IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0577

(Underlying Monongalia County Civil Action No. 19-C-348)

MARCH-WESTIN COMPANY, INC.,
a West Virginia Corporation, Defendant below,

Petitioner,

v.

HONORABLE PHILLIP D. GAUJOT, Judge of the Circuit Court of Monongalia County, West Virginia; and DAVID RAYMOND WESTON, Plaintiff below,

Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION

PREPARED BY:

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2. Whether the Circuit Court committed clear error by striking Defendant March-Westin Company, Inc.'s Notice of Non-Party Fault because March-Westin is required to prove the Monongalia County Commission acted with deliberate intent with regard to Plaintiff's claim?

3. Whether the Circuit Court committed clear legal error by striking Defendant March-Westin Company, Inc.'s Notice of Non-Party Fault because the potential assessment of fault against the Monongalia County Commission under West Virginia Code § 55-7-13d would lead to an "inequitable" result if the Commission's workers' compensation insurance carrier is permitted to assert any subrogation rights it has against Plaintiff's potential award against March-Westin?

4. Whether the Circuit Court Committed clear error in holding that March-Westin cannot argue the fault of the Monongalia County Commission for Plaintiff's injuries because Plaintiff settled his workers' compensation claim against the Commission?

II. STATEMENT OF THE CASE

A. PERTINENT FACTUAL BACKGROUND

The pertinent factual background is undisputed. This matter arises out of a claimed injury to David Weston that occurred on January 5, 2018. **App. 0002**. At the time of the incident at issue, Mr. Weston was employed by the Monongalia County Commission (herein, the

"**Commission**") as a maintenance worker. **App. 0002.** March-Westin's project superintendent, Harman Hartman, was present at the Monongalia County Courthouse that day, as March-Westin was finalizing the Courthouse plaza renovation. **App. 0012 & 0103.** Finalization of the Courthouse remodeling project had been delayed as Dominion Hope had yet to install a new gas meter to allow the radiant ground heating system to be connected, tested, and put into service. **App. 0012.** In order for Dominion Hope to install a new gas meter that would allow the newly installed radiant heating system to be connected to the gas line, the County was required to remove a utility pole located outside of Courthouse building, but adjacent to the Courthouse. **App. 0011.**

On January 5, 2018, Plaintiff, his supervisor, his co-worker, as well as Mr. Hartman, participated in the process of removing the utility pole behind the Courthouse. Mr. Hartman was asked by Darrell Fox (a Commission employee and Plaintiff's supervisor) to assist in the removal of the utility pole by: (1) climbing a ladder (which belonged to the County), (2) removing a light fixture from the pole, (3) tying a rope to the top of the pole and handing a rope (which belonged to the County) to Plaintiff and another county employee, Jeremy Scarbro, who were stationed inside a second-story Courthouse window, and (4) then Mr. Hartman cut the base of the pole with a chainsaw. **App. 0012-0017.** The devised plan was to cut the bottom of the pole and then lower the pole to the ground with a rope that had been tied to the top. **App. 0012.** The record is unclear as to whether the plan for removing the pole was devised by the Commission, March-Westin, or both. **App. 0114.**

Plaintiff and a co-worker were directed by Plaintiff's supervisor, Mr. Fox, to the second-story window of the Courthouse to hold the rope and lower the pole after it was cut. **App. 0010.** After the pole was cut, the pole leaned against the side of the Courthouse. **App. 0012.** Thereafter, Mr. Fox picked up the bottom of the utility pole by himself and walked the pole backwards, while

the Plaintiff and Jeremy Scarbro lowered the same with the Commission's rope. **App. 0018 & 0023**. Plaintiff testified in his deposition that whoever moved the bottom of the pole (*i.e.*, that being his own supervisor) was the person who hurt him. **App. 0020-0021**. Plaintiff also testified that he believed that the pole would be held stationary after it was cut, and that he and Mr. Scarbro would lower the pole to the ground, but "[s]omebody picked it up and scooted it back." **App. 0020**. During discovery, Plaintiff's own expert witness, David Gardner, testified that the Commission was at fault, at least in part, for the accident which led to Plaintiff's injury.

Following the pole's removal, Plaintiff reported he had been injured while lowering the pole with the rope. On August 2, 2019, Administrative Judge Douglas V. Adkins of the Workers' Compensation Office of Judges issued a *Decision* finding that Plaintiff sustained a compensable injury as a result of the January 5, 2018 accident. **App. 0023-0035**.

B. Pertinent Procedural Background

Plaintiff filed his Complaint against March-Westin on November 15, 2019. **App. 0036-0040**. In his Complaint, Plaintiff claims that March-Westin's negligence in the lowering of the pole caused him to be injured. **App. 0036-0040**. Plaintiff seeks damages from March-Westin, including medical expenses, pain and suffering, physical limitations, diminished enjoyment of life, lost wages, lost earning capacity, annoyance and inconvenience, other consequences and damages, as well as punitive damages.

On April 29, 2020, March-Westin timely filed a *Notice Pursuant to Section 55-7-13d of the West Virginia Code* (herein, "**Notice of Non-Party Fault**"), stating it "has information and belief the Monongalia County Commission, Plaintiff's employer, and/or agents and/or employees of the Commission operating within their course and scope of work, had whole or partial fault in the matter subject to Plaintiff's Complaint[]" and "respectfully requested that if the matter is to be

tried that the trier of the fact be informed that in assessing percentages of fault, they shall consider the fault of all parties or persons who contributed to the alleged damages regardless of whether the person was or could have been named as a party to the suit." **App. 0041-0043.**

On February 19, 2021, nearly ten months after March-Westin filed its Notice of Non-Party Fault, and after significant discovery in the case had been completed, Plaintiff filed a *Motion to Strike the Defendant's Notice Pursuant to Section 55-7-13d of the West Virginia Code*. **App. 0044-0054**. On April 1, 2021, the Circuit Court conducted a hearing on Plaintiff's *Motion to Strike* and heard argument from the parties. **App. 0108**. The Court reserved ruling on Plaintiff's motion pending further consideration of the issue and a review of the arguments in the transcript. **App. 0142.**

On May 4, 2021, the Court held a Pretrial Conference, at which time it orally granted Plaintiff's *Motion to Strike*. The Court stated that:

> [T]he defendant wishes to apportion fault to the County Commission. The County Commission is a political subdivision which is immune from liability. And injuries that occur as a result of anything that happened while employed is covered by Workers' Compensation. So for that reason, the defendant is barred from arguing fault on the part of the Monongalia County Commission.

App. 0147. Plaintiff was directed by the Court prepare an order granting the motion. **App. 0160**. On June 2, 2021, Plaintiff filed his proposed Order. **App. 0163-0173**. On June 8, 2021, March-Westin filed an objection to Plaintiff's proposed Order on the basis that the proposed order added reasons for the Court's decision beyond the scope of what the Circuit Court held during the hearing. **App. 0174-0181**.

On June 9, 2021, the Circuit Court entered Plaintiff's proposed *Order Granting Plaintiff's Motion to Strike Defendant's Notice Pursuant to Section 55-7-13d of the West Virginia Code*, without modification. **App. 0001-0008** (herein, "**Order to Strike**"). In its Order to Strike, the

Circuit Court cited to Section 55-7-13d(a)(1), which states 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[.]" **App. 0003**. The Court also cited to subsection 55-7-13d(a)(4), which states that "[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" and subsection 55-7-13d(g), which states that "[n]othing in this section creates a cause of action. Nothing in this section alters, in any way, the immunity of any person as established by statute or common law." **App. 0003**. The Circuit Court further noted that the Commission is immune from suit under West Virginia Code § 23-12A-5(a)(11) for Plaintiff's injuries because "the loss in this case was covered and compensated by available workers insurance coverage[.]" **App. 0003**.

The Circuit Court found that "[t]he plain language of the Statute [Section 55-7-13d] is clear – a non-party that is immune from suit may not be apportioned fault by a jury" and that "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." **App. 0004**. The Circuit Court thus concluded that ". . . given the Commission's immunity from suit under the circumstances of the case, it may not be apportioned fault by a jury under W.Va. Code § 55-7-13d." **App. 0004**.

The Circuit Court also alternatively found that even if Section 55-7-13d permitted statutorily immune entities to be apportioned fault, March-Westin would be required to prove that the Commission acted with deliberate intent because it "pertains to employer liability." **App. 0004**. The Circuit Court based its finding on West Virginia Code 55-7-13b, which defines the term "fault" under the Statute, and includes a reference to the deliberate intent statute (West

Virginia Code § 23-4-2). **App. 0004**. The Circuit Court then found that "the Defendant has failed to allege any evidence to make a prima facie case of deliberate intent against the Commission." **App. 0007.**

The Circuit Court also struck March-Westin's Notice of Non-Party Fault based on its conclusion that assessment of fault to the Commission would lead to an inequitable result for the Plaintiff if the Commission's insurance carrier asserted its subrogation rights to Plaintiff's potential recovery from March-Westin. The Circuit Court held that "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 (or its insurance carrier) paid from the injured worker's already-reduced recovery from the responsible third-party." **App. 0005-0006**. "This amounts to a double reduction in 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." **App. 0006**.

For all these reasons, the Circuit Court struck March-Westin's Notice of Non-Party Fault. The Court also prohibited March-Westin "from arguing the fault on the part of the County Commission at the trial of this matter[,]" pursuant to *Board of Ed. v. Zando, Martin and Milstead, Inc.*, 182 W. Va. 597, 390 S.E.2d 796 (1990) and *Doe v. Wal-Mart Stores, Inc.*, 210 W. Va. 664, 558 S.E.2d 663 (2001). **App. 0007**. Trial is scheduled for August 23 through 26, 2021. **App. 0188.**

III. SUMMARY OF ARGUMENT

March-Westin respectfully petitions this Court for a writ of prohibition to prohibit the Circuit Court of Monongalia County from enforcing – in any respect – its June 9, 2021 *Order Granting Plaintiff's Motion to Strike Defendant's Notice Pursuant to Section 55-7-13d of the West*

Virginia Code. The Circuit Court's Order to Strike contains a fundamental misinterpretation of the clear language and purpose of Section 55-7-13d – which is to permit apportionment of fault to non-parties even if those non-parties are immune from suit. The Circuit Court, however, interprets the statute to mean that parties which are immune from civil actions cannot be assessed fault.

The Commission was clearly responsible for Plaintiff's injuries because Commission employees directed the work and directed Plaintiff to lower the utility pole – not March-Westin. While the Commission is certainly immune from Plaintiff bringing a civil action against it under West Virginia Code § 29-12A-5(11), Section 55-7-13d was designed to address this specific situation: permitting an at-fault non-party to be placed on the verdict form even if the non-party is immune from civil liability. The Circuit Court's interpretation of Section 55-7-13d has been rejected by two judges of the United States District Court for the Northern District of West Virginia: *Taylor v. Wallace Auto Parts & Servs.*, 2020 U.S. Dist. LEXIS 47573, 2020 WL 1316730 (N.D.W. Va. Mar. 19, 2020) (Kleeh, J.) and *Metheney v. Deepwell Energy Servs., LLC*, 2021 U.S. Dist. LEXIS 120483, 2021 WL 2668821 (N.D.W. Va. June 29, 2021) (Bailey, J.).

The Circuit Court also committed clear error in finding two "alternative" bases for its Order to Strike. The Circuit Court found that even if Section 55-7-13d permits parties who are immune from civil suit to be assessed fault, March-Westin nevertheless must prove the Commission acted with deliberate intent with regard to Plaintiff's injury, and March-Westin has not met that burden of proof. As explained by Judge Kleeh in his *Taylor* decision, deliberate intent need not be alleged for a non-party employer to be assessed fault – pursuant to the clear language of Section 55-7-13d.

The Circuit Court also committed clear legal error in granting Plaintiff's *Motion to Strike* when it found that Section 55-7-13d would lead to an "inequitable" result if the Commission's workers' compensation insurance carrier is permitted to assert subrogation rights it has against any

potential award Plaintiff may obtain against March-Westin. The Circuit Court substituted its judgment about what the statutory result should be in this case for the judgment of the West Virginia Legislature. As stated by the *Metheney* court, "[t]he fact that another party may have a right of subrogation is irrelevant to consideration of a notice of nonparty fault under West Virginia Code § 55-5-13d." *Metheney*, 2021 U.S. Dist. LEXIS 120483 at *21 (internal citations omitted).

Finally, the Circuit Court erred in finding that March-Westin cannot argue to the jury that the Commission was at fault for Plaintiff's injuries because Plaintiff settled his workers' compensation claim against the Commission. Subsection 55-7-13d(3) is clear that if a non-party settles a claim with a plaintiff, the plaintiff's recovery is reduced by the percentage of fault assigned by the jury to the settling party, and not simply by the amount of the settlement. Thus, March-Westin is clearly permitted under the statute to argue the fault of the Commission, regardless of the settlement of Plaintiff's workers' compensation claim.

For all of these reasons, the Circuit Court committed clear legal error when it struck March-Westin's Notice of Non-Party Fault.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the criteria set forth in Rule 19 of the Rules of Appellate Procedure, Petitioner believes that the decisional process would be significantly aided by oral argument, as it would allow the parties to further address the arguments presented in this matter and to respond to questions of the Court regarding issues related to the Circuit Court's clear error, substantial abuse, and overstep of power.

V. STANDARD OF REVIEW

"The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of

power, when the inferior court has no jurisdiction of the subject-matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W.Va. Code § 53-1-1; *see also* syl. pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953). In that regard, this Honorable Court, speaking through Justice Cleckley, has held:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) Whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impressions.

Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S. E. 2d 12 (1996); syl. pt. 2, *State ex rel. State v. Sims*, 240 W. Va. 18, 807 S.E.2d 266 (2017). "These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue." Syl. pt. 4, *Hoover*, 199, W. Va. 12, 483 S.E.2d 12; syl. pt. 2, *Sims*, 240 W. Va. 18, 807 S.E.2d 266. The party seeking the writ is not required to satisfy all five factors but "it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syl. pt. 4, *Hoover*, 199 W. Va. 12, 483 S. E. 2d 12; syl. pt. 2, *Sims*, 240 W. Va. 18, 268, 807 S.E.2d 266. This Court has held that "[i]nterpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review." Syl. pt. 1, *Appalachian Power Co. v. State Tax Dep't of W. Va.*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

VI. ARGUMENT

A. Petitioner Has No Other Adequate Means To Obtain Relief And Petitioner Will Be Damaged And Prejudiced In A Way That Is Not Correctable On Appeal If The Case Is Allowed To Proceed

In its *Order Granting Plaintiff's Motion to Strike Defendant's Notice Pursuant to Section 55-7-13d of the West Virginia Code*, the Circuit Court erroneously struck the Commission as a party to whom fault can be assessed by the jury at trial. Thus, if the trial of this matter proceeds without this Court issuing March-Westin's requested writ of prohibition, a traditional appeal could not correct the Circuit Court's error without a re-trial of the case – to allow the jury to assess fault to the Commission. No party should be forced to try the same case twice when the Circuit Court commits a clear legal error by improperly excluding an at-fault non-party from the verdict form, as expressly permitted by Section 55-7-13d. Going to trial twice is not correctable on appeal.

As demonstrated *infra*, the Circuit Court's Order to Strike is based on a clear misunderstanding of the West Virginia Code, and is thus clear error for which a writ of prohibition is warranted.

B. The Circuit Court's Order to Strike Contains Several Clear Legal Errors That Warrant The Issuance of a Writ of Prohibition

1. The Circuit Court Erred in Finding that Parties Which Are Immune from Suit by the Plaintiff Cannot be Assessed Non-Party Fault Under Section 55-7-13d

In its Order to Strike, the Circuit Court ignores the plain language of Section 55-7-13d in holding that because the Commission is immune from civil liability under West Virginia Code § 29-12A-5(11), it cannot be apportioned fault under Section 55-7-13d. The clear language and purpose of Section 55-7-13d is to permit apportionment of fault to non-parties – even if the non-parties are immune from suit.

In 2015, the West Virginia Legislature made major changes to this State's general liability statute, West Virginia Code § 55-7-1 to -31. The changes abolished joint and several liability and instituted a new modified comparative fault system. *See* W. Va. Code §§ 55-7-13 and 55-7-24; *see also* W. Va. Code § 55-7-13a, -13b, -13c, -13d. Under the amended statute, liability is several and defendants are responsible for only their proportion of fault. *See id.* § 55-7-13c. Moreover, the new statute allows juries to consider the fault of non-parties. *See id.* § 55-7-13d.

Based on the undisputed evidence developed during discovery, the Commission was responsible for Plaintiff's injuries. As relevant to the issues in this case, West Virginia Code § 55-7-13d states:

> (a) Determination of fault of parties and nonparties. —
>
> (1) In 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;
>
> . . .
>
> (3) In all instances where a nonparty is assessed a percentage of fault, any recovery by a plaintiff shall be reduced in proportion to the percentage of fault chargeable to such nonparty . . .;
>
> (4) Nothing 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;
>
> (5) Assessments of percentages of fault for nonparties are used only as a vehicle for accurately determining the fault of named parties. Where fault is assessed against nonparties, findings of such fault do not subject any nonparty to liability in that or any other action, or may not be introduced as evidence of liability or for any other purpose in any other action[.]
>
> (g) Limitations. — Nothing in this section creates a cause of action. Nothing in this section alters, in any way, the immunity of any person as established by statute or common law.

(emphasis added).

In analyzing any section of the West Virginia Code, this Court has stated that "[w]here the language of a statute is plain and unambiguous, there is no basis for application of rules of statutory construction; but courts must apply the statute according to the legislative intent plainly expressed therein." Syl. pt. 1, *Dunlap v. State Compensation Director*, 149 W. Va. 266, 140 S.E.2d 448 (1965). "Courts always endeavor to give effect to the legislative intent, but a statute that is clear and unambiguous will be applied and not construed." Syl. pt. 1, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). "Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syl. pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970). "We look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995).

The language of Section 55-7-13d is clear and unambiguous. Under subsection (a)(1), "[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[.]" (emphasis added). Under Section (a)(4), those non-parties retain any defenses and immunities, despite being placed on the verdict form. And under subsection (a)(5), the Legislature was clear even if fault is assessed against the non-party, any such finding does not subject the non-party to any liability, in any action. In other words, the only possible purpose for placing the non-party in the verdict form is to potentially reduce the liability of the named defendant – and the non-party's legal rights are not affected whatsoever.

The specific issue of whether an employer who is immune from civil actions based on workers' compensation law can be assessed non-party fault under Section 55-7-13d was first

considered by the United States District Court for the Northern District of West Virginia in *Taylor v. Wallace Auto Parts & Servs.*, 2020 U.S. Dist. LEXIS 47573, 2020 WL 1316730 (N.D.W. Va. Mar. 19, 2020). In *Taylor*, the decedent suffered fatal injuries at the Morgan Camp mine in Randolph County when his mine vehicle struck a screwjack. *Id.* at 2. Plaintiff-Administratrix filed an action against Wallace Auto Parts & Services, Inc., alleging product liability, breach of warranties and negligence counts. *Id.* at 1. The defendant thereafter filed a 55-7-13d Notice based on a Mine Safety and Health Administration report, which concluded that the Carter Roag Coal Company, the decedent's employer, was solely responsible for the decedent's injuries. *Id.* at 2-3. Plaintiff-Administratrix then filed a motion to strike the 55-7-13d Notice, arguing that because Carter Roag was immune from liability under the Workers' Compensation Act and deliberate intent had not been proven, it could not be placed on the verdict form.

The District Court concluded that Carter Road should be placed on the verdict form as a non-party under Section 55-7-13d. In so holding, Judge Kleeh stated that "[t]he language of section 55-7-13d indicates that the Legislature contemplated a set of circumstances where a nonparty might be included on the verdict form despite its immunity via the Workers Compensation Act or another avenue[]" and "[r]egardless of whether Plaintiff would be able to file suit directly against CRCC, Section 55-7-13d provides that CRCC may be placed on the verdict form for purposes of assessing the percentages of fault attributable to the parties for the subject incident here." *Id.* at 5-6. Judge Kleeh further held "Allowing the jury to assign fault to CRCC does not diminish CRCC's defenses or immunities or subject it to liability. Instead, the process required by statute seeks to set the level of fault attributable to Defendant, and Plaintiff's recovery from Defendant will be confined by that percentage — exactly as contemplated and provided for by the statute." *Id.* at 6.

In *Metheney v. Deepwell Energy Servs., LLC*, 2021 U.S. Dist. LEXIS 120483, 2021 WL 2668821 (N.D.W. Va. June 29, 2021), Judge Bailey adopted Judge Kleeh's reasoning – and specifically rejected Judge Gaujot's Order to Strike, which was cited and argued in that case. In Judge Gaujot's Order to Strike, he reasons because Section 55-7-13d provides non-parties retain statutory immunities (such as employer immunity under workers' compensation law), the Commission may not be apportioned fault. In rejecting Judge Gaujot's reasoning, Judge Bailey found that:

> [I]f significance and effect are to be given to every section of the statute, fault and liability must be distinct: "Where fault is assessed against nonparties, findings of such fault do not subject any nonparty to liability." W.Va. Code § 55-7-13d(a)(5). This resolves the problem argued by plaintiff—that the defendants' interpretation renders the immunities referred to in § 55-7-13d surplusage: a nonparty can be attributed fault and still retain their immunity. Thus, this Court finds *Taylor* to be the better analysis.

Id. at *20-21.

In this case, the evidence adduced during discovery in this case is undisputed: the Monongalia County Commission was responsible for Plaintiff's injuries because Commission employees supervised his work and directed Plaintiff to lower the utility pole which led to Plaintiff's injury, not March-Westin. While the Commission is immune from civil suit pursuant to West Virginia Code § 29-12A-5(11), Section 55-7-13d was designed to address this specific situation: permitting an at-fault non-party to be placed on the verdict form even if that non-party is immune from civil liability. Judge Kleeh and Judge Bailey's interpretation of Section 55-7-13d is consistent with the plain language of the statute and should be adopted by this Court.

Because the Circuit Court clearly erred in striking March-Westin's Notice of Non-Party Fault, this Court should prohibit the Circuit Court from enforcing its Order to Strike and permit the Commission to be included on the verdict form and assessed fault at the trial of this action.

2. The Circuit Court Erred in Finding that March-Westin Must Prove that the Monongalia County Commission Acted with Deliberate Intent

In its Order to Strike, the Circuit Court also erred in finding that even if Section 55-7-13d permits the allocation of fault to non-parties who are immune from suit, the Commission should nevertheless not be included on the verdict form because March-Westin is required to prove that the Commission acted with deliberate intent – and March-Westin has not made a *prima facie* showing of the Commission's deliberate intent. **App. 0004 and 0007.**

Section 55-7-13d simply does state that in order for a non-party to be assessed fault, the defendant who filed the notice of non-party fault most prove anything other than the fault of the non-party. *See* W. Va. Code 55-7-13(d) ("[t]he burden of alleging and proving comparative fault shall be upon the person who seeks to establish such fault."). The Circuit Court's conclusion that deliberate intent must be proven simply is not part of the Code.

In his *Taylor* decision, Judge Kleeh rejected the argument that deliberate intent must be proven against a non-party employer in order to assess fault against the employer under Section 55-7-13d. Specifically, Judge Kleeh held that:

> Defendant seeks, pursuant to a clear and applicable statute, to have the fault assessed in this case among all persons or parties who may have contributed to the incident made subject of this litigation. Such is Defendant's right under section 55-7-13d. The only entity possibly "liable to respond in damages" in this case is Defendant. Because the only liability (as opposed to assessment of fault) to be established here is the fault of the non-employer Defendant, the elements of deliberate intent need not be alleged for Defendant to avail itself of section 55-7-13d of the West Virginia Code.

Id. at 8-9. In similar fashion, Judge Bailey adopted Judge Kleeh's reasoning for "reject[ing] plaintiff's argument that defendant would be required to prove deliberate intent in order to attribute fault to the employer[.]" *Metheney* at 17-19.

The Northern District of West Virginia's interpretation of Section 55-7-13d that assessment

of fault and liability are distinct concepts under that statute is the correct interpretation. Thus, March-Westin only has the burden to prove that the Commission was at-fault for Plaintiff's injuries – and March-Westin should not be required to prove the Commission acted with deliberate intent.[1]

3. The Circuit Court Erred in Finding that an Employer Cannot be Assessed Non-Party Fault Because Plaintiffs Would be Subject to a "Double Reduction" Based on Workers' Compensation and Subrogation Law

The Circuit Court's final basis for striking March-Westin's Notice of Non-Party Fault is wholly based in equity – and ignores the West Virginia Code. The Circuit Court found if the Commission's workers' compensation insurance carrier is permitted to assert any subrogation rights it has against Plaintiff's potential award against March-Westin, that award should not also be reduced by the amount of the Commission's fault. **App. 0005-0006**. The Circuit Court believes that this so-called "double reduction" is an inequitable result for the Plaintiff, and cites case law from other jurisdictions in support of its conclusion. **App. 0006.**

Judge Bailey rejected Judge Gaujot's analysis in *Metheney*:

> Further, insofar as plaintiff argues this interpretation will create a "second absurdity" wherein recovery may be reduced by attributing fault to [the employer], and then again reduced by virtue of the subrogation lien, the plaintiff's argument goes to the propriety of the lien, which is outside the scope of the instant motion [to strike]. The solution plaintiff proposes creates its own absurdity: that defendants be liable for their own portion of fault and for [for the employer's] portion of fault, at odds with § 55-7-13d. In short, this Court agrees with Tug Hill that "[t]he fact that another party may have a right of subrogation is irrelevant to consideration of a notice of nonparty fault under West Virginia Code § 55-7-13d."

Additionally, that a particular statutory result may be "inequitable" to the Circuit Court is not a valid basis for ignoring Section 55-7-13d. The Legislature was clearly aware of the

[1] Regardless, because deliberate intent claims cannot be filed against West Virginia political subdivisions under West Virginia Code § 29-12A-5(11), the Circuit Court's finding that March-Westin must prove the Commission acted with deliberate intent is clear legal error.

provisions of the Workers Compensation Act when it enacted Section 55-7-13d:

> Though the Legislature, in enacting the [statute] may not have realized or foreseen the result of its action ..., it is presumed to be familiar with "all existing law", constitutional, statutory or common, applicable to the subject matter, and it has, by clear, explicit, and unambiguous language, which must be given its usual and ordinary significance and meaning, expressed its intention to accomplish that result. Its power to do so must be recognized, and its enactment given full force and effect, by the courts. If its exercise of that power cause an undesirable result, the remedy lies with the Legislature, whose action has produced it, and not with the courts. The question of dealing with the situation in a more satisfactory or desirable manner is a matter of policy which calls for legislative, not judicial, action.

Hereford v. Meek, 132 W. Va. 373, 388, 52 S.E.2d 740, 748 (1949) (citation omitted). The Circuit Court simply does not have the discretion to substitute its judgment for that of the West Virginia Legislature with regard to whether its acts are "equitable."

For the reasons, the Circuit Court committed clear legal error striking March-Westin's Notice of Non-Party Fault because the Commission's workers' compensation insurer might assert subrogation rights against any award Plaintiff may receive in this case.

4. The Circuit Court Erred in Finding that March-Westin Cannot Argue to the Jury that the Monongalia County Commission Was At Fault for Plaintiff's Injuries Because Plaintiff Settled His Workers' Compensation Claim

Finally, the Circuit Court also found in its Order to Strike that because Plaintiff settled his workers' compensation with the Commission, March-Westin is prohibited from arguing the fault of the Commission at trial. In support of this holding, the Court cites *Board of Ed. v. Zando, Martin and Milstead, Inc.*, 182 W. Va. 597, 390 S.E.2d 796 (1990) and *Doe v. Wal-Mart Stores, Inc.*, 210 W. Va. 664, 558 S.E.2d 663 (2001). If this Court vacates the Order to Strike and finds that the Commission should be placed on the verdict form and assessed fault, March-Westin presumes that the Circuit Court would revisit its finding that March-Westin cannot argue the fault of the Commission at trial. Nevertheless, March-Westin will address this separate holding of the Circuit Court.

Under the *Zando* decision, "[d]efendants in a civil action against whom a verdict is rendered are entitled to have the verdict reduced by the amount of any good faith settlement previously made with the plaintiff by other jointly liable parties." Syl. pt. 7, *Bd. of Educ. of McDowell Cty. v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990). In *Doe*, this Court held that "[i]t is improper for counsel to make arguments to the jury regarding a party's omission from a lawsuit or suggesting that the absent party is solely responsible for the plaintiff's injury where the evidence establishing the absent party's liability has not been fully developed." Syl. pt. 2, *id.*

While this Court has not specifically addressed Section 15-7-13d's impact on *Zando* and *Doe*, the statute clearly impacts both decisions. With regard to *Zando*, Section 15-7-13d(3) states ". . . [w]here a plaintiff has settled with a party or nonparty before verdict, that plaintiff's recovery will be reduced in proportion to the percentage of fault assigned to the settling party or nonparty, rather than by the amount of the nonparty's or party's settlement[.]" Thus, when fault is attributed to a non-party under Section 15-7-13d, *Zando* no longer applies. For all of the reasons *supra*, March-Westin's Notice of Non-Party Fault was properly filed by March-Westin, and any settlement between Plaintiff and the Commission has no effect on Plaintiff's potential recovery in this case. Therefore, *Zando* does not support the Circuit Court's decision to prohibit March-Westin from arguing the fault of the Commission at trial.

With regard to the "empty chair" analysis of *Doe*, Judge Armstead recently observed (in dissent) that ". . . the 2015 Act expressly allows a party to assert an 'empty-chair defense." *State ex rel. Amerisourcebergen Drug Corp. v. Moats*, 2021 W. Va. LEXIS 330 at *43, 2021 WL 2390204 (W. Va. June 11, 2021). This Court has also recently observed that:

> Under this new framework, defendants no longer need to file third-party complaints against non-parties if they wish to assert claims for contribution to have fault

> assessed against other potentially liable parties and no longer need to give notice that they intend to have the fault of non-parties considered. This procedure permits the jury to consider fault of all potentially liable parties.

State ex rel. Chalifoux v. Cramer, 2021 W. Va. LEXIS 317, *10, 2021 WL 2420196 (W. Va. June 14, 2021). In other words, Section 55-7-13d clearly permits the empty chair defense when a defendant properly files a notice of non-party fault, as March-Westin has done in this case.

Regardless, even if Section 55-7-13d did not expressly permit the empty chair defense, case law of this Court permits such a defense, including as to immune defendants. *See Landis v. Hearthmark, LLC*, 232 W. Va. 64, 75, 750 S.E.2d 280, 291 (W. Va. 2013) (placement of an immune defendant on the verdict form was required by equitable principles of fairness, the concepts underlying the doctrine of comparative negligence, and caselaw).

VII. CONCLUSION

The Circuit Court committed clear legal error in striking March-Westin's Notice of Non-Party Fault because: (1) Section 55-7-13d permits non-parties to be allocated fault and placed on the verdict form even if those non-parties are immune from suit; (2) March-Westin is not required to prove that the Commission acted with deliberate intent because Section 55-7-13d does not require such a quantum of proof; and (3) the Circuit Court erred in concluding that, based on equity, Section 55-7-13d can be ignored if the non-party employer's insurance carrier might file a subrogation claim against the plaintiff's monetary recovery. The Circuit Court also committed clear legal error in finding that March-Westin cannot argue to the jury that the Commission was at fault for Plaintiff's injuries.

Petitioner therefore requests that this Court issue a writ of prohibition to prevent the Circuit Court from enforcing its Order to Strike, *in toto*, and further find that the Monongalia County Commission be included on the verdict form as a non-party defendant to whom fault may be

assessed by the jury, pursuant to West Virginia Code § 55-7-13d.

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VERIFICATION

I, Keith C. Gamble, being first duly sworn, state that I have read the foregoing VERIFIED PETITION FOR WRIT OF PROHIBITION; that the factual representations contained therein are true, except so far as they are stated to be on information and belief; and that insofar as they are stated to be on information and belief, I believe them to be true.

Keith C. Gamble, Esq.

Taken, subscribed, and sworn to before me this 22nd day of July, 2021.

My Commission expires: 1·23·2024

OFFICIAL SEAL
STATE OF WEST VIRGINIA
NOTARY PUBLIC
Britney Harmison
984 Oak Grove Road, Grafton, WV 26354
My Commission Expires January 23, 2024

Britney Harmison
Notary Public

CERTIFICATE OF SERVICE

The undersigned, counsel of record, does hereby certify that I served this "***Verified Petition for Writ of Prohibition***" on July 22, 2021, consistent with Rule 37 of the West Virginia Rules of Appellate Procedure, by having deposited a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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