

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BROTHERHOOD MUTUAL INSURANCE CO.,
a foreign corporation, a/s/o The Keystone Apostolic
Church, f/k/a The Pentecostal Assembly of Jesus
Christ, a non-profit association,

Plaintiff

v.

Civil Action No. 16-C-293

CENTRAL WEST VIRGINIA REGIONAL
AIRPORT AUTHORITY, INC., et al.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND
RECOMMENDATION OF THE MASS LITIGATION PANEL

On August 18, 2016, the Central West Virginia Regional Airport Authority, Inc. ("CWVRAA") filed a *Motion to Refer Actions to the Mass Litigation Panel* ("Motion to Refer") in the above-styled civil action. CWVRAA seeks referral of the above-styled action, as well as the following Kanawha County civil actions:

1. *Central West Virginia Regional Airport Authority v. Triad Engineering, Inc., et al.*, Civil Action No. 15-C-1022;
2. *Theodore and Rebecca Carter vs. Central Regional West Virginia Airport Authority, et al.*, Civil Action No. 15-C-1074;
3. *Kenneth W. Carter v. Cast & Baker Corp., et al.*, Civil Action No. 15-C-1791;
4. *Robert L. Harrah II v. Cast & Baker Corp., et al.*, Civil Action No. 15-C-1792;
5. *Terry and Rosemary Letart vs. Cast & Baker Corp., et al.*, Civil Action No. 15-C-1793;
6. *Deborah K. Harrah v. Cast & Baker Corp., et al.*, Civil Action No. 15-C-1794; and
7. *The Keystone Apostolic Church, f/k/a The Pentecostal Assembly of Christ vs. Central West Virginia Regional Airport Authority*, Civil Action No. 16-C-536.

The parties to the eight (8) actions that are the subject of the Motion to Refer filed the following reply memoranda:

1. *Theodore Carter and Rebecca Carter's Response in Opposition to Defendant's Motion to Refer Actions to the Mass Litigation Panel*, September 7, 2016;

2. Keystone Apostolic Church f/k/a The Pentecostal Assembly of Jesus Christ's *Response in Agreement with Motion to Refer Actions to the Mass Litigation Panel*, September 8, 2016;
3. *Defendants' Joint Response in Opposition to Defendant Central, West Virginia Regional Airport Authority Inc. 's Motion to Refer Actions to the Mass Litigation Panel*, September 8, 2016;
4. *Response of Brotherhood Mutual Insurance Company to Motion to Refer Actions to the Mass Litigation Panel*, September 9, 2016;
5. *Theodore Carter and Rebecca Carter's Corrected Response in Opposition to Defendant's Motion to Refer Actions to the Mass Litigation Panel*, September 12, 2016; and
6. *Defendant, Central West Virginia Regional Airport Authority, Inc. 's Reply to the Joint Response in Opposition to Motion to Refer Actions to the Mass Litigation Panel*, November 1, 2016.

Having reviewed the motion and reply memoranda, the Chief Justice ordered the Mass Litigation Panel or a designated member thereof to conduct a hearing to receive evidence and entertain arguments by the parties or any judge, and submit findings of fact and a recommendation to the Chief Justice as soon as practicable as to whether these cases should be referred to the Panel or be consolidated before a judge of the Thirteenth Judicial Circuit under Rule 42 of the West Virginia Rules of Civil Procedure. See November 18, 2016, *Administrative Order of the Supreme Court of Appeals of West Virginia*.

On November 18, 2016, The Honorable Alan D. Moats, Chair of the Mass Litigation Panel, ordered the Mass Litigation Panel or a designated member thereof to conduct a hearing on December 9, 2016, to receive evidence and entertain arguments by the parties or any judge relative to the *Motion to Refer Actions to the Mass Litigation Panel*. Order entered November 18, 2016.

On December 9, 2016, the Honorable Alan D. Moats and the Honorable Jack Alsop, upon proper notice, convened and received evidence and arguments as to whether these eight (8) civil actions should be referred to the Panel or be consolidated before a judge of the Thirteenth Judicial Circuit under Rule 42 of the West Virginia Rules of Civil Procedure. The Honorable

John A. Hutchison and the Honorable Derek C. Swope were also present for oral argument and conferred with Judge Moats and Judge Alsop regarding the pending Motion to Refer.

Having considered all of the submissions of the parties, and having heard argument of counsel in support of and in opposition to the Motion to Refer, the Panel makes the following **FINDINGS OF FACT** and **RECOMMENDATION** to the Chief Justice:

FINDINGS OF FACT

1. The potential Mass Litigation arises from the March 12, 2015, failure of the mechanically stabilized earth retention structure at the end of Runway 5 at the CWVRAA's Yeager Airport in Charleston in West Virginia, sending hundreds of thousands of cubic yards of material onto Keystone Drive and into Elk Two Mile Creek. Motion, ¶¶ 1-2.

2. All eight (8) civil actions are pending in the Circuit Court of Kanawha County, West Virginia. Motion, ¶ 2.

3. During the hearing, Counsel represented to the Panel that two additional, related cases have been filed. The Panel is advised that the two additional cases were filed by the Masters Law Firm on behalf of owners of property on Keystone Drive: *James Johnson, et al. v. Cast & Baker Corporation, et al.*, Civil Action No. 16-C-1826; and *Patricia A. Wolfe, et al. v. Cast & Baker Corporation, et al.*, Civil Action No. 16-C-1815. The Panel is further advised that both cases are assigned to the Honorable Charles E. King.

4. Plaintiff, Brotherhood Mutual Insurance Co., as subrogee of The Keystone Apostolic Church, asserts causes of action for negligence, trespass and strict liability against Defendant CWVRAA, ten (10) other named defendants, and ten (10) John Doe defendants for damages allegedly suffered by Keystone as a result of the March 12, 2015, failure of the mechanically stabilized earth retention structure at the end of Runway 5 at the CWVRAA's

Yeager Airport. The Keystone Apostolic Church also filed a motion to intervene in the action to assert additional causes of action against CWVRAA and the other defendants. Motion, ¶¶ 3-4.

5. Seven (7) of the eight (8) civil actions were filed by adjacent property owners against CWVRAA, as well as entities involved in the design and construction of the mechanically stabilized earth retention structure. These civil actions allege causes of action for trespass, strict liability, negligent design, private nuisance, and public nuisance, among others. Motion, ¶ 6.

6. Additionally, CWVRAA filed a civil action against ten (10) entities allegedly involved in the design and/or construction of the mechanically stabilized earth retention structure at Yeager Airport, fourteen (14) insurance companies, and forty (40) John Doe defendants, asserting causes of action for negligence, breach of implied warranty, breach of contract, breach of quasi-contract, express warranty, implied warranty of fitness, implied warranty of merchantability, declaratory judgment and punitive damages. Motion, ¶ 7.

7. The eight (8) civil actions were assigned to four (4) different judges of the Circuit Court of Kanawha County, West Virginia. Motion, ¶¶ 8-9.

8. All eight (8) civil actions arise from the March 12, 2015, failure of the mechanically stabilized earth retention structure at Yeager Airport, and allege similar causes of action against the same or similar defendants. Motion, ¶ 12.

9. Counsel represented to the Panel that this very complex, catastrophic failure of the mechanically stabilized earth retention structure at the end of runway 5 of the CWVRAA's Yeager Airport impacts thousands of people, including homeowners in the communities on Keystone Drive and Barlow Drive, members of the Keystone Apostolic Church, and employees of the airport.

10. Counsel further represented to the Panel that substantial insurance coverage issues must be resolved in these cases, and limited insurance funds must be fairly and equitably apportioned among numerous affected parties with competing interests.

CONCLUSIONS OF LAW

Trial Court Rule 26 provides that:

Any party, judge, or the Administrative Director of the Courts may seek a referral of actions as Mass Litigation to the Panel by filing a Motion to Refer to the Mass Litigation Panel in any circuit court in which an action is pending. The motion shall identify the nature of the actions sought to be referred, the number of plaintiffs, the number of defendants, the number of actions pending, the basis for the request, a listing of the particular actions in all the circuits for which a referral is being requested, and, if known, whether additional related actions may be filed in the future.

W. VA. TRIAL CT. R. 26.06(a)(1).

Through the creation of . . . a mass litigation panel, it was believed that this State's judicial system and those individuals seeking redress would benefit by permitting the use of innovative means of trial management concerning issues unique to mass litigation, which would in turn encourage a more expeditious resolution of these matters than that permitted by traditional means of case resolution.

State ex rel. Allman v. MacQueen, 209 W. Va. 726, 731, 551 S.E.2d 369, 374 (2001).

Trial Court Rule 26.04(a) defines "Mass Litigation" as:

[t]wo (2) or more civil actions pending in one or more circuit courts:

(1) involving common questions of law or fact in mass accidents or single catastrophic events in which a number of people are injured; or

(2) involving common questions of law or fact in "personal injury mass torts" implicating numerous claimants in connection with widely available or mass-marketed products and their manufacture, design, use, implantation, ingestion, or exposure; or

(3) involving common questions of law or fact in "property damage mass torts" implicating numerous claimants in connection with claims for replacement or repair of allegedly defective products, including those in which claimants seek compensation for the failure of the product to perform as intended with resulting

damage to the product itself or other property, with or without personal injury overtones; or

(4) involving common questions of law or fact in "economic loss" cases implicating numerous claimants asserting defect claims similar to those in property damage circumstances which are in the nature of consumer fraud or warranty actions on a grand scale including allegations of the existence of a defect without actual product failure or injury; or

(5) involving common questions of law or fact regarding harm or injury allegedly caused to numerous claimants by multiple defendants as a result of alleged nuisances or similar property damage causes of action.

W. VA. TRIAL CT. R. 26.04(a).

1. The presence of two (2) or more pending civil actions in one or more circuit courts is sufficient to satisfy the numerosity requirement of Rule 26.04(a). Thus, the presence of eight (8) pending civil actions involving ten (10) plaintiffs and at least twenty-eight (28) named defendants, assigned to four (4) different circuit judges in the Circuit Court of Kanawha County Circuit Court supports referral of these actions to the Panel.

2. Because the "common questions of law or fact" requirement in mass litigation is almost identical to the "commonality" requirement in Rule 23(a)(2) - "questions of law or fact common to the class" - the test for commonality under Rule 23(a)(2) is instructive in the mass litigation context:

"A common nucleus of operative fact [or law] is usually enough to satisfy the commonality requirement." *Rosario v. Livaditis*, 963 F.2d 1013, 1017-18 (7th Cir.1992). "The threshold of 'commonality' is not high," and "requires only that resolution of the common questions affect all or a substantial number of the class members." *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (5th Cir.1986).

In re West Virginia Rezulin Litigation, 214 W.Va. at 67, 585 S.E.2d at 67.

3. The Panel CONCLUDES the eight (8) pending civil actions that are the subject of the Motion to Refer qualify as Mass Litigation, as defined by Trial Court Rule 26.04(a)(3) and (5). All eight (8) civil actions allege property damage as a result of the March 12, 2015, failure

of the mechanically stabilized earth retention structure at the end of Runway 5 of the CWVRAA's Yeager Airport. All eight (8) civil actions allege the same or similar causes of action against defendants involved in the design and construction of the mechanically stabilized earth retention structure. Seven (7) of the eight (8) civil actions allege the same causes of action against CWVRAA.

4. The Panel CONCLUDES that referral of these civil actions to the Panel will allow implementation of "[a] creative and innovative trial management plan . . . designed to ensure an orderly, reasonably swift and efficient disposition of mass liability cases . . . [that] does not trespass upon the procedural due process rights of the parties." Syllabus Point 3, *State ex rel, Appalachian Power Co. v. MacQueen*, 198 W.Va. 1, 479 S.E.2d 300 (1996). Referral will also ensure consistency of rulings, and permit the parties to mediate some or all of these cases before the Panel's Resolution Judges at the appropriate time(s).

5. Based upon its prior experience in complex property damage cases, such as the Flood Litigation, the Mingo County Coal Slurry Litigation, and the University Commons Litigation, the Panel CONCLUDES that it will be able to implement efficiency and time saving devices without limiting the ability of the Parties to litigate their non-common individual issues.

6. Based upon its prior experience in complex insurance coverage issues and limited insurance funds in the Mingo County Coal Slurry Litigation and the Mountain State University Litigation, the Panel CONCLUDES that it can fairly and equitably address and apportion limited insurance funds among numerous parties with competing interests.

RECOMMENDATION

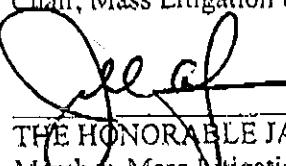
Based on the foregoing and pursuant to Trial Court Rule 26 the Panel RECOMMENDS that the Chief Justice refer the above-styled civil actions to the Mass Litigation Panel. Pursuant

to Trial Court Rule 26.09(b), the Panel further RECOMMENDS that the Supreme Court authorize the Mass Litigation Panel to transfer and join with the existing Mass Litigation any similar cases currently pending as well as any subsequently filed cases arising from the March 12, 2015, failure of the mechanically stabilized earth retention structure at the end of Runway 5 at the CWVRAA's Yeager Airport in Charleston in West Virginia. The Panel will submit its "Findings of Fact, Conclusions of Law and Recommendation of the Mass Litigation Panel" to Chief Justice Menis Ketchum pursuant to Trial Court Rule 26.06(c)(2).

The Panel ORDERS the *Findings of Fact, Conclusions of Law and Recommendation of the Mass Litigation Panel* FILED in the Circuit Court Kanawha County, West Virginia, and made part of the record. The Circuit Clerk of Kanawha County is ORDERED to transmit a copy of the *Findings of Fact, Conclusions of Law and Recommendation of the Mass Litigation Panel* to the Honorable Charles E. King, the Honorable James C. Stucky, the Honorable Tod J. Kaufman, and the Honorable Joanna I. Tabit, Judges of the Thirteenth Judicial Circuit; the Clerk of the Supreme Court of Appeals of West Virginia; and the Mass Litigation Manager; and to serve copies on all parties of record or their counsel.

RECOMMENDED: December 15, 2016


THE HONORABLE ALAN D. MOATS
Chair, Mass Litigation Panel


THE HONORABLE JACK ALSOP
Member, Mass Litigation Panel