

No. 11-0079

COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GRANT THORNTON LLP, Plaintiff Below/Petitioner,

v.

KUTAK ROCK LLP, Defendant Below/Respondent.

REPLY BRIEF

Honorable Rudolph J. Murensky, II
Circuit Court of McDowell County
Civil Action No. 04-C-33-M

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INTRODUCTION

Defendant Kutak Rock LLP (“Kutak” or the “Firm”) argues for blanket immunity from *any* claim by Grant Thornton LLP (“Grant Thornton”) seeking damages that include Grant Thornton’s liability to the First National Bank of Keystone (“Keystone” or the “Bank”). According to Kutak, any claim seeking those damages (no matter what conduct it is based on) is a claim for contribution or indemnity that is barred by Kutak’s settlement with the Bank.

Kutak advocates for this broad immunity because it lacks any other basis for seeking the dismissal of Grant Thornton’s claims. To the contrary, the circuit court correctly held that Kutak owed Grant Thornton duties independent of those it owed the Bank. And Grant Thornton has introduced ample evidence that Kutak breached those independent duties, including by lying to Grant Thornton during its audit of Keystone.

An argument to nullify claims that are supported by both evidence and West Virginia law demands extraordinary support. But no West Virginia court has ever suggested that the State’s limitations on contribution and indemnity claims against settling joint tortfeasors also confer sweeping protection from liability for fraud. In fact, Kutak cannot identify a single West Virginia case treating direct claims as claims for contribution or indemnity merely because the

damages include amounts paid to a third party with whom the defendant previously settled. That is not surprising, because this Court has repeatedly recognized that contribution or indemnity claims are defined by the defendant's alleged breach of a duty to a third party, not the damages sought. Numerous federal cases, moreover, expressly hold that one joint tortfeasor's settlement with the plaintiff does not bar claims by the nonsettling joint tortfeasor – even if the damages sought include the nonsettling party's liability to the plaintiff.

The only cases that Kutak offers in support of its position involved discretionary judicial orders barring claims against settling defendants in federal securities class action suits. But these orders explicitly barred independent claims; by contrast, in this case the district court in the FDIC litigation expressly stated that Grant Thornton could pursue its direct claims in a separate lawsuit. The cases relied upon by Kutak also involved a very different settlement credit regime than West Virginia has adopted. Federal securities law takes into account the relative culpability of the defendants, including any direct claims, in allocating a settlement (or judgment) credit to nonsettling defendants. West Virginia law does not, and also does not take any such direct claims into account in determining whether a joint tortfeasor entered a settlement in "good faith." The modest settlement credit that Grant Thornton received thus merely reflected

the partial compensation that the FDIC had already received for the injury to the Bank for which Grant Thornton was held responsible. The settlement credit did not take into account Grant Thornton's claim that Kutak had harmed it directly by its acts of fraud and misrepresentation.

This Court should not permit Kutak to shield itself from all liability for its wrongdoing by hiding behind its settlement with the FDIC. Kutak's proposed rule would enable joint tortfeasors to misuse settlements to evade responsibility for their misconduct toward third parties. Grant Thornton was injured by Kutak's many misstatements and nondisclosures. It has not been compensated for that injury, and is entitled to make its case to a jury.

ARGUMENT

I. THE DAMAGES SOUGHT BY GRANT THORNTON DO NOT TRANSFORM ITS DIRECT CLAIMS INTO CONTRIBUTION OR INDEMNITY CLAIMS

Contrary to Kutak's assertions (at 3-7), Grant Thornton's claims against Kutak are *not* based on its status as a joint tortfeasor vis-à-vis Keystone. These claims arise instead from Kutak's *breach of its duties to Grant Thornton*. Grant Thornton would be able to assert these claims even if Kutak had not violated any duty to Keystone. Moreover, although Grant Thornton's damages include the judgment won by the FDIC, they extend beyond that single element.

A. *West Virginia Recognizes That Direct Claims Against a Joint Tortfeasor Are Distinct From Contribution or Indemnity Claims*

1. Kutak maintains that “[a]ll of Grant Thornton’s claims against Kutak arise out of their common duty and common liability to the Bank” and that “Kutak and Grant Thornton had no relationship with each other that could have created any legal duties apart from their common relationship with the Bank.” Kutak Resp. at 4-5. The circuit court considered and rejected this argument as “without merit.” S.J. Order at 14 ¶ 2. It explained that Kutak owed Grant Thornton an independent duty of disclosure because “the Bank is a common client of both Kutak and Grant Thornton, on common issues.” *Id.* at 13-14 ¶ 1. Kutak also owed Grant Thornton an independent duty not to lie to it in connection with the audit – a duty Kutak breached more than once, including by knowingly sending Grant Thornton a false attorney disclosure response letter. *See* Supp. Br. at 5-9. Grant Thornton’s claims “arise out of” these independent duties, not the duties that Kutak and Grant Thornton owed to their common client, Keystone. The “claims are each grounded in separate theories which require proof of different elements than does a simple claim for contribution” or indemnity. *In re Cendant Corp. Sec. Litig.*, 166 F. Supp. 2d 1, 10 (D.N.J. 2001).

2. Kutak relies on West Virginia cases holding that, “when the acts of

various parties result in a common obligation or liability, a right of contribution arises that is extinguished by a good faith settlement.” Kutak Br. at 5. But those cases do not support Kutak’s argument, because the plaintiffs pled straightforward contribution claims, and did not assert the violation of independent duties. *See, e.g., Charleston Area Med. Ctr., Inc. v. Parke-Davis*, 217 W. Va. 15, 23, 614 S.E.2d 15, 23 (2005); *Bd. of Educ. of McDowell Cnty. v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 602, 390 S.E.2d 796, 801 (1990). This Court recognizes the difference between claims for contribution and direct claims. *See* Supp. Br. at 12 (citing *Jennings v. Farmers Mut. Ins. Co.*, 224 W. Va. 636, 687 S.E.2d 574 (2009) (per curiam); *Dunn v. Kanawha Cnty. Bd. of Educ.*, 194 W. Va. 40, 44, 459 S.E.2d 151, 155 (1995)); Pet. at 21-23, 26-29.

Numerous federal cases expressly hold that settlement by one joint tortfeasor with the plaintiff does not bar direct claims by the nonsettling joint tortfeasor. *See* Supp. Br. at 12-13; *see also In re Cendant Corp. Sec. Litig.*, 139 F. Supp. 2d 585, 588 (D.N.J. 2001). These cases all recognize (either explicitly or implicitly) that “[r]ecovery by contribution between two defendants who have allegedly committed a tort on a third person is not the same thing as recovering because one defendant also committed a tort on the other.” Supp. Br. at 12 (quoting *In re Cendant*, 166 F. Supp. 2d at 10-11, and citing other cases). They also

give effect to the fundamental principle that a joint tortfeasor “cannot extinguish its . . . liability [on] . . . (a separate and independent claim) . . . by settling a separate and unrelated claim with the [plaintiff].” *Liberty Seafood, Inc. v. Herndon Marine Prods., Inc.*, 38 F.3d 755, 759 (5th Cir. 1994).

3. The district court’s award of a \$1.9 million settlement credit to Grant Thornton, *see* Kutak Resp. at 4, does not justify treating its claims as if they were contribution or indemnity claims. The district court followed West Virginia’s “practice of granting a nonsettling defendant a *pro tanto*, or dollar-for-dollar, credit for partial settlements against any verdict ultimately rendered for the plaintiff,” *Zando*, 182 W. Va. at 606, 390 S.E.2d at 805. *See Grant Thornton, LLP v. FDIC*, 694 F. Supp. 2d 506, 516-24 (S.D. W. Va. 2010), *aff’d in relevant part, rev’d in part on other grounds*, No. 10-1306, 2011 WL 2420264 (4th Cir. June 17, 2011). In accordance with this approach, the district court calculated the credit without even accounting for Kutak’s “actual degree of fault” for the joint harm to Keystone, *Zando*, 182 W. Va. at 606, 390 S.E.2d at 805. It certainly did not consider whether Kutak had violated independent duties to Grant Thornton.

Consistent with the principle of joint and several liability, West Virginia’s approach to settlement credit ensures that (1) the nonsettling defendant (rather than the plaintiff) will “absorb[] the loss” “[i]f the amount of the settlement is less

than the settling party's *pro rata* share of the verdict" and (2) the plaintiff will recover no more than "one complete satisfaction." *Zando*, 182 W. Va. at 606 & n.10, 390 S.E.2d at 805 & n.10. But because that approach does not compensate the defendant for the loss of direct claims, it cannot justify extinguishing those claims. See *TBG, Inc. v. Bendis*, 36 F.3d 916, 929 (10th Cir. 1994) (allowing independent claims to proceed in similar circumstances because, "[e]ven with a fairness hearing, a *pro tanto* credit would not be even roughly equal to the value of [such a] claim except by accident"); *In re Masters Mates & Pilot Pension Plan*, 957 F.2d 1020, 1033 (2d Cir. 1992) ("[A]lthough judgment reduction compensates a nonsettling defendant for his lost rights of indemnity and contribution, it does not necessarily compensate him for other lost claims.").¹

Kutak points to the district court's "good faith" review of the Kutak/FDIC settlement as a "backstop against abuse." Kutak Resp. at 17. But Kutak's breaches of its independent duties to Grant Thornton were outside the scope of

¹ This case demonstrates the point. The district court did not reduce Grant Thornton's liability to the FDIC by the full amount of the Kutak/FDIC settlement. Instead, finding that "Kutak was responsible for \$292,899,625 in damages to the FDIC, including the \$25,080,777 of post-audit net operating losses for which it was jointly liable with Grant Thornton," the district court allocated only the proportional amount of that settlement—*i.e.*, 8.563% (\$25,080,777 divided by \$292,899,685)—to Grant Thornton. See *Grant Thornton*, 2011 WL 2420264, at *12. This fractional allocation is hardly an adequate substitute for Grant Thornton's well-founded claims that Kutak's fraudulent and other tortious acts against Grant Thornton were the very cause of its issuance of the incorrect audit report.

that review, which focused on whether the settlement was the product of “corrupt behavior,” not whether it “fell within a ‘reasonable range of the settling tortfeasor's proportional share of comparative liability.” *Smith v. Monongahela Power Co.*, 189 W. Va. 237, 246, 429 S.E.2d 643, 652 (1993). The district court recognized this limitation on the scope of the settlement: it ruled that, although the settlement extinguished Grant Thornton’s contribution claims, “[a]ny direct claims Grant Thornton has against Kutak Rock may be addressed in another lawsuit.” GT Ex. F at 5. Because “[t]he district court did not consider at all whether the settlement credit compensated [the claimant] for the loss of this potential claim when it found the settlement to be fair,” *Bendis*, 36 F.3d at 929, the “good faith” review does not justify precluding Grant Thornton’s direct claims. *See id.* (permitting independent claims notwithstanding contribution bar).

B. Mere Overlap In Damages Does Not Transform Grant Thornton's Direct Claims Into Barred Claims for Contribution or Indemnity

Kutak contends that Grant Thornton’s effort to recover the amount of its liability to the FDIC from Kutak is enough to transform its direct claims into barred claims for contribution or indemnity. Kutak is mistaken.

1. In its suit against Kutak, Grant Thornton seeks to recover “two items of damages: (a) the amount of the judgment against it in 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).” S.J. Order at 5-6 ¶ 18; *see also* Compl., at Prayer for Relief ¶ A.² The second category of damages is independent of the first. Indeed, as the circuit court noted, Grant Thornton incurred some of these expenses in litigation with parties other than the FDIC. *See, e.g., Ellis v. Grant Thornton LLP*, 530 F.3d 280 (4th Cir. 2008); *Grant Thornton LLP v. OCC*, 514 F.3d 1328 (D.C. Cir. 2008).³

The mere fact that Grant Thornton seeks to recover the first category of

² Contrary to Kutak’s suggestion (at 17), Grant Thornton does not seek to recover the expenses it incurs in this suit.

³ According to Kutak, the circuit court found that “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.” Kutak Resp. at 4 n.2 (quoting S.J. Order at 8 ¶ 6); *see also id.* at 7, 8. The circuit court almost certainly did not mean that the only item of damages sought by Grant Thornton is the amount of its liability to the FDIC, as the court also recognized (as quoted above) that Grant Thornton also seeks to recover its litigation expenses. To the extent that the circuit court did mean that Grant Thornton claimed no other damages, and that it would have ended this suit had the district court ruled in its favor in the FDIC suit, the finding is clear error. Grant Thornton has consistently maintained from the inception of this litigation that it seeks to recover its litigation expenses “regardless” whether the FDIC “prevail[s] on any claims against Grant Thornton.” Compl., at Prayer for Relief ¶ A. The hearing statement upon which the district court apparently relied does not assert otherwise. *See* Tr. of Summ. J. Hr’g at 17 (Jan. 16, 2009) (“I believe, Your Honor, that the question would be moot, *maybe, a fee, maybe a — a settlement, maybe, but — maybe.*”) (emphasis added).

damages does not “automatically convert [its] state law claims into impermissible” contribution or indemnity claims. *In re Cendant*, 166 F. Supp. 2d at 12. This Court has never suggested that a claimant seeking to recover the damages paid to a joint tortfeasor necessarily is bringing a contribution or indemnity claim. To the contrary, West Virginia cases have repeatedly recognized that a claim is not one for contribution or indemnity unless it is based on the breach of a duty to a third party. *See* Pet. at 22.⁴ Federal courts also have explicitly recognized that direct and derivative claims remain distinct even if they “provide [for] the same recovery.” *Cendant*, 166 F. Supp. 2d at 12. Thus, damages paid to a common plaintiff can constitute “a permissible item of damages” in an independent suit by one co-defendant against another. *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 458 (7th Cir. 1982); *see also* Pet. at 34-35 (discussing other cases).

2. Kutak relies heavily on a line of federal cases addressing the discretionary authority of federal courts to enter broad orders barring future litigation as part of securities class action settlements (the “bar order cases”). *See* Kutak Resp. at 6-7. It contends that the bar order cases demonstrate that the

⁴ The cases that Kutak relies upon (at 3) stand merely for the proposition *that the plaintiff suffers “but one loss” “regardless of the different theories [of liability] and parties pursued by the plaintiff.”* *Zando*, 182 W. Va. at 609, 390 S.E.2d at 808 (emphasis added; internal quotation marks omitted).

overlap between Grant Thornton's liability to the FDIC and the damages it seeks here transforms its direct claims into "disguised indemnity claim[s]." *Id.* at 6. Kutak's reliance on these cases is misplaced.

First, most of the orders at issue *expressly* prohibited a nonsettling defendant's independent claims seeking to recover liability to the plaintiffs. *See, e.g., In re Heritage Bond Litig.*, 546 F.3d 667, 680 (9th Cir. 2008); *Gerber v. MTC Elec. Techs. Co.*, 329 F.3d 297, 307 (2d Cir. 2003); *see also Bendis*, 36 F.3d at 928 (vacating order that swept more broadly). As the court explained in *In re Cendant*, the bar order cases do not stand for the proposition that "all claims for which damages are 'measured by' the defendant's liability to the plaintiff constitute claims for contribution" or indemnity. 166 F. Supp. 2d at 3. They instead hold only that district courts *may* (but need not) bar direct claims against settling defendants *in addition to* those for contribution or indemnity. *See id.* (observing that federal cases "distinguish[] among claims for contribution, indemnity, and those other claims whose injury and damages happen to encompass the defendants' liability to plaintiffs"). Far from issuing such an order, the district court in the FDIC litigation expressly ruled that Grant Thornton could pursue its direct claims in a separate lawsuit. *See* page 8, *supra*.

Second, the nonsettling defendants in the bar order cases were entitled to

a judgment credit that took into account “the settling defendants’ proportionate share of the total damages.” *Gerber*, 329 F.3d at 305. This critical fact made “the settling defendant’s wrongdoing . . . relevant” and ensured “that, at the end of the day, the non-settling defendants are not held responsible for any damages for which the settling defendants are proven liable.” *Id.* at 305-06; *see also In re HealthSouth Corp. Sec. Litig.*, 572 F.3d 854, 858 (11th Cir. 2009). Here, by contrast, because West Virginia law does not permit the consideration of proportionate fault in calculating a settlement credit, there is no such guarantee. *See* pages 6-7, *supra*.

Third, it is not true that Grant Thornton was “only damaged to the extent [it is] liable to the [FDIC] in the underlying litigation.” *Gerber*, 329 F.3d at 306. As noted above, Grant Thornton seeks significant additional damages, including the amounts it spent defending Keystone-relating litigation *in which it prevailed*. *Gerber*, the leading bar order case cited by Kutak, expressly identified claims seeking defense costs as unaffected by even the broad discretionary bar order that was before the court. *See id.*; *see also Daiwa Secs. Am. Inc. v. Grande Holdings Ltd.*, No. 98-CV-336, 2007 WL 4180664, at *3-4 (E.D.N.Y. Nov. 20, 2007) (unpublished) (following *Gerber*).

3. Kutak's effort (at 11) to distinguish *Liberty Seafood* and *Bertram* as "appl[ying] a special exception for maintenance-and-cure claims" betrays confusion. The crux of those decisions is not that the *plaintiff seaman* "seek[s] recovery for two separate types of injury" when he sues his employer for maintenance-and-cure and a third party for damages. Kutak Resp. at 11. It is instead that an *employer's* claim for "*reimbursement* of maintenance and cure" against a joint tortfeasor "is not a derivative right through [the seaman], but [i]s a separate and distinct cause of action." *Bertram v. Freeport McMoran, Inc.*, 35 F.3d 1008, 1015 (5th Cir. 1994) (internal quotation marks omitted; emphasis added); see also *Liberty Seafood*, 38 F.3d at 758 ("an employer's claim for recovery over for maintenance and cure is separate and distinct from an injured seaman's claim for damages"). Here, likewise, Grant Thornton's direct claims are "not a derivative right through" the FDIC, but rather are "separate and distinct" claims. Kutak further misreads the cases when it states that "a seaman's settlement with a third-party defendant on other claims cannot encompass maintenance-and-cure payments." Kutak Resp. at 11. *Bertram* actually expressly rejected the notion that such an overlap would change the "separate and distinct" nature of the two types of claims. 35 F.3d at 1017 n.5.

II. GRANT THORNTON'S NEGLIGENCE DOES NOT EXTINGUISH ITS CLAIMS

Grant Thornton has shown that its fraud and other claims against Kutak may not be extinguished merely because the district court found that Grant Thornton was negligent in connection with the Keystone audit. *See* Supp. Br. at 14-16; *see also* Pet. at 36-38. In response, Kutak calls it “preposterous” for Grant Thornton to describe itself as the “victim” of Kutak’s fraud. Kutak Resp. at 13. But Kutak concedes that the truth of Grant Thornton’s “allegations” must be assumed in resolving this appeal. *Id.* at 2. Furthermore, Grant Thornton’s claims rest on more than “allegations”: they are supported by ample evidence of Kutak’s significant, affirmative misconduct toward Grant Thornton. *See* Supp. Br. at 5-9; Pet. at 6-15. Grant Thornton would have discovered the truth about Keystone’s financial condition, and might not have undertaken the audit at all, had it not been for Kutak’s many misstatements and nondisclosures.

Contrary to Kutak’s suggestion (at 9), several cases have permitted similar claims to go forward even though the claimant bore some fault. *See Liberty Seafood*, 38 F.3d at 758 (“[T]he partial fault of the shipowner does not preclude recovery for maintenance and cure from a joint tortfeasor for its portion of the fault.”); *In re Cendant*, 166 F. Supp. 2d at 8 n.3 (referring to claimant as a “tortfeasor”); *In re Cendant*, 139 F.Supp.2d at 591 (same). Kutak repeatedly

asserts that Grant Thornton is an “adjudicated wrongdoer,” but does not explain why that status should distinguish its direct claims from those brought by these other claimants who bore some fault.⁵

III. GRANT THORNTON’S CLAIMS FURTHER WEST VIRGINIA PUBLIC POLICY

Contrary to Kutak’s policy arguments (at 14-17), allowing Grant Thornton’s claims to go forward would advance West Virginia’s public policy. *See* Supp. Br. at 16-18; Pet. at 38-41. Tortfeasors could continue to rely on settlement with the plaintiff to buy complete peace from the derivative claims of joint tortfeasors; but they would be unable to misuse such a settlement to evade liability to third parties on independent claims. This approach favors settlement, while also respecting the “underlying objectives of tort liability” to “compensate the victims of wrongdoing” and “deter future wrongdoing.” *Cenco*, 686 F.2d at 455; *cf. Ladd Furniture, Inc. v. Ernst & Young*, No. 2:95-cv-00403, 1998 WL 1093901, at *4 (M.D.N.C. Aug. 27, 1998) (“To the extent that [the auditor] claims to be a victim of [the client’s] wrongdoing . . . , this Court finds that it would be in

⁵ The West Virginia cases dismissing indemnity claims that Kutak relies upon do not suggest a different result. *See* Kutak Resp. at 8-10 & n.6. In none of those cases did this Court mention the concept of a “disguised” indemnity claim. Nor did it ever suggest that it would treat claims for fraud or other torts as if they were indemnity claims merely because the damages sought overlapped with those that would be available in an action for indemnity.

keeping with the objectives of tort liability to allow [the auditor] to seek redress for any damages it may have incurred as a result of [that] conduct.”).

Kutak is wrong in arguing that recognition of Grant Thornton’s claims will open the floodgates to “disguis[ed]” independent claims and in suggesting that Grant Thornton is seeking a “special law” for auditors and attorneys. Kutak Resp. at 14-15. The fact is that the close relationship between accountants and attorneys in the audit context gives rise to duties that do not run between persons who merely share a duty to a third party. Auditors rely greatly on outside attorneys’ representations about the common client’s business and finances, particularly when the attorneys have a close and longstanding relationship with the client, as Kutak had with Keystone. *See* Pet. at 7-10. Affirmative misrepresentations and other acts of deception by those attorneys make it almost impossible for auditors to do their jobs properly. *See* Supp. Br. at 7-9.

This level of mutual reliance is rare among joint tortfeasors generally. For example, Kutak’s hypothetical (at 14-15) – involving an asbestos manufacturer, a premises owner, and a plaintiff asbestos worker – does not appear to describe any interaction that would give rise to a direct claim by the premises owner against the manufacturer. Something more than the manufacturer’s breach of a

duty to the worker would be needed to establish its direct liability to the premises owner. And creative pleading could not supply the necessary independent duty, breach, and other elements of a direct tort claim. The explosion of direct claims that Kutak predicts therefore is implausible.

Finally, West Virginia public policy demands that, when lawyers choose to communicate with third parties, they do so honestly. Kutak knew of fraud and other serious problems at Keystone that bore directly on the Bank's financial viability. *See* Pet. at 7-10. Kutak might have declined to answer Grant Thornton's questions about the Bank on the ground of attorney-client privilege or some other basis. Instead, it chose to provide false responses to those questions. *See* Supp. Br. at 6-9; Pet. at 11-14. No law firm should be allowed to escape liability for its lies to third parties simply because the law firm has settled its claims with its former client.

IV. GRANT THORNTON'S LITIGATION EXPENSES ARE A PERMISSIBLE CATEGORY OF DAMAGES

This case presents a material issue of fact regarding whether Kutak's misconduct was a proximate cause of Grant Thornton's Keystone-related litigation expenses. *See* Supp. Br. at 18-20; Pet. at 41-47. In support of its argument that those expenses are not recoverable as a matter of law, Kutak relies

almost entirely on an unpublished decision, *Cortec Industries, Inc. v. Sum Holding L.P.*, No. 90 Civ. 0165, 1994 WL 722708 (S.D.N.Y. Dec. 30, 1994). *Cortec* is readily distinguishable and, in any event, is inconsistent with West Virginia precedent and has been strongly criticized.

In *Cortec*, an auditor that had been sued for negligence brought a claim based on the “tort of another” theory to recover its litigation expenses from its co-defendants. See 1994 WL 722708, at *1-*2. The court dismissed the claim on the ground that the auditor had not established that the defendants breached any independent duties to it, dismissing its “allegations of [such] duties” as “conclusory and unsupported by pertinent authority.” *Id.* at *5. The court also stated that an auditor that is negligent in performing an audit “has breached its own professional duties, and cannot transform those breaches into, or mask them behind, breaches of duties allegedly owed to the auditor by the keepers of the books the auditor was retained to audit.” *Id.*

Three factors make *Cortec* irrelevant here. First, the circuit court ruled that Kutak owed Grant Thornton independent duties, and Grant Thornton has introduced ample evidence that Kutak breached those duties. See page 14, *supra*. Second, “unlike the situation in the present matter, the auditor in *Cortec* did not assert any substantive claims, such as fraud or breach of contract, but only

asserted a claim for attorneys' fees and costs on the ['tort of another'] theory." *Ladd Furniture*, 1998 WL 1093901, at *4. "[B]ecause [Grant Thornton's] claims are of a different nature from the claims that were dismissed by the court in *Cortec*, . . . the decision in *Cortec* is inapposite." *Id.* Third, Kutak, unlike the defendant in *Cortec*, was not "the keeper[] of the books [Grant Thornton] was retained to audit." *Cortec*, 1994 WL 722708, at *5. Instead, Kutak was a third party whom the auditors depended upon for accurate and objective information about the Bank.

To the extent that *Cortec* holds that a party with some fault cannot recover its collateral litigation expenses, it contradicts this Court's decision in *Thomason v. Mosrie*, 134 W. Va. 634, 644-45, 60 S.E.2d 699, 706 (1950), as well as precedents from other jurisdictions, see *Gerber*, 329 F.3d at 306; *Collins v. First Fin. Servs., Inc.*, 815 P.2d 411, 412-15 (Ariz. Ct. App. 1991).

Indeed, *Cortec* has been heavily criticized. As the court explained in *Ladd Furniture*, "other courts have allowed auditors to pursue claims against their former clients for misrepresentations made in connection with audited financial statements, even when the auditors themselves were sued for alleged wrongdoing." 1998 WL 1093901, at *4. *Cortec* also "has been criticized both for having a 'basic misunderstanding of the auditor-client relationship,' as embodied

by generally accepted auditing standards, and for its failure either to cite or to discuss *Cenco*, which is the leading Court of Appeals case on the issue of an auditor's right to pursue claims against the company it audited." *Id.* (quoting Michael R. Young, *The Liability of Corporate Officials to Their Outside Auditor for Financial Statement Fraud*, 64 Fordham L. Rev. 2155, 2177-78 (1996)).

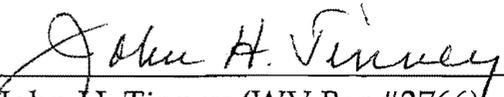
CONCLUSION

This Court should reverse the circuit court's order granting Kutak's motion for summary judgment and remand to the circuit court for further proceedings.

Respectfully submitted,

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GRANT THORNTON LLP,

Plaintiff/Petitioner,

v.

CIVIL ACTION NO. 04-C-33-M
(Judge Murensky)

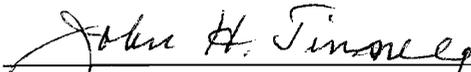
KUTAK ROCK LLP,

Defendant/Respondent.

CERTIFICATE OF SERVICE

I, John H. Tinney, counsel for Grant Thornton LLP, hereby certify that on the 15th day of August, 2011, "**Grant Thornton LLP's Reply Brief**" was served upon Defendant Kutak Rock LLP by hand delivery to counsel as follows:

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