IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

DAVID RAYMOND WESTON,

Plaintiff,

v.

CIVIL ACTION NO.: 19-C-348
HONORABLE PHILLIP D. GAUJOT

MARCH-WESTIN COMPANY, INC.
A West Virginia Corporation,

Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S NOTICE PURSUANT TO SECTION 55-7-13d OF THE WEST VIRGINIA CODE

On April 1, 2021, came the Plaintiff, David Raymond Weston, by and through his counsel, Eric M. Hayhurst, Esq., and Defendant, March-Westin Company, Inc., by and through their counsel, Keith C. Gamble, Esq., for a hearing upon *Plaintiff's Motion to Strike Defendant's Notice Pursuant to Section 55-7-13d of the West Virginia Code.* In his Motion to Strike, Plaintiff sought to strike Defendant March-Westin Company, LLC's Notice. After due consideration of Plaintiff's Motion, March-Westin Company, Inc.'s Response to Plaintiff's Motion to Strike Defendant's Notice Pursuant to Section 55-7-13d of the West Virginia Code, *Plaintiff's Reply to March-Westin Company Inc.'s Response to Plaintiff's Motion to Strike Defendant's Notice Pursuant to Section 55-7-13d of the West Virginia Code*, the arguments of counsel and the relevant legal authorities, this Court hereby **GRANTS** Plaintiff's Motion to Strike Defendant's Notice based on the Findings of Fact and Conclusions of Law that follow:

FINDINGS OF FACT

1. Mr. Weston was an employee of the Monongalia County Commission ("Commission") maintenance crew when he was allegedly injured at the Monongalia County Courthouse on January 5, 2018.

2. At the time of the incident, the square in front of the Courthouse was being remodeled by the Defendant.

3. Mr. Weston filed a workers' compensation claim for his injuries sustained in the January 5, 2018 incident, which were deemed compensable and for which Mr. Weston received workers' compensation benefits. Mr. Weston's injuries were deemed to constitute a 7% whole person impairment via an independent medical examination conducted through the Commission's workers' compensation insurance carrier.

4. Mr. Weston, after settling his worker's compensation claim on September 9, 2019, brought the instant action against the Defendant, alleging a claim of negligence for its role in the incident.

5. On April 29, 2020, the Defendant filed its *Notice Pursuant to Section 55-7-13D [sic] of the West Virginia Code* ("Notice") purporting to place whole or partial fault for the allegations of negligence in the Complaint upon the Commission or its agents and/or employees and seeking inclusion of the Commission or its agents/employees in the assessment of fault by the jury in this matter.

6. Thereafter, the Plaintiff filed the instant motion seeking to strike the Notice and preclude the inclusion of the Commission on the jury verdict form for apportionment of fault.

CONCLUSIONS OF LAW

7. West Virginia's Modified Comparative Fault Statute ("Statute"), W.Va. Code § 55-7-13d(a)(1), provides that "[i]n assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the alleged damages regardless of whether the person was or could have been named as a party to the suit." W. Va. Code § 55-7-13d(a)(1).

8. However, "***[n]othing in this section is meant to eliminate or diminish any defenses or immunities, which exist as of the effective date of this section, except as expressly noted herein.***" W. Va. Code § 55-7-13d(a)(4) (emphasis added). Moreover, "***[n]othing in this section alters, in any way, the immunity of any person as established by statute or common law.***" W. Va. Code § 55-7-13d(g) (emphasis added).

9. The Commission is a "political subdivision" of the State of West Virginia. *See* W.Va. Code § 29-12A-3(c). Under the Governmental Tort Claims and Insurance Reform Act, "a political subdivision is immune from liability if a loss or claim results from ... any claim covered by any workers' compensation law ..." W.Va. Code § 29-12A-5(a)(11).

10. Furthermore, "[t]he immunity from liability extended to political subdivisions by West Virginia Code § 29-12A-5(a)(11) (1992) includes immunity from "deliberate intent" causes of action brought pursuant to West Virginia Code § 23-4-2(c)(2) (1994)." Syl. pt. 4, *Michael v. Marion Cnty. Bd. of Educ.*, 198 W. Va. 523, 482 S.E.2d 140 (1996).

11. As the loss in this this case was covered and compensated by available workers' compensation insurance coverage, the Commission is immune from suit regarding the Plaintiff's loss.

12. The plain language of the Statute is clear – a non-party that is immune from suit may not be apportioned fault by a jury under W.Va. Code § 55-7-13d.

13. Moreover, it is clear from the plain language of the Statute that the Legislature did not intend to except from the Statute non-parties who are otherwise immune from suit as the Statute expressly preserves all immunities available under the law to the non-party.

14. As such, given the Commission's immunity from suit under the circumstances of this case, it may not be apportioned fault by a jury under W.Va. Code § 55-7-13d.

15. Alternatively, even if the Statute permitted the inclusion of an immune political subdivision in the jury's determination of fault, such as the Commission, the Statute would require that the Defendant prove fault against the Commission based upon existing law as it pertains to employer liability (i.e., deliberate intent).

16. W.Va. Code § 55-7-13d(a)(1) clearly defines the term "fault" as is pertains to apportionment as:

> "Fault" means an act or omission of a person, which is a proximate cause of injury or death to another person or persons, damage to property, or economic injury, including, but not limited to, negligence, malpractice, strict product liability, absolute liability, ***liability under section two [§ 23-4-2], article four, chapter twenty-three of this code*** or assumption of the risk."

W. Va. Code § 55-7-13b (emphasis added).

17. There are only two ways in which an employer may be found liable under W.Va. Code § 23-4-2: 1) by proving specific intent to kill or injure or 2) by proving deliberate exposure/intent under a statutorily defined five (5) element test. The Legislature could have simply stated that an employer whom is normally immune from suit could be held at fault

without any particular burden of proof. However, the Legislature specifically chose language linking "fault" for employers to the burdens of proof under W.Va. Code § 23-4-2.

18. "A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute." *Meadows v. Wal-Mart Stores*, 207 W.Va. 203, 530 S.E.2d 676 (1999). Further, a statute must not be interpreted in a way that renders entire subsections superfluous. *See e.g. Christopher J. v. Ames*, 241 W. Va. 822, 829 (2019).

18. In support of its position to the contrary, the Defendant cites an opinion from the United States District Court for the Northern District of West Virginia – *Taylor v. Wallace Auto Parts & Services, Inc.* 2020 U.S. Dist. LEXIS 47573 (N.D.W.Va. 2020). However, the opinion by the Northern District is not persuasive upon this Court as the *Taylor* court failed to consider the aforementioned rules of statutory construction in its ruling. As such, the *Taylor* court's decision is incongruous with the words and plain meaning of the Statute and this Court must reject the *Taylor* decision as erroneous, or at the very least, unpersuasive.

19. Further, under W. Va. Code § 23-2A-1, after paying workers' compensation benefits, an employer or its insurance carrier holds a statutory subrogation lien against any recovery that an injured worker receives from a responsible third-party. This right of subrogation or reimbursement is not tempered by the Statute or its consequences in a case involving a third-party who attempts to apportion fault on an otherwise immune employer.

20. Thus, in an action against a third-party tortfeasor, if a court allows the amount of a non-party employer's negligence to be deducted from the third-party's liability, the negligent non-party employer would then be able, through subrogation/reimbursement, to collect the

workers' compensation benefits it (or its insurance carrier) paid from the injured worker's already-reduced recovery from the responsible third-party. This amounts to a double reduction in the Plaintiff's recovery, creating an inequitable result as the injured worker would not be fully compensated by the responsible employer or the responsible third-party.

21. The Third Restatement of Torts, the Supreme Court of Arizona, the Supreme Court of Kansas, and the Supreme Court of Tennessee, among others, recognized that, without changing workers' compensation laws, allowing a third party's liability to be reduced by the amount of a non-party employer's negligence imposes a grave injustice upon injured workers.

22. In *Aitken v. Industrial Commission of Arizona*, the Supreme Court of Arizona ruled that a workers' compensation lien should be reduced when a non-party employer's negligence is deducted from a third-party's liability and stated the following:

> In other words, the employee should not be forced to endure the combined effect of first having his or her award reduced by reason of the employer's fault, and thereafter having to satisfy a lien against this diminished recovery in favor of the employer and its carrier to the full extent of compensation benefits provided. If injured claimants stand to gain little or nothing by invoking both the workers' compensation and the tort systems, there will scarcely be any incentive for them to pursue responsible third parties.

904 P.2d 456, 461 (Ariz. 1995).

23. Additionally, the Supreme Court of Kansas, in *Negley v. Massey Ferguson, Inc.*, 625 P.2d 472, 475 (Kan. 1981), recognized that the conflict between Kansas's comparative negligence statute and workers' compensations laws created a "practical result of a concurrently negligent employer profiting from the suit of the employee by obtaining reimbursement of all compensation expenditures." The Kansas legislature subsequently changed Kansas's workers'

compensation laws to remove the inherent unfairness to injured workers caused by such a result. *See Brabander v. W. Co-op. Elec.*, 811 P.2d 1216, 1219 (Kan. 1991).

24. Further, the Supreme Court of Tennessee, a comparative fault jurisdiction that allows apportionment of fault to immune non-parties, carved out an exception excluding the apportionment of fault to non-party employers whose liability is covered by workers' compensation laws as the Plaintiff's recovery would be subjected to a "double reduction," and the unfairness of such a result justified excluding a non-party employer's fault from apportionment. *See Troup v. Fischer Steel Corp.*, 236 S.W.3d 143, 149 (Tenn. 2007); *Carroll v. Whitney*, 29 S.W.3d 14, 19 (Tenn. 2000).

25. As such, based upon the wording of the Statute, and specifically the definition of "fault" used by the Legislature, and the inherent inequities that would occur otherwise, West Virginia's Modified Comparative Fault statute requires a defendant to provide evidence of deliberate intent in order to apportion fault to non-party employers. In this case, however, the Defendant has failed to allege any evidence to make a prima facie case of deliberate intent against the Commission. To be sure, the Defendant could not satisfy a prima facie case of deliberate intent as the permanent impairment rating assigned to the Plaintiff as a result of his injuries arising from the incident that forms the basis of this lawsuit is less than the 13% rating required by W.Va. Code § 23-4-2(d)(2)(B)(v)(I)(a).

26. Finally, as there was a good faith settlement between the Plaintiff and the Commission in the workers' compensation claim, the only claim the Plaintiff could have brought against the Commission, and the Commission is not a party to this action, the Defendant is prohibited from arguing fault of the Commission at the trial of this matter. *See* Syl. pts. 5, 6 and

7, *Board of Ed. V. Zando, Martin & Milstead, Inc.*, 182 W.VA. 597, 390 S.E.2d 796 (1990) and Syl. Pt. 2, *Doe v. Wal-Mart Stores, Inc.*, 210 W. Va. 664, 558 S.E.2d 663 (2001).

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, this Court hereby **STRIKES** the "Plaintiff's Motion to Strike the Defendant's Notice Pursuant to Section 55-7-13d of the West Virginia Code" and prohibits the placement of the Monongalia County Commission on the jury verdict form in this matter and further prohibits the Defendant from arguing the fault on the part of the County Commission at the trial of this matter.

ENTERED this 9th day of June, 2021.

PHILLIP D. GAUJOT, JUDGE

Prepared by:

ENTERED: June 9, 2021
DOCKET LOG: 117 Jean Friend, Clerk

/s/ Eric M. Hayhurst
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