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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

WEST VIRGINIA PAVING, INC.,
Defendant/Petitioner

v.

C & O MOTORS, INC.,
Plaintiff/Respondent,

Appeal No.
(Civil Action No. 06-C-305
Honorable Jennifer Bailey Walker)

PETITION FOR APPEAL
FROM CIRCUIT COURT OF KANAWHA COUNTY

WEST VIRGINIA PAVING, INC.
PETITIONER/DEFENDANT
BY COUNSEL

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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(Civil Action No. 06-C-305

Honorable Jennifer Bailey Walker)

PETITION FOR APPEAL

Petitioner, West Virginia Paving, Inc. ("Petitioner"), by counsel, submits this Petition for Appeal of an Order entered by the Circuit Court of Kanawha County on May 1, 2007, which (1) erroneously grants Motion for Summary Judgment in favor of plaintiff C&O Motors, Inc. ("Respondent") when there is clearly outstanding issues at hand and (2) denies Petitioners Motion for Joinder when it is undisputed that a third party is the alleged responsible party.

I. Nature of the Proceedings and Ruling

This appeal arises from an Order entered by Judge Jennifer Bailey Walker of the Circuit Court of Kanawha County on May 1, 2007, (a copy of said Order is attached hereto and made a part hereof as Exhibit A) regarding a roadway milling operation that

occurred on or about May 3rd and 4th, 2006, in the City of St. Albans, WV for the purposes of resurfacing State Route 60.

The Respondent in this case, sought damages for the clean up of certain new vehicles on its sales lot located immediately adjacent to the road that was being milled. Petitioner moved the lower Court to order joinder of the sub-contractor Coady Construction, Inc., ("Coady") as that company is the responsible party for the work done in milling (removing asphalt) that the Respondent alleges caused dust and debris to collect on Respondent's vehicles. The Circuit Court agreed with Respondent that there were no genuine issue of material fact or law and granted summary judgment in its favor. Petitioner also filed a Motion for Joinder to join Coady as a necessary party which the lower court denied.

II. Factual Background

Respondent filed a Complaint in the Circuit Court of Kanawha County, West Virginia, on February 15, 2006, seeking damages in the amount of \$20,000.00 in regards to the allegations that WV Paving, Inc., "negligently caused tar and other debris to splatter on Plaintiff's vehicles on the car lots abutting Route 60" (See Exhibit B, Complaint Paragraph B.)

During discovery, Petitioner later filed a *Motion for Joinder of Persons Needed for Just Adjudication Pursuant to Rule 19 of the Rules of Civil Procedure* "on the grounds that the alleged deposition of foreign material on the Plaintiff's subject vehicles, was, more than likely, done by the entity known as Coady Construction, Inc. pursuant to a subcontract with the Defendant, West Virginia Paving, Inc. who was operating as General Contractor, under a contract with the State of West Virginia, Department of

Transportation, Division of Highways for the milling and resurfacing of State Route 60, located along the Respondent's boundary in the City of St. Albans, Kanawha County, West Virginia". The Circuit Court denied Petitioner's Motion for Joinder and granted Respondent's Motion for Summary Judgment against Petitioner.

The history of this case begins with a Contract between WV Division of Highways and West Virginia Paving, Inc. (WV Paving) for WV Paving to do the removal and resurfacing of asphalt in St. Albans, West Virginia. WV Paving used a subcontractor, Coady Construction, Inc., (Coady), to perform all milling (removal of asphalt) along State Route 60 on the days in question. Petitioner has used this subcontractor (Coady), before and decided to hire it again for the milling project in question. WV Paving never performed any milling along the stretch of Route 60 in St. Albans at the C&O Motors location. WV Paving only performed the repaving of the surfaces after Coady completed the milling project. A milling project consists of grinding up the asphalt, using water to keep the blades cool as well as keeping the dust to a minimum, and depositing the ground asphalt by conveyor into a truck. WV Paving does not have the equipment to perform milling projects so they hire subcontractors to fulfill the contract obligations.

C&O and surrounding businesses were amply warned of the milling project and the dates they were to be performed. The contract between WV Division of Highways ("DOH") and WV Paving provides that the DOH give standard public notice prior to the project.

The milling activity started about six (6) miles East of the Respondents location and slowly proceeded West. The Respondent had many days constructive and actual

notice that the large and noisy milling machine was on its way, and, therefore, had ample time and opportunity to remove or otherwise protect its automobiles from dust and debris. C&O did not relocate any of their vehicles while the milling was being performed. During the milling operation there is no record of C&O approaching the milling operators to complain of the debris being allegedly thrown on their vehicles. Instead, C&O waited until the project was completed and had the vehicles cleaned before they complained to WV Paving who, in turn, told them they were not responsible for the debris from the milling project, and that it was their subcontractor Coady. The Petitioner takes the position that C&O Motors should have moved or otherwise protected its vehicles, and by not doing so is responsible, (or at least partially responsible), and, therefore, wholly or comparatively negligent for the debris deposition on their new vehicles.

III. Assignment of Error

A. The Circuit Court erred by affirming the moving party's request for summary judgment when there are clearly material issues as to who the responsible party is and what percentage of comparative negligence exists among the parties. This case is a "comparative negligence" case which should be decided by the trier of fact. By granting the Motion for Summary Judgment, the Court in effect ruled this case to be a "strict liability" case.

B. The Circuit Court erred by not granting Petitioner's Motion for Joinder to join necessary party, the sub-contractor, Coady Construction, Inc., which performed the milling operation in question.

IV. Discussion of Law with Points and Authorities

In Syl. Pt. 2 of Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995) it states that:

Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the non-moving party, such as where the non-moving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syl. Pt. 2, Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995).

In this regard, Respondent has not sufficiently shown that there is no genuine issue of material fact or law when there is a clear issue as to who the responsible party is for the damages, and what percentage all parties are at fault, and the amount of damages.¹

Petitioner states that the Circuit Court erred in granting Respondent's Motion for Summary Judgment in that the Respondent and Coady are clearly "responsible parties" for damages which makes this a comparative negligence case to be decided by a jury, and not a strict liability case to be decided by the Judge. The DOH sent clear and concise notices through the media via, radio, television and newspapers to inform all residents and businesses of the upcoming project on State Route 60. Respondent had sufficient time to relocate its cars from the edge of the roadway or to cover and protect its cars to ensure its cars were not damaged, or that any debris from the project would not collect on said vehicles. Respondent is liable in part, or in full, as it is negligent in not relocating or protecting its vehicles during the milling process.

¹ The Order of May 1, 2007, granting summary judgment does not order a dollar amount to be awarded to the plaintiff. Without a monetary amount, the Order established a "legal" liability but does not provide a mechanism for the Plaintiff to collect from the Defendant a monetary amount.

In following these guidelines Syl. Pt. 6 of Rowe v. Sisters of the Pallottine Missionary Society, 211 W.Va. 16, 560 S.E.2d 491 (2001) states:

In order to obtain a proper assessment of the total amount of the plaintiffs contributory negligence under our contributory negligence rule, it must be ascertained in relation to all the parties whose negligence contributed to the accident, and not merely those defendants involved in the litigation.

Syl. Pt. 6 of Rowe v. Sisters of the Pallottine Missionary Society, 211 W.Va. 16, 560 S.E.2d 491 (2001), citing Syl. Pt. 3, Bowman v. Barnes 168 W.Va. 111, 282 S.E.2d 613 (1981).

Respondent also subcontracted Coady for the purposes of the milling project since they have done this work for them in the past. The "Subcontract Agreement" (attached hereto and made a part hereof as Exhibit C) between Respondent and Coady states under paragraph 21 Liability and Indemnification that "The Contractor shall not be liable for any loss or casualty incurred or caused by the Subcontractor. The Subcontractor shall hold the Contractor harmless from any and all liability, costs, damages, attorney's fees, and expenses from any claims of action of whatsoever nature arising while on or near the Project, or while performing Contract related work, including those claims relating to its subcontractors, suppliers, or employees, or by reason of any claim or dispute of any person or entity for damages from any cause directly or indirectly relating to any negligence by the Subcontractor, its representatives, employees, subcontractors, or suppliers."

Further, Petitioner, by subcontract approved by the owner (DOH), hired Coady to do the milling. It is Coady that performed all milling operations and who, logically,

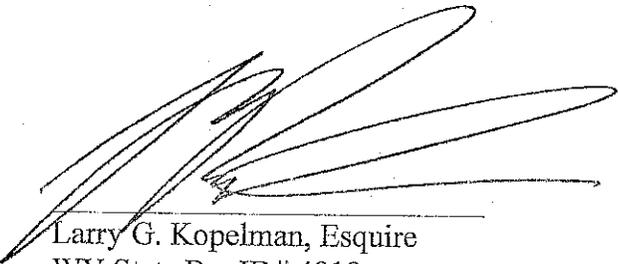
deposited debris, if any, upon the vehicles of the Respondent. Coady is a necessary third-party in this lawsuit when recognizing that this is a claim for negligence, and the theory of comparative negligence is West Virginia's measure of liability. In other words, Coady is a necessary party and should be required to be joined by the Respondent pursuant to Rule 19 of the Rules of Civil Procedure.

V. Conclusion and Requested Relief

Petitioner respectfully requests that this Court reverse the lower court's decision by concluding that there are material issues of fact and law (comparative negligence) which must be determined by a jury (and in doing so, reverse the lower Court's determination of "strict liability" and establish "comparative negligence" as the cause of action), and direct joinder of Coady Construction, Inc. as a necessary party.

Respectfully submitted,

WV Paving, Inc.
By Counsel



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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

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SATYR... JUDGE...
KANAWHA CO. CIRCUIT COURT

C & O MOTORS, INC.,

Plaintiff,

v.

Civil Action No. 06-C-305

WEST VIRGINIA PAVING, INC.,

a West Virginia corporation,

Defendant.

ORDER

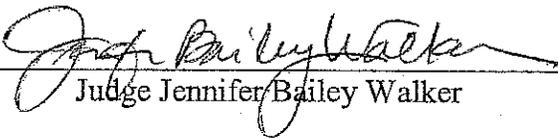
On the 28th day of February, 2008, came the Plaintiff, by counsel, Mary Jo Swartz and the Defendant, West Virginia Paving, Inc., by counsel, Larry G. Kopelman upon the Plaintiff's Motion for Award of Damages and the Defendant's Motion to Reconsider the Court's ruling granting Summary Judgment to the Plaintiff.

Upon those issues the Court does find that this Court's Order issued April 30, 2007, is final, that the Defendant's Motion for Reconsideration is denied and that the Court's finding of Summary Judgment in favor of the Plaintiff is appealable. Defendant shall be entitled to an appeal window which shall be ten days from the date of entry of this Order to allow the Defendant to appeal this Court's decision of Summary Judgment as against the Defendant, and in favor of the Plaintiff, to the West Virginia Supreme Court of Appeals.

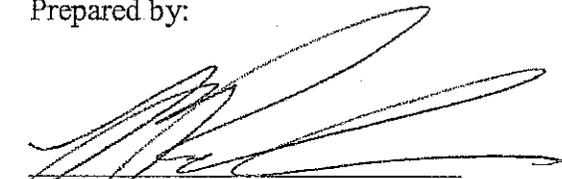
It is therefore, **ORDERED** and **ADJUDGED** that the Defendant shall have ten days from the date of entry of this Order to allow the Defendant to file an appeal to the West Virginia Supreme Court of this Court's Order dated April 30, 2007.

The Court notes the exception and objection of the Plaintiff.

ENTERED 17 day of March 2008.


Judge Jennifer Bailey Walker

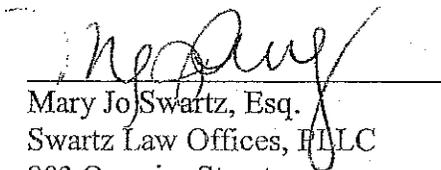
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STATE OF WEST VIRGINIA
CLERK OF THE DISTRICT COURT OF SAND COUNTY
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et

Approved by:



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EXHIBITS

ON

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