

IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

GRANT THORNTON LLP,

PLAINTIFF,

v.

CIVIL ACTION NO. 04-C-33-M

KUTAK ROCK LLP,

DEFENDANT.

**ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

Pending before the Court is Defendant Kutak Rock LLP's ("Kutak") Motion for Summary Judgment. Kutak's reasons for its motion for summary judgment are that 1) the claims by Grant Thornton are barred by Kutak's good faith settlement with the FDIC and by the District Court judgment in the FDIC Federal Court Action; 2) the claims by Grant Thornton are barred by the statute of limitations; 3) the claims by Grant Thornton are barred by collateral or judicial estoppel; and 4) Kutak owed no duty to disclose to Grant Thornton client confidences between Kutak and First National Bank of Keystone.

Upon consideration of the briefs, numerous exhibits, the entire voluminous file and arguments of counsel, the Court makes the following findings of fact and conclusions of law and **GRANTS** Kutak's Motion for Summary Judgment.

**FINDINGS OF FACT**

1. This case arises out of the fraudulent operation of the First National Bank of Keystone ("the Bank") and its closure on September 1, 1999 by the Office of the Comptroller of the Currency ("OCC"). The Bank was located in the City of Keystone, McDowell County, West Virginia.
2. The Bank hired Plaintiff Grant Thornton LLP ("Grant Thornton"), an independent

accounting firm, to audit the Bank's 1998 financial statements pursuant to the directives of a Supervisory Agreement with the OCC. Grant Thornton auditor Stan Quay ("Quay") was the partner in charge of the Bank audit and Grant Thornton auditor Susan Buenger ("Buenger") was the associate on the audit. In accepting the assignment, Grant Thornton rated the the Bank audit maximum risk. It was, in fact, the highest risk audit on which Buenger and Quay had ever worked.

3. On April 19, 1999, Grant Thornton issued a clean audit opinion to the Bank.

4. Prior to the Bank closing on September 1, 1999, Grant Thornton learned during a meeting with federal bank examiners that its April 19, 1999 audit opinion was fundamentally flawed. Specifically, bank regulators informed Quay on August 25, 1999 that the Grant Thornton audit had failed to discover that approximately \$500 million in loans supposedly owned by the Bank and reported as assets on the Bank's balance sheet were, in fact, the property of United National Bank and, therefore, that the bank's balance sheet was materially misstated. The Bank was closed on September 1, 1999.

5. Kutak represented the Bank in various capacities from 1993 - 1998. Michael Lambert ("Lambert") was the Kutak partner in charge of the Bank representation.

6. Following the Bank's closure, the Federal Deposit Insurance Corporation ("FDIC"), as Receiver for the Bank, intervened to assert claims in multiple Bank-related lawsuits filed in the United States District Court for the Southern District of West Virginia ("the Federal Litigation"). On October 16, 2001, the FDIC filed a counterclaim against Grant Thornton seeking damages for Grant Thornton's negligent audit which failed to uncover the fraud that caused the closure of the Bank ("FDIC Federal Court Action").

7. Prior to the filing of any action against Kutak, the FDIC and Kutak entered into a

settlement for \$22 million in exchange for a release of all claims. The settlement released claims that the FDIC might have had for Kutak's alleged failure to detect or report the misstatement of the balance sheet, among other things. Under the terms of the settlement, Kutak's primary insurer, Executive Risk Indemnity, Inc, paid all of the remaining proceeds of its policy to the FDIC, Kutak itself paid \$4 million and agreed to pursue a proof of claim under Kutak's Reliance Insurance Company excess policy against the Reliance liquidation estate for the benefit of the FDIC. Depending on the amount of the final distribution from the Reliance liquidation estate, Kutak may have an additional \$2.75 million in liability. The FDIC and various other potential defendants also reached settlements.

8. Grant Thornton chose not to settle claims made by the FDIC based upon Grant Thornton's audit of the Bank's financial statements.

9. On April 3, 2003, Grant Thornton moved to file a third-party complaint against Kutak in the FDIC Federal Court Action asserting claims of fraud, negligent misrepresentation, tortious interference with a contract, and contribution.

10. On December 11, 2003, the District Court denied Grant Thornton's Motion for Leave to File a Third-Party Complaint in the FDIC Federal Court Action, holding that the contribution claims asserted by Grant Thornton were barred by Kutak's good faith settlement with the FDIC. In its Order, the District Court noted that Grant Thornton "contends that it has a number of direct claims against Kutak . . ." Denying as untimely Grant Thornton's attempt to assert these claims, the District Court ruled that "[a]ny direct claims Grant Thornton has against Kutak Rock may be addressed in another lawsuit." The District Court did not rule upon the viability of Grant Thornton's claims or any defenses Kutak may have to those claims.

11. Grant Thornton filed the present action against Kutak on February 10, 2004, alleging fraud, negligent misrepresentation, and tortious interference with a contract. By its own admission, Grant Thornton based the allegations in the Complaint in this Court upon the prior Federal Litigation and FDIC Federal Court Action.

12. Following a bench trial in the FDIC Federal Court Action, which began on May 17, 2004, the District Court found in favor of the FDIC and against Grant Thornton, making extensive findings of fact and conclusions of law. The findings of fact as set forth in *Grant Thornton, LLP v. F.D.I.C.*, 535 F.Supp.2d 676, are made a part of this Order the same as though set forth herein in extenso.

13. The District Court found that Grant Thornton had been engaged by the Bank “to perform an audit of [the Bank’s] December 31, 1998, financial statements in accordance with Generally Accepted Auditing Standards (“GAAS”),” that at the time of its engagement, Grant Thornton knew the Bank had “significant accounting problems,” and that there was a “troubled relationship between the Bank and federal regulatory authorities.” (*Id.* at pp. 682-83, ¶¶ 12,15).

14. The District Court further found that Grant Thornton: (a) repeatedly violated GAAS in the performance of its audit (*Id.* at pp. 685-90, p. 695, ¶¶ 30, 41, 38, 40, 47, 49, 58, 63, 82); (b) failed to follow its own audit manual (*Id.* at p. 687, ¶ 38); (c) gave “a ‘clean opinion’ on the Bank’s financial statement without having adequate evidence to support that opinion and while having substantial evidence that contradicts the opinion” (*Id.* at p. 695, ¶¶ 82, 84); and (d) presented at trial the testimony of Buenger, who was found “not entirely truthful” in her testimony to the District Court. (*Id.* at p. 691, ¶ 69).

15. The District Court concluded that Grant Thornton was negligent and should have

discovered the fraud that caused the closure of the Bank by no later than March, 1999, and awarded damages in favor of the FDIC and against Grant Thornton in the amount of \$25,080,777 (“FDIC Verdict”), which included the Bank’s net additional cost of operations and dividends paid from April 21, 1999 until the Bank closed on September 1, 1999. (*Id.* at p. 627, ¶ 140; p. 729, ¶ 12). Grant Thornton subsequently moved the District Court for a settlement credit against the FDIC Verdict based upon the \$22 million Kutak settlement with the FDIC.

16. In its Motion for a Settlement Credit, Grant Thornton argued that the District Court should reduce the FDIC Verdict by the full amount of the Kutak good faith settlement on the grounds that Grant Thornton and Kutak were joint tortfeasors responsible for a single, indivisible injury to the Bank. In that Motion, Grant Thornton argued that in order to avoid the application of a full \$22 million settlement credit, the FDIC would be required to prove that Grant Thornton caused an injury to Keystone separate and divisible from any injury encompassed by Kutak’s settlement, and admitted that “Grant Thornton does not believe any evidence can support this point.”

17. On September 30, 2008, the District Court entered an Order granting Grant Thornton’s Motion for a Settlement Credit. Such Order confirms that Grant Thornton was a joint tortfeasor. Having obtained set off relief and conceded its status as a joint tortfeasor, Grant Thornton is estopped to deny in this litigation that 1) it was a joint tortfeasor; 2) it was at fault; and 3) the damages awarded against it were based on its culpable negligence or reckless conduct.

18. In the pending suit, Grant Thornton seeks two items of damages: (a) the amount of the judgment against it in the District Court for its negligent audit of the Bank (\$25,080,777 minus the offset by the District Court); and (b) the litigation expenses, including attorneys fees, it has incurred as a result of litigation related to the closure of Keystone, which includes responding to an

inquiry by the OCC as well as other claims that Grant Thornton has settled, tried to a verdict, and prosecuted (approximately \$14,000,000).

19. Thus, by this action Grant Thornton seeks to impose liability on Kutak such that ultimately Kutak will not only pay its \$22 million settlement to the FDIC, but also the approximately \$39,000,000 in damages, settlement, legal fees and expenses incurred by Grant Thornton during the course of its Keystone-related litigation. At oral argument on January 16, 2009, in opposition to Kutak's Motion for Summary Judgment, Grant Thornton acknowledged that notwithstanding the FDIC Verdict, which found that Grant Thornton had performed a negligent audit causing over \$25 million in damages to the Bank, Grant Thornton seeks by the present action to impose on Kutak a total liability of over \$60 million with no liability on Grant Thornton.

#### **SUMMARY JUDGMENT STANDARDS**

Summary judgment is appropriate if there are no genuine issues as to any material fact and the moving party is entitled to a judgment as a matter of law. *Painter v. Peavy*, 451 S.E.2d 755 (W.Va. 1994); W. Va. Rule Civ. P. 56(c). While the moving party bears the burden of showing that there is no genuine issue of material fact, the nonmoving party must offer more than a mere "scintilla of evidence" in support of its position to defeat summary judgment.

#### **CONCLUSIONS OF LAW**

##### **Grant Thornton's Claims In This Lawsuit Are Contribution Claims Barred By Kutak's Good Faith Settlement In The FDIC Federal Court Action**

1. Under West Virginia law, regardless of different theories of liability, where the acts of various parties have resulted in a single, indivisible injury, a good faith settlement bars contribution claims against the settling party. *Board of Education of McDowell County v. Zando*,

*Martin & Milstead, Inc.*, 390 S.E.2d 796, 803 (W. Va. 1990).

2. While barred from seeking contribution, a joint or successive tortfeasor is entitled to set-off the amount of the prior settlement of a joint tortfeasor against any judgment against it. *See, e.g., Mackey v. Isisari*, 445 S.E.2d 742, 747 (W. Va. 1994); Syl. pt. 3, *Haynes v. City of Nitro*, 240 S.E.2d 544 (W. Va. 1977); *Pennington v. Bluefield Orthopedics, P.C.*, 419 S.E.2d 8 (W. Va. 1992). In order to obtain this set off, the party seeking it must demonstrate that it would otherwise have been entitled to contribution. Accordingly, the underlying premise for any claim to a set off is that the party seeking the set off was a joint tortfeasor that engaged in culpable negligent or reckless conduct. If a party has not engaged in culpable conduct it will not seek contribution or a set off, but rather it might seek indemnity which would shift entirely the responsibility to pay any damage award. In this case, Grant Thornton acknowledges, as it must, that the District Court found that it engaged in culpable negligence or recklessness, that it was at fault, and that it was entitled to a set off as the substitute for contribution.

3. The right of a nonsettling tortfeasor to a credit for the amount of a prior settlement between a plaintiff and a joint tortfeasor, and the concurrent discharge of the settling party from further liability, are based upon West Virginia's substantial public policy of encouraging out-of-court settlements. *See, e.g., Zando*, 390 S.E.2d at 804 ("Few things would be better calculated to frustrate this policy [of encouraging settlements] and to discourage settlement of disputed tort claims, than knowledge that such a settlement lacked finality and would but lead to further litigation with one's joint tortfeasors, and perhaps further liability."); Syl. pt. 1, *Sanders v. Roselawn Memorial Gardens*, 159 S.E.2d 784 (W. Va. 1998) ("The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation.").

4. By arguing for a set-off of the full amount of Kutak's settlement with the FDIC in the FDIC Federal Court Action, Grant Thornton has conceded that, regardless of the theories of liability, a common loss is at issue as a result of losses incurred by Keystone from April 21, 1999 until the Bank closed on September 1, 1999. In arguing for such set-off in the FDIC Federal Court Action, Grant Thornton cited *Strahin v. Cleavenger*, 603 S.E.2d 197, 211 (W. Va. 2004) for the proposition that "[t]hose who act together in committing wrong, or whose acts if independent of each other, unite in causing a single injury," are therefore, "jointly or severally liable in tort for the same injury to person or property." As a result, the District Court granted Grant Thornton's Motion for a Settlement Credit by Order entered September 30, 2008 Order.

5. Although Grant Thornton now contends its claims against Kutak in this Court are "independent," it seeks to recover the same, indivisible damages from Kutak for which it was awarded a set-off in the FDIC Federal Court Action. Moreover, while arguing that its claims against Kutak for fraud, tortious interference and negligent misrepresentation are "direct" and based upon Kutak's violation of "independent duties" to Grant Thornton, Grant Thornton simultaneously undermines its own position by arguing that it suffered no injury with regard to the FDIC claims until the FDIC filed suit against Grant Thornton. The Court finds that Grant Thornton's claims against Kutak are not "independent" claims, but are contribution claims which are barred by Kutak's good faith settlement with the FDIC.

6. Grant Thornton has conceded that if the District Court had found no liability on the part of Grant Thornton in the FDIC Federal Court Action, any damages it now seeks against Kutak would be moot.

7. While Grant Thornton attempts to characterize its claim in this suit as a "direct claim"

distinct from contribution or implied indemnity claims which are barred under West Virginia law against settling parties, Grant Thornton cites no West Virginia law but relies instead upon three federal cases, *In re Cendant Corporate Securities Litigation*, 139 F. Supp. 2d 585 (D.N.J. 2001); *In re Cenco Inc. v. Seidman & Seidman* 686 F.2d 449 (7<sup>th</sup> Cir.), cert. denied, 459 U.S. 880 (1982); and *In re Sunrise Securities Litigation*, 793 F. Supp. 1306 (E.D. Pa. 1992). The Court finds all of these cases distinguishable and, being based upon the law of other jurisdictions, not binding in any event. Notably, none of these cases cited by Grant Thornton involve a plaintiff which has been found guilty of wrongdoing (as Grant Thornton was), asserting a claim against another joint tortfeasor who has entered into a good faith settlement (which Kutak did). Here, as the District Court expressly held, Grant Thornton is an adjudicated wrongdoer.

8. Regardless of Grant Thornton's characterizations, this action by a party with fault is, in fact, an action for contribution, and thus is barred by Kutak's good faith settlement with the FDIC. *Charleston Area Medical Ctr., Inc. v. Parke-Davis*, 614 S.E.2d 15, 23 (W. Va. 2005) (whatever the theory of liability, where the acts of various parties result in a common obligation or liability to a third party, a right of contribution arises that is extinguished by a good faith settlement).

9. In *Parke-Davis*, the West Virginia Supreme Court of Appeals, in answering a certified question, noted the "preference for single-suit resolution of issues" and quoted the holding in *Howell v. Luckey*, 518 S.E.2d 873, 874 (W. Va. 1999), that "[a] defendant may not initiate a separate cause of action against a joint tortfeasor for contribution after judgment has been rendered in the underlying case, when that joint tortfeasor was not a party in the underlying case and the defendant did not file a third-party claim pursuant to Rule 14(a) of the West Virginia Rules of Civil Procedure." *Parke-Davis*, 614 S.E.2d at 21.

10. The Court finds that a separate action for contribution cannot be brought by an adjudicated wrongdoer against a party who entered into a good faith settlement with the alleged victim. Such a holding would contravene West Virginia law encouraging good faith settlement.

11. The Court holds, as did the District Court, that Kutak's good faith settlement with the FDIC bars contribution as between Kutak and Grant Thornton.

**Implied Indemnity Claims Are Barred By The FDIC Judgment**

12. To the extent Grant Thornton seeks to recover its alleged damages through a claim of implied indemnity against Kutak, such claim is unsupported by West Virginia law and barred by the District Court's finding of wrongdoing and its judgment against Grant Thornton in the FDIC Federal Court Action.

13. An adjudicated wrongdoer cannot establish an implied indemnity claim under West Virginia law. In *Hill v. Joseph T. Ryerson & Son, Inc.*, 268 S.E.2d 296, 300-01 (W. Va. 1980), the West Virginia Supreme Court explained that the remedy of "implied indemnity" is based on principles of restitution, stating:

"A person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in discharge of such liability." *Restatement of Restitution* § 96 (1937).

*See also Hager v. Marshall*, 505 S.E.2d 640, 648 (W. Va. 1998), where the West Virginia Supreme Court of Appeals held that in non-product liability multi-party civil actions, a good faith settlement between a plaintiff and a defendant will extinguish the right of a non-settling defendant to seek implied indemnity "unless such non-settling defendant is without fault." Pursuant to the District Court judgment, Grant Thornton is not without fault.

14. The Court accordingly that Grant Thornton cannot establish the first element of an implied indemnity claim—that it is without fault. The Court further finds that as an adjudicated wrongdoer, Grant Thornton cannot transfer the consequences of its own negligent actions to Kutak under an implied indemnity claim.

15. To the extent Grant Thornton seeks to recover the litigation expenses it has incurred in the Federal Litigation, no West Virginia authority permits recovery of such collateral litigation expenses, voluntarily incurred, by an adjudicated wrongdoer.

16. Under the law of West Virginia and elsewhere, the costs and expenses incurred in collateral litigation may be recovered when they are the proximate result of another defendant's conduct. *Thomason v. Mosrie*, 60 S.E.2d 699, 706 (W. Va. 1950) (citing 37 C.J.S., *Fraud* § 141e(2)). To be recoverable, the suit involving the third party must have been proximately caused by the tortious act of the present defendant and the expenses incurred must be reasonable and the natural and necessary consequence of the defendant's act. *Id.* See 22 Am. Jur. 2d *Damages* §§ 437, 439; *Restatement (Second) of Torts* § 914(2) and Comment to Subsection (2) (“recovery of collateral litigation expenses allowed where an alleged cause of action against the defendant in a proceeding exists only because of a tort of another. . .”).

17. The “tort of another” doctrine, by its own terms, is not applicable here and does not allow Grant Thornton to recover the fees and expenses incurred in the Federal Litigation from Kutak. Grant Thornton's own acts of wrongdoing, not Kutak, caused Grant Thornton to have to defend itself in the Federal Litigation brought against it.

18. Grant Thornton's negligence is well documented in the District Court's Findings of Fact and Conclusions of Law. Grant Thornton's negligent conduct was not the natural and necessary

consequence of any act by Kutak. The District Court concluded in the FDIC Federal Court Action that Grant Thornton conducted a negligent audit by its failure to follow GAAS, and that, had it conducted a proper audit, Grant Thornton should have discovered the loan inventory fraud at the Bank by March, 1999. Nothing Kutak did or did not do precluded Grant Thornton from following GAAS.

19. Further, Grant Thornton voluntarily incurred the costs and attorneys' fees Grant Thornton now seeks to recover from Kutak. Irrespective of Kutak's actions, Grant Thornton chose to litigate claims with the FDIC and others when it could have avoided those costs by reaching reasonable settlements. Instead, Grant Thornton elected to litigate, but did so unsuccessfully. The Court finds that Grant Thornton's litigation expenses were incurred as a result of its own voluntary choices and cannot be recovered as the "natural and necessary consequence" of any actions by Kutak.

**Kutak Rock's Claim That Grant Thornton's Claims Are  
Barred By The Statute Of Limitations Is A Question For The Jury.**

1. There is a legitimate question as to when the plaintiff knew or should have know that it may have had a claim against the defendant.

2. In *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997) at 909-910 our Court said, "In the great majority of cases, the issue of whether a claim is barred by the statute of limitations is a question of fact for the jury. 'The question of when plaintiff knows or in the exercise of reasonable diligence has reason to know of medical malpractice is for the jury.' Syllabus Point 4, *Hill v. Clarke*, 161 W. Va. 258, 241 S.E.2d 572 (1978). See also, Syllabus Point 6, *Teter v. Old Colony Co.*, 190 W. Va. 711, 441 S.E.2d 728 (1994) ("Where a cause of action is based on tort or on a claim of fraud, the statute of limitations does not begin to run until the injured person knows,

or by the exercise of reasonable diligence should know, of the nature of his injury, and determining that point in time is a question of fact to be answered by the jury.' Syllabus Point 3, *Stemple v. Dobson*, 184 W. Va. 317, 400 S.E.2d 561 (1990)").

3. In *Harris v. Jones, et al.*, 209 W. Va. 557, 550 S.E.2d 93 (2001) our Court followed the same reasoning relating to this issue being a question for the jury when it said, "It is for the jury to decide when Dr. Harris recognized, or through reasonable diligence should have appreciated, that the appellees had sold him an inadequate insurance policy. "In a great majority of cases, the issue of whether a claim is barred by the statute of limitations is a question of fact for the jury." *Gaither*, 199 W. Va. at 714, 487 S.E.2d at 909-910.

4. This Court finds, as our Supreme Court found in *Gaither*, that the question as to when the plaintiff knew or should have know that it may have had a claim against the defendant is a question for the jury.

**Kutak's Claim That Collateral Estoppel Bars  
Grant Thornton Previously Ruled Upon By This Court.**

1. On February 15, 2008, this Court considered the collateral estoppel impact of the District Court's findings upon Grant Thornton's claims against Kutak in this case, and entered an order dated February 29, 2008 denying Kutak's motion.

2. The Court finds that it does not need to revisit this issue and declines to do so.

**Kutak's Claim That Kutak Owed No Duty To  
Disclose Information Concerning The Bank To Grant Thornton.**

1. Kutak pleads that Grant Thornton's case against Kutak is premised upon Kutak's alleged failure to disclose to a third party, Grant Thornton, information concerning Kutak's client, the Bank. However, the Bank is a common client of both Kutak and Grant Thornton, on common

issues.

2, This Court finds that Kutak's argument on this issue is without merit. The fact that Grant Thornton and Kutak are representing a common client, the Bank, on related issues distinguishes this from a case involving different clients or even a common client, but on separate unrelated issues.

### CONCLUSION

Regardless of how many different ways this Court has reviewed this case, it all relates back to a common source, the failure of the First National Bank of Keystone. The acts of both Kutak and Grant Thornton resulted in a single, indivisible injury. Kutak and Grant Thornton were joint tortfeasors. Kutak entered into a good faith settlement with the F.D.I.C. Grant Thornton did not and chose to go to trial. Now Grant Thornton wants judgment against Kutak for the amount of the judgment against them, plus their attorney fees. If allowed, this would make Kutak pay for both their liability and Grant Thornton's liability. In effect, this would make Kutak pay for Grant Thornton's wrongdoing, as found by the District Court. Grant Thornton would not even have the cost of their own attorney fees, except for this case. This would place a chilling effect on settlements, and settlements would cease to exist.

For the reasons set forth in this Order, Kutak's Motion for Summary Judgment is hereby **GRANTED.**

The hearing scheduled for March 31, 2010 is cancelled. The trial scheduled for May 17, 2010 is also cancelled. The Clerk is directed to remove this case from the Trial Docket of this Court.

The objection of Grant Thornton to the Court's ruling is noted.

The Clerk is directed to send an attested copy of this Order to the following:

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Enter this the 11<sup>th</sup> day of March, 2010.

  
RUDOLPH J. MURENSKY, II JUDGE

A TRUE COPY TESTE  
FRANCOINE SPENCER CLERK

BY 