants in the underlying case that gave them the right to unilaterally determine the value of the case, settle it, and then seek contribution from the third-party defendant without prior consultation. (J.A.1373). That is simply not how this system of justice is supposed to work. Poerio contended from its inclusion into this matter that Plaintiff Jarrett Smith was contributorily negligent for the accident, with a degree of fault likely exceeding 50%. As such, Poerio would not have supported Petitioners decision to settle Plaintiffs claims, and certainly not for the amount expended.[4] However, Petitioners chose to globally settle with Plaintiffs and then turned around and sought contribution against Poerio, which is unsupported by the jurisprudence of West Virginia as it is patently unfair to the non-settling alleged tortfeasor.

The Court held in Syllabus point 6 of *Zando*, "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." *Board of Education v. Zando, Martin & Milstead*, 390

[4] This was evidenced in the mediation proceedings referred to during the pre-trial conference. (J.A. 197).

S.E.2d (W. Va. 1990). The Court's ruling applied to cross-claims against co-defendants and claims between third-party plaintiffs and third-party defendants. *Id.* at FN. 1. In the instant case, Modular and McLaughlin settled with Plaintiffs for any and all claims asserted by Plaintiffs against them. These settlements relieved Modular, McLaughlin, and Poerio from any liability or claims for contribution.

Further, keeping in mind that Plaintiffs never directly sued Poerio, the Court should consider *Smith v. Monongahela Power*, wherein a third-party defendant settled directly with the plaintiff, and was found to have extinguished any claims for contribution by the third-party plaintiff against it. *Smith v. Monongahela Power*, 429 S.E.2d 643 (W. Va. 1993). The Court ultimately 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, if the settlement was made in good faith and the amount of the settlement is disclosed to the trial court for the purpose of reducing the verdict." *Id.* at Syl. Pt. 4. Again, in the instant matter, the "good faith settlement" between Poerio and Plaintiffs relieved Poerio of any liability for contribution under the holdings in *Smith*, regardless of the fact that Plaintiffs never directly sued Poerio.

The settlement between Plaintiffs, Respondents and Poerio was presumably created in good faith as well. In *Smith*, the Court held in Syllabus Point 7, that the main concern of the trial court is to determine if the circumstances of the settlement indicate that the "non-settling tortfeasor was substantially deprived of a fair trial because of corrupt behavior on the part of the other parties." *Id.* at Syl. Pt. 7. The Court relied upon its analysis of good faith settlements from *Zando*, stating, "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." 429 S.E.2d at 805. Similarly in *Smith*, the plaintiffs' attorney made a determination that the plaintiff could not formulate a legal theory of recovery against the third-party defendant. *Id.* at 653. The court held that the fact that the third-party defendant, although not directly sued by the plaintiff, settled any potential future claims the plaintiff may have brought against it did not constitute bad faith. *Id.*

In the instant case, counsel for Plaintiffs obviously determined that Plaintiffs did not have a viable claim against Poerio and thus could release Poerio from any future liability. Plaintiffs in this case, in fact, never asserted a direct action against Poerio after it was brought into the case (right before the original trial date in August 2012). Plaintiffs' decision to settle any potential claims against Poerio was a strategic decision, made and encouraged in consultation with Modular and McLaughlin's counsel. Therefore, there can be no allegation that the settlement reached was not in good faith. As the law and public policy of West Virginia favors settlements, the settlement between Poerio and Plaintiffs was in good faith and therefore extinguished Modular's claims for contribution against Poerio.

The West Virginia Supreme Court took its analysis of settlement and contribution even further in the matter of *Jennings v. Farmers Mutual Insurance Company*, 687 S.E.2d 574 (W. Va. 2009), which the Circuit Court clearly understood and properly applied in its Judgment Order in this matter. In *Jennings*, the plaintiff sued Farmers Mutual and her insurance agent, Kevin Fike, alleging breach of contract and violations of the Uniform Trade Practices Act. *Id.* at 577. Farmers filed a cross-claim against Fike for misrepresentation, contribution, and indemnity. *Id.* Farmers settled with Jennings before trial, but tried to pursue Jennings' claims against Fike through assignment, much like Modular tried to preserve its claim for contribution against Poerio

in the settlement agreement.[5] However, despite these efforts, the circuit court held that Farmers' claims for contribution against Fike were dismissed, and the West Virginia Supreme Court agreed. *Id.*

The Court held that under *Zando*, Farmers' settlement with Jennings extinguished any claim for contribution that Fike may have had against Farmers. *Id.* at 578. The Court further held that the opposite is also true: Any claims that Farmers may have had against Fike were also extinguished because "it would be unfair to permit the settling defendant to pursue a claim of contribution against a non-settling defendant, while simultaneously precluding the non-settling defendant from pursuing a claim for contribution against the settling defendant." *Id.* As applied to the facts of this matter, the law in *Jennings* clearly states that not only would a settlement between Plaintiff and Modular result in the extinguishment of a claim by Poerio for contribution against Modular, but it would also result in the extinguishment of a claim by Modular for contribution against Poerio. 687 S.E.2d at 578. To hold otherwise would be contrary to the holding in *Jennings*.[6]

Lastly, the West Virginia Supreme Court further held, "If a tortfeasor is not a part of the litigation – whether because of a settlement or because the tortfeasor was not sued – our law is clear that no contribution may be had from that tortfeasor." *Id.* Farmers was deemed to no longer be "in the litigation" in order to assert claims of contribution because it settled with

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[5] Modular could not have taken an assignment from Plaintiffs in this matter as Plaintiffs never directly sued Poerio. If Poerio had been directly sued, Modular likely would have used assignment as the avenue to pursue its contribution claim against Poerio. Instead, Modular chose to include the preservation of its contribution claims in the release agreement, which attempts to accomplish the the same goal, albeit through a different means.

[6] What also needs to be remembered is that Modular's primary claim against Poerio (and in fact its only true, viable claim after settling with Plaintiffs) was for breach of contract, which would have enabled Modular to recover not only the entire $380,000 that was paid to Plaintiffs, but also all of its attorneys' fees and costs. Modular was so confident that it would prevail on the breach of contract claim and recoup the entire amount that it appears the contribution claim was merely an afterthought – a "throw in" claim in the event the contract claim was not successful. (J.A. 194-197).

Jennings. *Id.* In the instant matter, the settlement between Plaintiffs, Modular, McLaughlin, and Poerio essentially ended the litigation amongst the parties for the primary claims asserted by Plaintiffs and the contribution claim, leaving just the breach of contract claim for indemnification by Modular. Therefore, Modular's claim for contribution no longer existed at the time of the jury's verdict, and this Court should affirm the Circuit Court's ruling on the same.

C. THE JURY PROPERLY CONSIDERED THE NEGLIGENCE OF EACH OF THE PARTIES, INCLUDING PLAINTIFF JARRETT SMITH, IN ITS DELIBERATIONS.

Modular contends that because the jury was permitted to determine the negligence of Plaintiff Jarrett Smith, in addition to the negligence of McLaughlin and Poerio, that it is entitled to a new trial or that Poerio is liable for contribution to Modular. Poerio strongly disagrees, and the facts support its position. The issue of contribution should not have been considered by the jury in the first place, as it was extinguished by Modular and McLaughlin's settlement with Plaintiffs under *Jennings*. *See §B, supra.* Nonetheless, since the issue went to the jury, it was proper for Plaintiff Jarrett Smith's comparative negligence in causing the accident to be considered, as there was no harm to the parties participating in the trial by the jury's determination of fault for each of the parties. The jury's determination of fault was based upon the trial testimony of Plaintiff Jarrett Smith and the affirmative defense of comparative negligence had been asserted by Defendants Modular and McLaughlin and Third-Party Defendant Poerio prior to trial. Joint and several liability was inapplicable to this case given its procedural posture at the time of trial.

First, even if it were improper for Plaintiff's negligence to be considered by the jury, which Poerio does not believe it was under the circumstances, doing so did not cause reversible error. Rather, the jury still considered the liability of Poerio and Modular and assigned what the jury found to be the appropriate percentage of fault to each. Under West Virginia's comparative

fault law, "A party is not barred from recovering damages in a tort action so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident." *Rowe v. Sisters of the Pallottine Missionary Society*, 560 S.E.2d 491, 496 (W. Va. 2001). In the instant matter, Modular/McLaughlin and Poerio were found to have an equal amount of negligence, thus there can be no recovery by Modular for its negligence based claim against Poerio.

Second, it was proper for the jury to consider the fault of Plaintiff in making its determination of negligence in this matter because Plaintiffs had settled prior to trial.[7] However, based upon the facts of this matter, Poerio asserted comparative negligence of Plaintiff Jarrett Smith as an affirmative defense, and when such a defense has been lodged "the negligence of the plaintiff in causing his or her injury is ascertained in relation to all other tortfeasors." (J.A. 18-19); *Rowe*, 560 S.E.2d 491 at 499. "In order to obtain a proper assessment of the total amount of the plaintiff's contributory negligence under our comparative negligence rule, it must be ascertained in relation to all of the parties whose negligence contributed to the accident, and not merely those defendants involved in the litigation." *Id.* In a comparative negligence or causation action the issue of apportionment of negligence or causation is one for the jury or other trier of the facts. . . The fact finder's apportionment of negligence or causation may be set aside only if it is grossly disproportionate." *Reager v. Anderson*, 371 S.E.2d 619 (W. Va. 1988).

[7] Again, Modular and McLaughlin chose to settle Plaintiffs' claims against them, and essentially gambled that the jury would find that Poerio breached the lease and owed Modular full indemnification. Modular's gamble did not pay off in this instance as the jury found that Poerio did not breach the lease. Now, Modular and McLaughlin assert that the jury should not have been permitted to consider Plaintiff's negligence because it is not to their benefit based upon the outcome of the trial. This inconsistent position should not be allowed to benefit Petitioners.

The affirmative defense of comparative negligence required that the jury determine the negligence of Plaintiff Jarrett Smith as well as the alleged joint tortfeasors. In order to assist in this decision making, Modular called Plaintiff Jarrett Smith as a witness during the trial in its case in chief, thus giving the jury the evidence necessary to make its determination of fault amongst the parties. Then, the jury, having all of the factual evidence necessary to render its verdict, found that Plaintiff Jarrett Smith was 60% at fault, while Poerio and Modular/McLaughlin were each 20% at fault for the subject accident. No further development of the facts were necessary for the jury to make this decision. Under West Virginia's rule of comparative negligence, Plaintiffs would not have been able to recover against Modular, and Modular would not have had a claim for contribution against Poerio based upon the outcome of the trial.

Thus, because a claim for contribution had been asserted by Modular against Poerio, and allowed to go to the jury by the Court, the jury had to determine the amount of fault in regard to each of the parties to the case, not just those in the litigation at the time of the verdict, as asserted by Modular. Modular is attempting to play both sides of the coin on this issue. First, Modular wants to assert that it was proper for contribution to go to the jury after it settled its claims with Plaintiffs. Also, Modular wants to claim that because it settled with Plaintiffs, Mr. Smith was obviously fault-free, which therefore warrants a complete lack of consideration for Plaintiff Jarrett Smith's negligence, despite affirmative defenses by both Modular and Poerio for comparative negligence against Plaintiff Jarrett Smith. (J.A. 6, 18-19). Modular is wrong in both instances. The jury should have never been asked to decide anything with regard to contribution but, since it did, the jury then needed to determine everybody's negligence or fault in causing this accident.

Further, Petitioners contend that because Plaintiffs were not "parties to the litigation" at the time of the trial, that Plaintiff Jarrett Smith's negligence could not properly be considered. Although "empty chair" evidence is prohibited in West Virginia under *Doe v. Wal-Mart Stores, Inc.*, 558 S.E.2d 663 (W. Va. 2001), when Petitioners called Plaintiff Jarrett Smith to the stand, they placed into controversy his proportionate amount of negligence. As such, "any error committed by the circuit court in allowing "empty chair" evidence was invited by petitioner, and therefore, not subject to appeal." *CJH, Inc. v. Quadruple S Farms*, LLC, 2013 W. Va. LEXIS 640 (W. Va. June 7, 2013); citing *Roberts v. Consolidation Coal Co.*, 539 S.E.2d 478 (W. Va. 2000).

Poerio further contends that it was proper for the jury to consider the proportionate degree of fault of Plaintiff Jarrett Smith as it would be patently unfair and prejudicial not to have done so. Again, Plaintiffs never sued Poerio and Poerio was not included in the settlement discussions with Plaintiffs. Rather, Poerio's position throughout litigation was that Plaintiff Jarrett Smith was contributorily negligent in such a large degree that he would be barred from recovery if the jury were permitted to assess his degree of fault. (J.A. 18-19). Petitioners argue that if they did not settle with Plaintiffs they would be gambling with potential exposure by not settling with a badly injured Plaintiff. While this may be true, Petitioners were also gambling by settling with Plaintiffs for a large sum of money and then attempting to recovery those costs from Poerio via their contractual and contribution claims. Taken to its logical conclusion, Petitioners were also gambling with the money of Poerio in making its imprudent settlement decision and then turning around to seek contribution from Poerio. This type of gambling is not contemplated under the law in West Virginia and is prohibited under *Jennings*.

Further, under the law in *Reager*, the jury's determination of fault in this matter was not "grossly disproportionate" to the facts of the matter, and should not be overturned by this Court. Typically, when a case has been determined by a jury, the questions of fact resolved by the jury will be accorded great deference. This Court consistently holds, "An appellate court will not set aside the verdict of a jury, founded on conflicting testimony and approved by the trial court, unless the verdict is against the plain preponderance of the evidence." *Roberts v. Consolidation Coal Co.*, 539 S.E.2d 478, 485-486 (W. Va. 2000) (internal citations omitted); *see also* Syl. pt. 4, *Stenger v. Hope Natural Gas Co.*, 90 S.E.2d 261 (W. Va. 1955) ("On appellate review of a case wherein a jury verdict has been rendered, it is the duty of the reviewing court to treat the evidence as being favorable to the verdict '. . . and give it the strongest probative force of which it will admit. So long as there is nothing so inherently or otherwise manifestly improbable in the character of the evidence as to justify the court in ignoring it."). Accordingly,

> in determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true.

Id., citing Syl. pt. 3, *Walker v. Monongahela Power Co.*, 131 S.E.2d 736.

Petitioners would like to think, and argue, that if the Plaintiffs had been parties in the case at the time of trial then the "outcome of trial would have been different," for various reasons such as sympathy for the Plaintiffs due to the amount of medical bills and severity of injuries, testimony from Plaintiffs' own accident reconstruction expert, David Harris, etc. This is merely speculation, of course, and what we do know is that the jury was presented with a significant amount of testimony and other evidence as to the cause of this accident, including Jarrett Smith's own admission that he was looking into the construction site right before the accident, as confirmed by Poerio's witness, Todd Sawicky. This would have been the same testimony and

evidence presented to the jury had the Plaintiffs been parties at the time of trial, and would have been further bolstered by Modular working with Poerio to persuade the jury of Jarrett Smith's own negligence as the cause of this accident.

Lastly, the joint and several liability statute is inapplicable to this case. The joint and several liability statute does not contemplate a case wherein a plaintiff's percentage of fault has not been determined before the jury is asked to apportion fault to the alleged joint tortfeasors. The Court will note that the statute instructs the court to determine "the total amount of damages sustained by the claimant" before the proportionate amount of fault of each of the parties can be determined. In the instant matter, there was no "claimant" at the time that the jury made its deliberations because the "claimant" (i.e. Plaintiffs) had settled his lawsuit. Thus, there were no damages for the jury to total before it could apportion fault. Therefore, the joint and several liability statute does not apply to this case.

Further, it seems that Modular is attempting to step into the shoes of the "claimant" in this matter through its assertion of its contribution claim based upon its settlement with Plaintiffs and extinguishment of Plaintiffs' claims. Even if Modular became the "claimant" due to the settlement with Plaintiffs, there would be no joint tortfeasors amongst whom to apportion liability, as the case would simply become "Third-Party Plaintiffs v. Third-Party Defendant." Thus, the joint and several liability statute would be inapplicable under this scenario. Therefore, Modular's argument that the jury should not have apportioned fault to Plaintiff based upon the joint and several liability statute fails, and it was proper for the jury to consider Plaintiff Jarrett Smith's negligence under the circumstances of this case as it was presented to the jury at the trial of this matter.

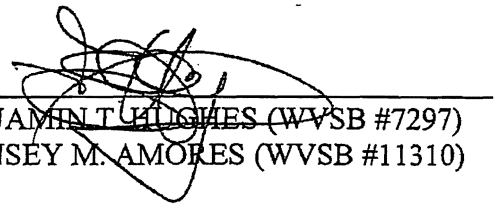
CONCLUSION

In conclusion, Modular and McLaughlin are not entitled to a new trial nor are they entitled to recover any of the settlement monies paid to Plaintiffs based upon the jury verdict in this case for the following reasons: (1) The jury's verdict in favor of Poerio on the breach of contract claim does not equate a finding of negligence such that Poerio then owes indemnification to Modular; (2) The settlement with Plaintiffs by Modular, McLaughlin, and Poerio extinguished Modular's claim for contribution; and (3) It was proper for the jury to consider the negligence of Plaintiff Jarrett Smith in making its determination as it was not detrimental to Modular or Poerio, as both Modular and Poerio asserted comparative negligence as an affirmative defense, and the joint and several liability statute does not apply to this case.

While the Respondent certainly understands that West Virginia jurisprudence favors settlement of claims over jury trials, West Virginia law surely does not condone, or support, the type of settlement made by Petitioners and the aftermath of the same as it played out in the trial of this case. In the end, however, any error at trial in regard to the jury's verdict in regard to the contribution claim was created by the Petitioners, and would be considered "harmless error" because the Petitioners clearly had their day in court on their contractual indemnity claim. They simply did not like, or expect, the end result. A new trial should not be granted in this instance.

WHEREFORE, Respondent, Poerio Incorporated, respectfully requests that this Court **DENY** Petitioners Modular and McLaughlin's Petition for Appeal, and **AFFIRM** the Trial Court's Order dated December 12, 2013, Denying Modular and McLaughlin's Motion for Judgment as a Matter of Law or For a New Trial.

POERIO INCORPORATED,
By Counsel:



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CERTIFICATE OF SERVICE

The undersigned counsel for Poerio Incorporated does hereby certify on May 28, 2014, that a true copy of this ***Respondent's Brief*** was served upon opposing counsel via U.S. Mail to:

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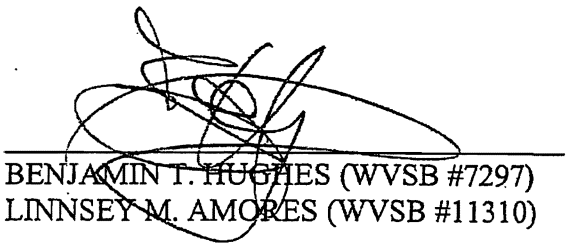

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