

1 **Senate Bill No. 404**

2 (By Senators Barnes, Hall, K. Facemyer, Nohe, Sypolt and Boley)

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4 [Introduced February 3, 2011; referred to the Committee on the
5 Judiciary; and then to the Committee on Finance.]

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10 A BILL to repeal §55-7-13 of the Code of West Virginia, 1931, as
11 amended; and to amend said code by adding thereto three new
12 sections, designated §55-7-13a, §55-7-13b and §55-7-13c, all
13 relating to comparative fault; abolishing joint liability;
14 providing that damages be allocated to any defendant held
15 liable in direct proportion to that defendant's percentage of
16 fault; and providing for method of assessing fault of the
17 parties.

18 *Be it enacted by the Legislature of West Virginia:*

19 That §55-7-13 of the Code of West Virginia, 1931, as amended,
20 be repealed; and that said code be amended by adding thereto three
21 new sections, designated §55-7-13a, §55-7-13b and §55-7-13c, all to
22 read as follows:

23 **ARTICLE 7. ACTIONS FOR INJURIES.**

24 **§55-7-13a. Comparative fault standard established.**

1 (a) "Comparative fault" means the degree to which the fault of
2 a person was a proximate cause of an alleged personal injury or
3 death or damage to property, expressed as a percentage. Fault
4 shall be determined according to the provisions of section
5 thirteen-c of this article.

6 (b) In any action for damages, recovery shall be predicated
7 upon principles of comparative fault and the liability of each
8 person, including plaintiffs, defendants and nonparties who caused
9 the damages shall be allocated to each applicable person in direct
10 proportion to that person's percentage of fault.

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

15 (d) This section supercedes, invalidates and repeals all other
16 state laws that conflict with its provisions.

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

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

22 **§55-7-13b. Several liability.**

23 (a) In any action for damages, the liability of each defendant
24 for compensatory damages must be several only and may not be joint.
25 Each defendant shall be liable only for the amount of compensatory

1 damages allocated to that defendant in direct proportion to that
2 defendant's percentage of fault and a separate judgment shall be
3 rendered against the defendant for that amount.

4 (b) To determine the amount of judgment to be entered against
5 each defendant, the court, with regard to each defendant, shall
6 multiply the total amount of all damages recoverable by the
7 plaintiff by the percentage of each defendant's fault and that
8 amount shall be the maximum recoverable against each defendant.

9 (c) A defendant's fault must be determined in accordance with
10 the provisions of section thirteen-c of this article.

11 (d) This section supercedes, invalidates and repeals all other
12 state laws that conflict with its provisions.

13 (e) This section applies to all causes of action initiated on
14 or after the effective date of its enactment.

15 (f) The provisions of this section are severable from one
16 another, so that if any provision of this section is held void, the
17 remaining provisions of this section shall remain valid.

18 **§55-7-13c. Determination of fault of parties and nonparties;**
19 **imputed fault; plaintiff's failure to take**
20 **reasonable precautionary measures; plaintiff's**
21 **involvement in felony criminal act; fault of person**
22 **not a manufacturer; burden of proof; limitations;**
23 **conflicting laws repealed; applicability; and**
24 **severability.**

1 (a) *Determination of fault of parties and nonparties.* --
2 "Fault" means an act or omission of a person, which is a proximate
3 cause of injury or death to another person or persons, damage to
4 property, or economic injury, including, but not limited to,
5 negligence, malpractice, medical professional liability, strict
6 product liability, absolute liability, liability under section two,
7 article four, chapter twenty-three of this code or assumption of
8 the risk:

9 (1) In assessing percentages of fault, the trier of fact shall
10 consider the fault of all persons who contributed to the alleged
11 damages regardless of whether the person was or could have been
12 named as a party to the suit. The fault shall include the fault
13 imputed or attributed to a person by operation of law, if any;

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

24 (3) In all instances where a nonparty is assessed a percentage
25 of fault, any recovery by a plaintiff shall be reduced in

1 proportion to the percentage of fault chargeable to such nonparty.
2 Where a plaintiff has settled with a party or nonparty before
3 verdict, that plaintiff's recovery will be reduced by the amount of
4 the settlement or in proportion to the percentage of fault assigned
5 to the settling party or nonparty, whichever is greater. The
6 plaintiff shall promptly and fully inform all other persons against
7 whom liability is asserted of the terms of any such settlement;

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

11 (5) Assessments of percentages of fault for nonparties are
12 used only as a vehicle for accurately determining the fault of
13 named parties. Where fault is assessed against nonparties,
14 findings of such fault shall not subject any nonparty to liability
15 in that or any other action, or be introduced as evidence of
16 liability or for any other purpose in any other action; and

17 (6) In all actions involving fault of more than one person,
18 unless otherwise agreed by all parties to the action, the court
19 shall instruct the jury to answer special interrogatories or, if
20 there is no jury, shall make findings, indicating the percentage of
21 the total fault that is allocated to each party and nonparty
22 pursuant to the provisions of this article. For this purpose, the
23 court may determine that two or more persons are to be treated as
24 a single person.

25 (b) *Imputed fault.* -- Nothing in this section may be construed

1 as precluding a person from being held responsible for the portion
2 of comparative fault assessed against another person who was acting
3 as an agent or servant of such person, or if the fault of the other
4 person is otherwise imputed or attributed to such person by statute
5 or common law.

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

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

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

24 (f) *Burden of proof.* -- The burden of alleging and proving
25 comparative fault shall be upon the person who seeks to establish

1 such fault.

2 (g) *Limitations.* -- Nothing in this section may be construed
3 to create a cause of action. Nothing in this section may be
4 construed, in any way, to alter the immunity of any person as
5 established by statute or common law.

6 (h) *Inapplicability of this code section.* -- This code section
7 is not applicable where any of the following occurs:

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

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

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

19 (i) *Conflicting laws repealed.* -- This section supersedes,
20 invalidates and repeals all other state laws that conflict with its
21 provisions.

22 (j) *Applicability.* -- This section applies to all causes of
23 action arising on or after the effective date of its enactment.

24 (k) *Severability.* -- The provisions of this section are
25 severable from one another, so that if any provision of this

1 section is held void, the remaining provisions of this section
2 shall remain valid.

NOTE: The purpose of this bill is to abolish joint liability and establish the principle of comparative fault by which each defendant is liable for damages according to the percentage of fault attributed by a judge or jury.

§§55-7-13a, 13b and 13c are new; therefore, strike-throughs and underscoring have been omitted.