Appeal No. 19-0666

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

WAL-MART STORES EAST, L.P.,

Petitioner,

v.

JOHNA DIANE ANKROM,

Respondent

RESPONDENT'S REPLY BRIEF IN SUPPORT OF CROSS ASSIGNMENT OF ERROR

From the Circuit Court of Wood County, West Virginia
Civil Action No. 15-C-3919

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I. ARGUMENT

Respondent, John Diane Ankrom, has filed a cross assignment of error challenging the trial court's application of W.Va. Code 55-7-24(a)(2) [2005]. Specifically, the trial court erred by concluding that Leist was a "defendant" under that code provision and entering judgment for only 30% of the verdict amount.

Wal-Mart spends barely two and a half pages addressing the issue raised via the cross assignment. Wal-Mart cites a single case, and its discussion of that case is limited to a single sentence. The lack of legal support for Wal-Mart's position is telling. The trial court's interpretation of W.Va. Code 55-7-24(a)(2) is contrary to its own language and to the rules of construction that should have been applied.

Wal-Mart makes one concession: when W.Va. Code 55-7-24(a)(2) was enacted in 2005, "defendant" was undefined. Therefore, under longstanding law it should have been given its plain, ordinary meaning, which clearly would not have included a "third party defendant." *West Virginia Consolidated Public Retirement Bd. v. Weaver*, 222 W.Va. 668, 675, 671 S.E.2d 673, 680 (2008)("If the Legislature has failed to provide a definition for a particular word or term it has employed in a statute, meaning can be ascribed to such statutory language by referring to the common, ordinary, accepted meaning of the undefined terminology."). Even more compelling is the fact that it was not until 10 years later that the Legislature expanded the definition of "defendant" so it actually did include a "third-party defendant"?[1] How does Wal-Mart deal with this fact? Without citing any authority, Wal-Mart claims that the Legislature "did not fundamentally alter the previously undefined

[1] The 2015 revisions were codified in W.Va. Code 55-7-13a *et seq.* According to 55-7-13b: "'Defendant' means, for purposes of determining an obligation to pay damages to another under this chapter, any person against whom a claim is asserted including a counter-claim defendant, cross-claim defendant or ***third-party defendant***."

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meaning" of the term but, instead, "clarified [it] without effecting a substantive change." Respondent's Reply Brief, at 24.

The problem with Wal-Mart's argument is that it violates the fundamental rules of statutory construction--in particular, the rules for interpreting statutes in derogation of the common law. Here, the Legislature was limiting the common law right of joint and several liability. Accordingly, under a line of cases going back at least 100 years, the language of W.Va. Code 55-7-24(a)(2) should have been interpreted ***strictly***. See, e.g., *Kellar v. James*, 63 W.Va. 139, 59 S.E. 939 (1907). Instead, the trial court gave the term "defendant" a ***broad*** interpretation that kept Respondent from receiving the benefit of a right that was guaranteed by the common law.

Wal-Mart also suggests that the trial court gave a "cogent" explanation for its interpretation, stating that "[t]he 2005 statute constructed a model in which the principles of joint and several liability co-existed with the principles of comparative fault." Petitioner's Reply Brief, at 25. But that is simply a red herring. The question is not whether the trial court's analytical process was "cogent." The question that must be asked, under our law, is whether there was "any doubt" regarding the meaning of "defendant" when the Legislature enacted W.Va. Code 55-7-24. If so, the trial court was duty bound to interpret that term "in the manner that makes the ***least*** rather than the most change in the common law." *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W.Va. 484, 647 S.E.2d 920 (2007)(emphasis added). Here, however, the trial court flipped that rule on its head, and, in so doing, committed clear legal error.

Near the end of its brief, Wal-Mart cites *Landis v. Hearthmark, LLC,* 232 W.Va. 64, 750 S.E.2d 280 (2013). According to Wal-Mart, the trial court's analysis "is consistent with

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this Court's holding in [*Landis*]." Wal-Mart then summarizes what it believes *Landis's* holding to be--i.e., "that W.Va. Code 55-7-24(a)(1), requires the consideration of the proportionate fault of each of the parties in the litigation at the time the verdict was rendered, and does not prevent the alleged negligence of the third party defendants from being considered." Petitioner's Reply Brief, at 25.

Wal-Mart's analysis is wrong because this Court never interpreted W.Va. Code 55-7-24 in *Landis*. The question in *Landis* was whether a parent, who was protected by parental immunity, could nevertheless be joined as a third party defendant in the child's wrongful death case solely for purposes of apportioning fault. *Landis* was not interpreting W.Va. Code 55-7-24 but was, instead, interpreting West Virginia common law—i.e., the common law of comparative fault. The plaintiff did cite W.Va. Code 55-7-24(a)(1), which requires the jury "to determine...the proportionate fault of each of the parties in the litigation at the time the verdict is rendered." Because the parent was not truly a "party," the plaintiff argued that W.Va. Code 55-7-24(a)(1) prevented the parent's fault from being considered. On the other hand, the defendant cited *Bowman v Barnes,* 168 W.Va. 111, 282 S.E.2d 613 (1981) and other comparative fault cases allowing the jury to consider the fault of "any party to the accident." In the end, *Landis* refused to apply the statute and, instead, applied the common law rule.

In short, *Landis* did not interpret W.Va. Code 55-7-24. More importantly, *Landis* ***did not in any way address the joint and several liability provisions found in W.Va. Code 55-7-24(a)(2)***. Thus, *Landis* clearly was not construing what the Legislature meant when it limited

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the application of its joint and several liability rule to "defendants." *Landis* adds nothing to Wal-Mart's argument.[2]

If the trial court had construed W.Va. Code 55-7-24 according to the interpretive principles adopted and consistently applied by this Court, it would have concluded that judgment had to be entered against the sole defendant, Wal-Mart, for the full amount of the verdict returned by the jury. Without the presence of multiple defendants against whom claims had been made and judgment could be entered, the verdict reduction provisions of W.Va. Code 55-7-24 did not apply.[3]

II. CONCLUSION

Consequently, this Court should reverse the judgment order insofar as it determined that W.Va. Code 55-7-24 required judgment to be entered for only 30% of the verdict amount. The case should then be remanded with directions to enter a judgment for the full amount of the verdict.

Respectfully submitted,
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[2] Apportionment of fault and the application of joint and several liability are, of course, ***different*** things requiring the trial court to apply ***different*** tests. Leist was a "party"; therefore, under *Bowman*, his fault was properly considered for apportionment purposes. Mrs. Ankrom's comparative fault, if any, could only be determined against the backdrop of all parties involved in the incident.

Under W.Va. Code 55-7-24(a)(2), the trial court was then required to enter judgment "against each defendant found to be liable on the basis of the rules of joint and several liability." Because Mrs. Ankrom only sued Wal-Mart and a judgment could only be entered against Wal-Mart, the principles of joint and several liability did not apply.

[3] Wal-Mart is not without a remedy here. It would be able to and can pursue its claim for contribution against Leist, which it asserted in its cross-claim against him, to attempt to recover a portion of the judgment from him.

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