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" (citing *Doe v. Wal-Mart Stores, Inc.*, 210 W. Va. 664, 558 S.E.2d 663 (2001)). And consider whether an even greater quantum of evidence would be necessary for arguing that the absent party's fault is a superseding and intervening cause that relieves a defendant entirely. *See* Syl. Pt. 4, *Landis v. Hearthmark, LLC*, 232 W. Va. 64, 750 S.E.2d 280 (2013); *Matheny v. Fairmont Gen. Hosp.*, 212 W. Va. 740, 575 S.E.2d 350 (2002).

If a joint tortfeasor enters into a settlement with the plaintiff before trial, the parties should raise with the court how an offset for the settlement is to be applied. A logical reading of the 2015 statute suggests that defendants are no longer entitled to "offsets" for pretrial settlements and that, instead, the jury should assess fault against any absent or settling parties (assuming their liability is fully established), and the parties in the case at the time of verdict should simply pay their apportioned share. This interpretation would eliminate the guidance expressed in *Hardin v. New York Central Railroad Co.*, 145 W. Va. 696, 116 S.E.2d 697, 700 (1960) and). In *Hardin* the Supreme Court of Appeals recognized three different methods for applying an offset to the verdict but subsequently stated that these methods are not "exhaustive" and that ". . . the trial court may on its own initiative, if the parties are unable to agree, determine the appropriate method of handling the settlement credit as against the jury verdict."

The Court further elaborated in *Groves v. Compton.*

There, the Court recognized two problems created by a settlement with a joint tortfeasor: (1) "How is the settlement figure to be credited against the jury verdict rendered against the remaining joint tortfeasor?" and (2) "how to deal with the fact that the absent party has been dismissed from the case as a result of the settlement." With regard to whether the jury should be informed of the dismissal, the *Groves* Court noted, "[W]e do not believe that any fixed rule can be set except that neither counsel should be permitted to take unfair advantage of the settlement and dismissal in presenting and arguing their case." *Id.* at 712.

Does the statute take away all this discretion and substitute a "simple" procedure involving just apportioning the fault of settling parties along with the others, assuming the remaining defendant(s) could prove the liability of such parties? If so, it certainly opens the possibility that the remaining defendants will get no benefit at all from the settlements. Perhaps some additional case law from an intermediate appellate court would leave us with more to go on.

The Viability of Third-Party Claims Under West Virginia Code Sections 55-7-13a-d

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"Can this Third-Party Complaint survive under West Virginia's modified comparative fault statutes?" As of 2015, this is a vital question every West Virginia attorney should be asking upon receipt of, or before filing, a third-party complaint. For most common law contribution claims, the answer is likely: No.

In 2015, the West Virginia Legislature enacted sweeping changes to the State's law regarding comparative fault and the related assessment of liability and damages between parties and nonparties. West Virginia Code §§ 55-7-13a-d were all initially passed together, and all relate to the allocation of fault and damages to most civil cases.[1] Because West Virginia Code §§ 55-7-13a-d apply to all cases arising or accruing on or after May 25, 2015, the new statutory scheme is beginning to apply to the vast majority of newly-filed cases, and the breadth of its implications are becoming more visible.

West Virginia Code §§ 55-7-13a-d establish and codify a modified comparative fault standard in West Virginia for almost all civil cases. Though the statutes are detailed, and additional provisions and exceptions apply which are not discussed here, the major overarching rule for allocating fault provides that the liability of each defendant for compensatory damages shall be several only and may not be joint, and the fault of nonparties who contributed to the alleged damages shall be considered by the trier of fact.[2]

It has been common practice in West Virginia to bring a third-party complaint under Rule 14 of the West Virginia Code of Civil Procedure ("Rule 14") against a nonparty whom a defendant believes may be liable for the damages in a particular case. Prior to the 2015 statutory changes, this was feasible and appropriate because the third-party defendant was often involved in the incident in question and would be subject to joint and several liability with the original defendant. The Supreme Court of Appeals of West Virginia has considered Rule 14 with respect to third-parties and stated, "[A] third-party claim may be asserted only when the third party's liability is in some way dependent

1 West Virginia Code 55-7-13c explicitly states that this section does not apply to West Virginia Code Sections: 55-7B-1 *et seq.* (regarding medical liability claims); 46-1-1 *et seq.* (the Uniform Commercial Code); and 29-12A-1 (Governmental Tort Claims and Insurance Reform Act). It is unclear if any provisions of West Virginia Code Sections 55-7-13a, 13b, or 13d would apply to these sections, but it seems questionable as some provisions of these various statutes would be then be contradictory.

2 Joint and several liability still applies in the following actions: (1) defendants consciously conspire to commit a tortious act, (2) alcohol or drug influenced driving, (3) criminal conduct, and (4) an illegal disposal of hazardous waste , (5) in cases against political subdivisions or its employee as to each defendant who bears twenty-five percent or more negligence, and (6) defendants who have the same liability on an instrument as makers, drawers, acceptors, indorsers, etc.

on the outcome of the main claim and the third party's liability is secondary or derivative. Put simply, a third-party claim is only viable where a proposed third-party plaintiff says, in effect, 'If I am liable to plaintiff, then my liability is only technical or secondary or partial, and the third-party defendant is derivatively liable and must reimburse me for all or part . . . of anything I must pay plaintiff.'" (internal citations and quotations omitted). *Braxton Lumber Co. v. Lloyd's Inc.*, 238 W. Va. 177, 181, 793 S.E.2d 341, 345 (2016). Stated otherwise, "[A] third-party complaint filed pursuant to Rule 14(a) of the West Virginia Rules of Civil Procedure is proper only when the party to be joined is or may be liable to the third-party plaintiff for all or part of the original plaintiff's claim(s) against the third-party plaintiff." *Id*.

Until 2015, it was well decided in West Virginia that there was an inchoate right of contribution, whereby "a defendant in a negligence action has a right in advance of judgment to join a joint tortfeasor based on a cause of action for contribution." *Board of Educ. V. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 602, 390 S.E.2d 796, 801 (1990). The Court has further held that the "procedural mechanism for invoking this non-statutory right of contribution . . . is by means of third-party joinder." *Charleston Area Med. Ctr., Inc. v. Parke-Davis*, 217 W. Va. 15, 20, 614 S.E.2d 15, 20 (2005) (citing *Sydenstricker v. Unipunch Prods., Inc.*, 169 W. Va. 440, 288 S.E.2d 511 (1982)). In fact, the Court went so far as to dictate that "[w]hether the inchoate right of contribution can be asserted in a given case will generally be determined based upon compliance with the procedural requirements necessary to invoke such right." *Id.*

However, West Virginia now generally only allows several liability, and each defendant is only responsible for the damages allocated to that defendant in direct proportion to that defendant's percentage of fault. Thus, contribution is only available where the parties are held jointly liable, which is now only permitted in limited circumstances. This line of reasoning is further supported by West Virginia Code §55-7-13d(a)(1)-(2), which allows for a nonparty's liability to be assessed by the finder of fact if the nonparty settled with the plaintiff or if the defendant filed a notice "no later than one hundred eighty days after service of process upon said defendant that [said] nonparty was wholly or partially at fault." The filing of a notice of nonparty fault ensures defendants that they will not be held liable for the entirety of the damages, inasmuch as they will be permitted to prove to the trier of fact that a nonparty bears some responsibility and should be apportioned fault, thus reducing their liability burden.

Despite the fact that third-party claims premised on common law contribution are now greatly limited, many third-party claims will survive in the context of indemnity. West Virginia Code §55-7-13c(f) states that "[t]his section does not affect, impair or abrogate any right of indemnity or contribution arising out of any contract or agreement or any right of indemnity otherwise provided by law." This provision leaves third-party claims based on express indemnity unaffected but may impose some limitations on implied indemnity.

Implied indemnity is "based upon equitable principles arising from the special nature of the relationship between the parties." *Sydenstricker v. Unipunch Prods.*, 169 W. Va. 440, 445, 288 S.E.2d 511, 515 (1982). However, even when there is some special relationship, implied indemnity requires that the party asserting implied indemnity has been subject to tort liability due to the actions of another and be without personal fault. *Hill v. Joseph T. Ryerson & Son*, 165 W. Va. 22, 27, 268 S.E.2d 296, 301 (1980). Because of the modified comparative fault scheme put into place by the legislature, if a defendant is without fault, the defendant cannot be held liable for the actions of a nonparty if certain statutory procedures are followed. *See* W. Va. Code 55-7-13d(a). This seemingly limits implied indemnity claims as long as a nonparty can be placed on the verdict form as contemplated by W. Va. Code 55-7-13d(a).

West Virginia courts have yet to set precedents on how third-party claims for common law contribution should be handled in light of the modified comparative fault scheme put in place by the legislature. But, given that defendants will now typically be only severally liable for their portion of a verdict, third party claims for common law contribution will likely be unavailable avenues for the defense.

Common Sense in Premises Liability; Will West Virginia Code § 55-7-8 be Reasonably Applied?

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A man watches as another man walks into a pit and falls. He watches a second man walk and fall into the same pit. The man then chooses to walk into and fall into the same pit. He then sues the landowner for having a pit.

Many attorneys quickly analyze the case under assumption of the risk, contributory negligence, and/or comparative fault. These defenses to liability are not the starting point. In reality, no defense to liability is necessary because there is no liability. When the pit is open and obvious, the landowner has no duty. There being no duty, there is no claim under West Virginia law. The pit was open, obvious, reasonably apparent, or as well-known to the man injured as it was to the owner or occupant of the property. Thus, the owner or occupant of the property owes no duty to the man. There being no duty, there can be no claim. Unfortunately, West Virginia courts are reluctant to apply this law.