

Senate Bill No. 2

(By Senators Gaunch, Carmichael, Ferns, Karnes, Maynard, Mullins, Nohe, Sypolt, Trump, Blair
and Cole (Mr. President))

[Introduced January 14, 2015; referred to the Committee on the Judiciary.]

A BILL to repeal §55-7-13 and §55-7-24 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto four new sections, designated §55-7-13a, §55-7-13b, §55-7-13c and §55-7-13d, all relating to predicating actions for damages upon principles of comparative fault; establishing comparative fault standard; abolishing joint liability and implementing several liability; establishing how to consider fault of nonparties; establishing how to consider fault of, and amounts paid by, settling parties; providing for use of special interrogatories; clarifying fault may be imputed to another person who was acting as an agent or servant of another; allowing assessment of a percentage of fault for failing to take reasonable precautionary measures that were available; precluding allocation of fault to a person such as a seller, distributor or installer on a strict product liability theory where that person did not contribute to the alleged defect; providing for burden of proof and limitations; and defining terms.

Be it enacted by the Legislature of West Virginia:

1 That §55-7-13 and §55-7-24 of the Code of West Virginia, 1931, as amended, be repealed;
2 and that said code be amended by adding thereto four new sections, designated §55-7-13a, §55-7-
3 13b, §55-7-13c and §55-7-13d, all to read as follows:

4 **ARTICLE 7. ACTIONS FOR INJURIES.**

5 **§55-7-13a. Comparative fault standard established.**

6 (a) For purposes of this article, "Comparative fault" means the degree to which the fault of
7 a person was a proximate cause of an alleged personal injury or death or damage to property,
8 expressed as a percentage. Fault shall be determined according to section thirteen-c of this article.

9 (b) In any action based on tort or any other legal theory seeking damages for personal injury,
10 property damage, or wrongful death, recovery shall be predicated upon principles of comparative
11 fault and the liability of each person, including plaintiffs, defendants and nonparties who caused the
12 damages shall be allocated to each applicable person in direct proportion to that person's percentage
13 of fault.

14 (c) The total of the percentages of comparative fault allocated by the trier of fact with respect
15 to a particular incident or injury must equal either zero percent or one hundred percent.

16 **§55-7-13b. Definitions.**

17 As used in this article:

18 "Agent" means a person who is authorized to act for another through employment by contract
19 or apparent authority.

20 "Compensatory damages" means money awarded to compensate a plaintiff for economic and
21 noneconomic loss.

1 "Damage" or "damages" means all claims under common law or statutory and equitable
2 causes of action for actual damages, including economic and noneconomic damages, and additional
3 damages, including knowing damages, punitive damages, treble damages, penalties, prejudgment
4 interest, post-judgment interest, attorney's fees, litigation costs, costs of court, and all other damages
5 of any kind.

6 "Defendant" means, for purposes of determining an obligation to pay money to another under
7 this chapter, any person against whom a claim is asserted by a plaintiff including a counter-
8 defendant, cross-defendant or third-party defendant.

9 "Plaintiff" means, for purposes of determining a right to recover under this chapter, any
10 person asserting a claim.

11 "Product" means a commercially distributed good that is the output or result of a fabrication,
12 manufacturing, or production process, and passes through a distribution channel before being
13 consumed or used.

14 **§55-7-13c. Liability to be several; amount of judgment; allocation of fault.**

15 (a) In any action for damages, the liability of each defendant for compensatory damages shall
16 be several only and may not be joint. Each defendant shall be liable only for the amount of
17 compensatory damages allocated to that defendant in direct proportion to that defendant's percentage
18 of fault and a separate judgment shall be rendered against the defendant for that amount. However,
19 joint liability may be imposed on two or more persons who consciously conspire and deliberately
20 pursue a common plan or design to commit a tortuous act. Any person held jointly liable under this
21 subdivision shall have a right of contribution from other defendants that acted in concert.

1 (b) To determine the amount of judgment to be entered against each defendant, the court,
2 with regard to each defendant, shall multiply the total amount of compensatory damages recoverable
3 by the plaintiff by the percentage of each defendant's fault and that amount shall be the maximum
4 recoverable against that defendant.

5 (c) Any fault chargeable to the plaintiff shall not bar recovery unless the plaintiff's fault is
6 equal to or greater than the combined fault of all other persons responsible for the total amount of
7 damages, if any, to be awarded. If the plaintiff's fault is less than the combined fault of all other
8 persons, the plaintiff's recover shall be reduced in proportion to the plaintiff's degree of fault.

9 (d) The fault allocated under this section to an immune defendant or a defendant whose
10 liability is limited by law may not be allocated to any other defendant.

11 **§55-7-13d. Determination of fault; imputed fault; failure to take reasonable precautionary**
12 **measures; plaintiff's involvement in felony criminal act; fault of person not a**
13 **manufacturer; burden of proof; limitations; conflicting laws repealed;**
14 **applicability; severability.**

15 (a) *Determination of fault of parties and nonparties.* – “Fault” means an act or omission of
16 a person, which is a proximate cause of injury or death to another person or persons, damage to
17 property, or economic injury, including, but not limited to, negligence, malpractice, medical
18 professional liability, strict product liability, absolute liability, liability under section two, article
19 four, chapter twenty-three of this code or assumption of the risk:

20 (1) In assessing percentages of fault, the trier of fact shall consider the fault of all persons
21 who contributed to the alleged damages regardless of whether the person was or could have been

1 named as a party to the suit. The fault shall include the fault imputed or attributed to a person by
2 operation of law, if any;

3 (2) Fault of a nonparty may be considered if the plaintiff entered into a settlement agreement
4 with the nonparty or if a defending party gives notice no later than sixty days before the date of trial
5 that a nonparty was wholly or partially at fault. The notice shall be given by filing a pleading or
6 discovery response in the action designating the nonparty and setting forth the nonparty's name and
7 last-known address, or the best identification of the nonparty which is possible under the
8 circumstances, together with a brief statement of the basis for believing such nonparty to be at fault;

9 (3) In all instances where a nonparty is assessed a percentage of fault, any recovery by a
10 plaintiff shall be reduced in proportion to the percentage of fault chargeable to such nonparty. Where
11 a plaintiff has settled with a party or nonparty before verdict, that plaintiff's recovery will be reduced
12 by the amount of the settlement or in proportion to the percentage of fault assigned to the settling
13 party or nonparty, whichever is greater. The plaintiff shall promptly and fully inform all other
14 persons against whom liability is asserted of the terms of any such settlement;

15 (4) Nothing in this section is meant to eliminate or diminish any defenses or immunities,
16 which exist as of the effective date of this section, except as expressly noted herein;

17 (5) Assessments of percentages of fault for nonparties are used only as a vehicle for
18 accurately determining the fault of named parties. Where fault is assessed against nonparties,
19 findings of such fault do not subject any nonparty to liability in that or any other action, or may not
20 be introduced as evidence of liability or for any other purpose in any other action; and

21 (6) In all actions involving fault of more than one person, unless otherwise agreed by all

1 parties to the action, the court shall instruct the jury to answer special interrogatories or, if there is
2 no jury, shall make findings, indicating the percentage of the total fault that is allocated to each party
3 and nonparty pursuant to this article. For this purpose, the court may determine that two or more
4 persons are to be treated as a single person.

5 (b) *Imputed fault.* – Nothing in this section may be construed as precluding a person from
6 being held responsible for the portion of comparative fault assessed against another person who was
7 acting as an agent or servant of such person, or if the fault of the other person is otherwise imputed
8 or attributed to such person by statute or common law.

9 (c) *Failure to take reasonable precautionary measures.* – In any civil action, the finder of
10 fact may assess a percentage of fault against a plaintiff who is injured as a proximate result of that
11 plaintiff's failure to take reasonable precautionary measures that are available.

12 (d) *Plaintiff's involvement in felony criminal act.* – In any civil action, a defendant is not
13 liable for damages that the plaintiff suffers as a result of the negligence or gross negligence of a
14 defendant while the plaintiff is attempting to commit, committing or fleeing from the commission
15 of a felony criminal act.

16 (e) *Fault of a person not a manufacturer.* – A person who is not the manufacturer of a
17 product but is merely in the chain of its distribution, such as a seller, distributor or installer and who
18 did not alter, change or modify the product in a way that created or contributed to the alleged defect,
19 may not be assessed a percentage of comparative fault under the theory of strict liability for
20 accidents, injuries or damages proximately caused, in whole or in part, by the product.

21 (f) *Burden of proof.* – The burden of alleging and proving comparative fault shall be upon

1 the person who seeks to establish such fault.

2 (g) *Limitations.* – Nothing in this section creates a cause of action. Nothing in this section
3 alters, in any way, the immunity of any person as established by statute or common law.

4 (h) *Inapplicability of this code section.* – This code section is not applicable where any of the
5 following occurs:

6 (1) A defendant whose conduct constitutes driving a vehicle under the influence of alcohol,
7 a controlled substance, or any other drug or any combination thereof, as described in section two,
8 article five, chapter seventeen-c of this code, is the proximate cause of the damages suffered by the
9 plaintiff;

10 (2) A defendant whose actions constitute criminal conduct is the proximate cause of the
11 damages suffered by the plaintiff; or

12 (3) A defendant whose conduct constitutes an illegal disposal of hazardous waste, as
13 described in section three, article eighteen, chapter twenty-two of this code, is the proximate cause
14 of the damages suffered by the plaintiff.

15 (i) *Conflicting laws repealed.* – This section supersedes, invalidates and repeals all other state
16 laws that conflict with its provisions.

17 (j) *Applicability.* – This section applies to all causes of action arising on or after the effective
18 date of its enactment.

19 (k) *Severability.* – The provisions of this section are severable from one another, so that if
20 any provision of this section is held void, the remaining provisions of this section shall remain valid.

NOTE: The purpose of this bill is to predicated actions for damages upon principles of comparative fault. The bill establishes the comparative fault standard. The bill abolishes joint liability and implements several liability. The bill establishes how to consider the fault of nonparties. The bill establishes how to consider the fault of, and the amounts paid by, settling parties. The bill provides for the use of special interrogatories. The bill clarifies fault may be imputed to another person who was acting as an agent or servant of another. The bill allows the assessment of a percentage of fault for failing to take reasonable precautionary measures that were available. The bill precludes the allocation of fault to a person such as a seller, distributor or installer on a strict product liability theory where that person did not contribute to the alleged defect. The bill provides for the burden of proof and limitations. The bill defines terms.

§55-7-13 and §55-7-24 are repealed.

The four sections are new; therefore, strike-throughs and underscoring have been omitted.