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No. 11-0079

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GRANT THORNTON LLP, Plaintiff Below/Petitioner,

v.

KUTAK ROCK LLP, Defendant Below/Respondent.

FILED
JUL 1 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

SUPPLEMENTAL BRIEF

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

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PROPOSED SYLLABUS POINTS

1. An attorney's fraudulent or negligent acts against the independent auditor of its client, including the attorney's false representation to the auditor that there are no unasserted possible claims against the client that may bear on the client's financial statement, give the auditor direct claims against the attorney that are not claims for contribution or indemnity.

2. A settlement between an attorney and client does not extinguish direct claims by the client's independent auditor against the attorney, when those direct claims are based on the attorney's fraudulent or negligent acts against the auditor.

3. The direct claims created by an attorney's fraudulent or negligent acts against the independent auditor of its client are not properly treated as contribution claims barred by a settlement between the attorney and the client merely because the auditor seeks as a portion of its damages the amount of its liability incurred in litigation brought by the client.

4. The direct claims created by an attorney's fraudulent or negligent acts against the independent auditor of its client are not extinguished by a settlement between the attorney and the client merely because the auditor was also negligent.

INTRODUCTION

Plaintiff Grant Thornton LLP ("Grant Thornton") submits this brief as a supplement to its Petition for Appeal. This brief (i) focuses on the key legal authorities and policy issues implicated by this appeal in an effort to frame them as clearly as possible for the Court, (ii) responds to arguments made in the Response to the Petition ("Response") by Defendant Kutak Rock LLP ("Kutak" or the "Firm"), and (iii) describes developments in related litigation.[1]

This suit alleges that Kutak lied to Grant Thornton during its audit of Keystone and thereby caused it not to discover the fraud at the Bank. As a result of Keystone's lies and other misconduct, Grant Thornton suffered significant damages, including the costs of defending itself in litigation arising out of the Keystone audit, and the amount of its liability to the FDIC, which (as receiver for Keystone) sued Grant Thornton for failing to uncover the Keystone fraud. Grant Thornton would not have incurred these losses if Kutak had been truthful.

The circuit court granted summary judgment to Kutak on the ground that Grant Thornton was really suing Kutak, as a joint tortfeasor, for contribution or indemnity, and that such claims were barred by Kutak's own prior settlement with the FDIC. The circuit court also ruled that Grant Thornton could not

[1] The Petition presents the following facts and legal authorities in greater detail, and we incorporate it by reference.

recover its litigation expenses because it had been found negligent and because its decision to defend against the FDIC's claims was "voluntary."

These rulings are wrong. If Grant Thornton can prove the elements of its direct claims against Kutak, and it can, West Virginia law entitles it to pursue them. That Grant Thornton and Kutak were "joint tortfeasors" vis-à-vis Keystone does not transform Grant Thornton's direct claims into barred claims for contribution or indemnity, or otherwise extinguish Grant Thornton's rights against Kutak. The mere fact that Grant Thornton seeks reimbursement of its liability to the FDIC and litigation expenses does not change this conclusion. If Grant Thornton incurred these losses as a foreseeable consequence of Kutak's fraud against it, then they are recoverable as damages. Put another way, Kutak would be liable to Grant Thornton even if Kutak had no liability to Keystone, and the fact that Kutak settled its liability to Keystone does not insulate it from liability for the harm it caused Grant Thornton directly.

In fact, Grant Thornton has introduced ample evidence, discussed at length in the Petition (and further elaborated below), that Kutak knew of the fraudulent activities at Keystone and actively concealed them from Grant Thornton. Although Kutak responds that "[i]t has never been determined in an action in which Kutak was a party that Kutak was aware of the Bank's fraudulent activities," Resp. at 5 n.2, that is a matter for the fact-finder to decide following a trial. Indeed, Kutak's Response makes little effort to defend its gross misconduct toward Grant Thornton, seeking instead to escape responsibility by hiding behind its settlement with the FDIC and continuing to insist that Grant Thornton's claims are barred claims for contribution or indemnity. Yet it cites no case from any jurisdiction—let alone West Virginia—in which a court has treated direct claims alleging fraud and other intentional torts as if they were merely in reality claims for contribution or indemnity.

Kutak's position, which the circuit court adopted, would give tortfeasors a blank check to defraud third parties in an effort to hide their original wrongdoing. In particular, as applied to the circumstances here, it would permit attorneys to lie to independent auditors engaged by a common client, thus predictably causing the issuance of an incorrect audit report, and then to escape liability to the auditors by settling with the client. That has never been, and should not be, West Virginia law. Kutak's settlement with the FDIC protects it from further liability for violating its duties to Keystone, including any effort to impose such liability through a contribution claim; but that settlement does not protect Kutak for violating its duties to Grant Thornton.

SUPPLEMENTAL STATEMENT OF THE CASE[2]

Grant Thornton's Petition sets forth (at 6-15) the relevant facts, and supporting record citations, in detail. As those facts demonstrate, Kutak violated many duties to Grant Thornton in the course of the Keystone audit. *Cf.* Order Granting Def.'s Mot. for Summ. J. at 14 (entered Mar. 11, 2010) ("Order") (finding that Kutak owed Grant Thornton a duty to disclose information concerning Keystone). We elaborate here on the affirmative misrepresentations that formed the heart of Kutak's fraud against Grant Thornton. Far from being "immaterial" to this case (as Kutak claims in its Response (at 3)), the misrepresentations vividly demonstrate the type of conduct that the circuit court's decision would excuse.[3]

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[2] The exhibits to Grant Thornton LLP's Resp. to Mot. of Kutak Rock LLP for Summ. J. on Grant Thornton's Compl. (entered Dec. 17, 2008) will be referred to as "GT Ex. __." The sequentially numbered exhibits to the Mem. of Law in Support of Mot. of Kutak Rock LLP for Summ. J. on Grant Thornton's Compl. (entered Nov. 10, 2008), and to Kutak Rock LLP's Reply to Grant Thornton LLP's Resp. to Kutak Rock's Mot. for Summ. J. (entered Jan. 7, 2009), will be referred to as "Kutak Ex. __."

[3] We also bring to the Court's attention the recent decision of the U.S. Court of Appeals for the Fourth Circuit resolving Grant Thornton's appeal of certain of the district court's rulings in the related FDIC litigation. *See Grant Thornton, LLP v. FDIC*, No. 10-1306, 2011 WL 2420264 (4th Cir. June 17, 2011). The Fourth Circuit affirmed on all the appealed issues, except Grant Thornton's challenge to the calculation of the settlement credit. *See id.* at *1. While the Fourth Circuit agreed with the district court's finding that Kutak had inflicted almost $300 million in losses on Keystone (and the district court's use of a multiplier of 8.563% to calculate the amount of the credit), *see id.* at *13, it determined that the credit should have been calculated based on the settlement's face value rather than Kutak's actual settlement payments. *See id.* at *10-*15. The court

During the course of the Keystone audit, Kutak attorneys lied, or did its legal equivalent, to the Grant Thornton auditors regarding several critically important facts.[4] For example, before Grant Thornton accepted the Keystone engagement, a Kutak attorney told a Grant Thornton auditor that Keystone's management was "honest," *see* Supp. Resp. at 7—thus directly contradicting what Kutak knew about the fraud at the Bank.[5] In addition, on several occasions, Michael Lambert—the Kutak partner in charge of the Keystone representation (who is no longer permitted to represent federally insured depository institutions, *see* GT Ex. E ¶ 40)—falsely confirmed for the auditors the truth of misrepresentations made by Keystone's management regarding the value of the Bank's residuals, *see* Supp. Resp. at 5, despite having ample reason to know their actual value, *see* GT Ex. I at 2-4; *Grant Thornton*, 694 F. Supp. 2d at 516-21.

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accordingly adjusted the credit upward to $1.9 million (8.563% of $22 million). *See id.* at *15.

[4] *See generally* supplemental answers 3(a), (b), (d), (f), (g), (i), & (k), Grant Thornton's Supp. Resp. to Def.'s 1st Set of Interrogs. (entered Nov. 13, 2008) ("Supp. Resp."); *see also* Ex. B at 5-6 ("Taylor Report"), Grant Thornton LLP's Resp. to Kutak Rock LLP's Mot. to Exclude Test. of Professor John Taylor (entered Nov. 10, 2009).

[5] *See, e.g.*, GT Ex. I at 2-4; Tr. of Evidentiary Hr'g Held Before the Hon. David A. Faber, Judge, U.S. District Ct. in Charleston, W. Va. (Nov. 27, 2007) ("Settlement Credit Hr'g Tr.") at 56, *Grant Thornton, LLP v. FDIC*, 694 F. Supp. 2d 506 (S.D. W. Va. 2010), *aff'd in part, rev'd in part*, 2011 WL 2420264; *see also Grant Thornton*, 694 F. Supp. 2d at 516-21.

An especially egregious lie was contained in the attorney disclosure response letter that Mr. Lambert sent Grant Thornton on March 1, 1999. *See* GT Ex. H. As is customary in independent audits, Kutak sent the letter to Grant Thornton at Keystone's request. The letter's purpose was to confirm that Keystone's management had properly identified and evaluated all possible unasserted legal claims against the company (e.g., lawsuits, potential lawsuits, regulatory actions, etc.) that might call for financial statement disclosure, and to identify any previously undisclosed claims of this type. *See* Taylor Report at 12-14. That letter — which was addressed to Grant Thornton, not Keystone — was a critical step in the audit process. *See id.* at 13. Without such a letter, an auditor will not issue an unqualified audit report, and may not issue any report at all.[6]

Kutak made two statements in its letter to Grant Thornton that, when read together, were false — and known by Kutak to be false. First, Kutak represented that, "whenever in the course of performing legal services for the Bank," Kutak learned of an "unasserted possible claim" that "the Bank must disclose or consider disclosure" in its financial statements, Kutak would consult with and "so advise the Bank." GT Ex. H at 3. Second, Kutak confirmed to Grant Thornton that it had no knowledge of any such unasserted possible claims: "We

[6] *See* GT Ex. R at 8; Kutak Ex. 18 at 76:10-19; Settlement Credit Hr'g Tr. at 70, 71, 76, 122-23.

confirm as correct the Bank's representation to you that there are no unasserted possible claims with respect to which we have advised the Bank of a probability of assertion which must be disclosed in accordance with FAS 5." *Id.* at 4. This response "amount[ed] to a representation that there were no unasserted claims that Keystone was required to disclose under FAS No. 5." Taylor Report at 14.[7]

Contrary to the representations in Kutak's letter to Grant Thornton, the evidence shows that Mr. Lambert, when he sent the letter, knew that Keystone's management was engaged in fraud and other undisclosed misconduct that made it highly susceptible to future lawsuits or regulatory actions.[8] He knew, for example, that the Bank's management was falsifying its records and violating federal banking regulations; that the loans going into Keystone's securitizations were of poor quality and the securitizations were not performing well; that the loan data underlying the securitizations was of questionable integrity; that a number of Keystone's securitization partners were dishonest, engaging in a scheme to defraud it, and otherwise placing the Bank's interests in jeopardy; that the Bank's residual valuations were overstated and its assets inflated; that the

[7] "[D]isclosure of unasserted claims is required" under FAS 5 "where the assertion of the claim is 'probable,' there is at least a 'reasonable possibility' of an unfavorable outcome if the claim is asserted, and the resulting liability would materially affect the financial condition of the client." Taylor Report at 14-15.

[8] *See* GT Ex. R at 6, 8; *see also* Supp. Resp. at 7; Taylor Report at 15; Settlement Credit Hr'g Tr. at 67-71, 118-120.

OCC had made a referral to the FBI regarding a corrupt officer and director of the Bank; and that the Bank's CFO considered himself a sham and without qualifications for the job. *See* GT Ex. I at 2-4; *Grant Thornton*, 694 F. Supp. 2d at 516-20. Mr. Lambert also knew that Keystone had breached certain agreements with another bank called United, which owned many of the loans claimed by Keystone.[9]

According to Grant Thornton's accounting expert, this is "precisely the kind of information that the Bank and Kutak would have been required to pass on to the auditors as a component of their respective representation letters provided to the auditors." GT Ex. R at 6; *see* Settlement Credit Hr'g Tr. at 122:6-8. According to Grant Thornton's legal ethics expert, assuming that Mr. Lambert knew (or should have known) that these claims should have been disclosed, "the audit inquiry letter would be a fraudulent [or negligent] misrepresentation." Taylor Report at 15. The letter was a lie, and it affected the course of the audit dramatically. As Mr. Quay attested in the district court proceeding, Keystone's "entire house of cards" would have unraveled had the auditors been told the truth. Kutak Ex. 18 at 68:9; *see also id.* at 76:10-19; GT Ex. R at 8; Settlement Credit Hr'g Tr. at 71, 76, 118.

[9] *See* GT Ex. R at 8; *see also* Kutak Ex. 18 at 67:18-68:9; Kutak Ex. 34 at 82:13-21.

SUPPLEMENTAL ARGUMENT

I. GRANT THORNTON'S DIRECT CLAIMS CANNOT BE TREATED AS BARRED CLAIMS FOR CONTRIBUTION OR INDEMNITY

A. Grant Thornton's Claims Are Viable Direct Claims

Grant Thornton has sued Kutak for fraud, negligent misrepresentation, and tortious interference with contract, ***not*** contribution or indemnity. "[R]ecovery under principles of contribution or indemnity is, quite simply, a different animal from recovery under principles of direct tort liability." *In re Cenco Inc. Sec. Litig.*, 642 F. Supp. 539, 541 (N.D. Ill. 1986) (internal quotation marks omitted). The crux of a claim for either contribution or indemnity is the breach of a duty to a third party. *See Dunn v. Kanawha Cnty. Bd. of Educ.*, 459 S.E.2d 151, 155 (W. Va. 1995); *Charleston Area Med. Ctr., Inc. v. Parke-Davis*, 614 S.E.2d 15, 22 (W. Va. 2005). By contrast, the "gist" of Grant Thornton's claims "is not that it is more equitable that [Kutak] pay" for the FDIC's damages, "but that [Kutak] has committed a tort on [Grant Thornton], and must pay damages for this." *In re Cenco*, 642 F. Supp. at 542. This fundamental difference between direct tort claims and contribution or indemnity claims is widely recognized. *See* Petition at 23 (citing cases). The district court recognized it in ruling in the FDIC litigation that, despite the Kutak-FDIC settlement that extinguished Grant Thornton's contribution clams, "[a]ny direct claims Grant Thornton has against

Kutak Rock may be addressed in another lawsuit." GT Ex. F at 5.

Grant Thornton can recover in this suit only if it shows that Kutak breached independent duties that it owed to Grant Thornton. The circuit court acknowledged that such duties exist, rejecting Kutak's argument that it owed Grant Thornton no duty to disclose information concerning Keystone. *See* Order at 13-14. Kutak's summary judgment motion otherwise did not challenge Grant Thornton's ability to prove a violation of those duties. In fact, as discussed above (at 5-9) and in the Petition (at 7-15), Grant Thornton has carried its burden by a wide margin.

B. West Virginia's Rule Relieving a Joint Tortfeasor that Settled with the Plaintiff from Liability for Contribution Does Not Bar Grant Thornton's Direct Claims

The circuit court erred in ruling that "Kutak's good faith settlement with the FDIC" barred Grant Thornton's claims. Order at 9.

1. The settlement bar recognized by this Court in *Board of Education of McDowell County v. Zando, Martin & Milstead, Inc.*, 390 S.E.2d 796 (W. Va. 1990), bars only contribution claims — that is, claims asserted by one joint tortfeasor against another that rest on joint liability to the plaintiff. *Cf. id.* at 808 (bar applies "regardless of the different theories [of liability] . . . pursued by the ***plaintiff***") (emphasis added); *see also id.* at 807 (similar). It has never been held to

extinguish claims asserting a violation of duties owed directly from one tortfeasor to the other. Nor does Grant Thornton know of any precedent applying the Uniform Contribution Among Tortfeasors Act of 1955 or the Uniform Comparative Fault Act—both of which this Court has looked to in applying the settlement bar, *see id.* at 803, 805—to extinguish such direct claims.

In fact, this Court's prior decisions acknowledge the difference between contribution claims and direct claims against a joint tortfeasor, and indicate that the latter are not barred by a settlement between one joint tortfeasor and the plaintiff. *See Jennings v. Farmers Mutual Insurance Company*, 687 S.E.2d 574 (W. Va. 2009) (per curiam), and *Dunn*, 459 S.E.2d 151, discussed in the Petition at 26-28. Courts in other jurisdictions have reached the same conclusion. *See, e.g., Liberty Seafood, Inc. v. Herndon Marine Prods., Inc.*, 38 F.3d 755, 757-58 (5th Cir. 1994) and *Bertram v. Freeport McMoran, Inc.*, 35 F.3d 1008, 1015 (5th Cir. 1994), discussed in the Petition at 29-30. They explicitly recognize 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.'" *In re Cendant*, 166 F. Supp. 2d at 10-11 (quoting *In re Cenco Inc.*, 642 F. Supp. at 542) (alterations omitted); *see also United States v. Tug Manzanillo*, 310 F.2d 220, 222 (9th Cir. 1962) ("[t]o hold that by paying certain sums to [a plaintiff] . . . [a tortfeasor] had thereby discharged its then existing liability to [a third-party], is a wholly impermissible conclusion"); *Liberty Seafood*, 38 F.3d at 759 (a joint tortfeasor "cannot extinguish its . . . liability [on] . . . (a separate and independent claim) [by another joint tortfeasor] . . . by settling a separate and unrelated claim with the [plaintiff]").

2. The circuit court reasoned that Grant Thornton's effort "to recover the same, indivisible damages from Kutak for which it was awarded a set-off" justifies treating its claims as barred contribution claims. Order at 8. This approach is wrong because the $1.9 million settlement credit awarded Grant Thornton as a joint tortfeasor substitutes only for its lost "contribution" claim, *Zando*, 390 S.E.2d at 803, not its direct claims. *See 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.").

Moreover, the fact that Grant Thornton might have been able to recover part (or even all) of the damages that it seeks here from Kutak through an action for contribution does not "automatically convert [Grant Thornton's] state law claims into impermissible contribution claims." *Cendant*, 166 F. Supp. 2d at 12. Distinct claims remain distinct even if they "provide [for] the same recovery," *id.*, and damages paid to a common plaintiff can constitute "a permissible item of damages" in an independent suit by one co-defendant against another, *Cenco,* 686 F.2d at 458. *See* Petition at 34-35 (discussing cases). Of course, Grant Thornton also seeks other recovery from Kutak, including the expenses it has incurred over the last decade of Keystone-related litigation. *See* Compl. at Prayer for Relief ¶ A; *see also In re Cendant,* 166 F. Supp. 2d at 11 (noting that cross-claimant "also seeks damages" against its co-defendant "beyond recovery of a portion of the [settlement amount]").

Similarly, Grant Thornton's status as an "adjudicated wrongdoer" does not justify treating its claims as contribution claims. Order at 9. In West Virginia (as elsewhere), "contributory negligence is not a defense" to an intentional tort such as fraud. *Bradley v. Appalachian Power Co.,* 256 S.E.2d 879, 887 (W. Va. 1979); *see also Cenco,* 686 F.2d at 454 ("Negligence is not a defense to an intentional tort such as fraud."). In particular, "'[t]he recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation.'" *Kidd v. Mull,* 595 S.E.2d 308, 316 (W. Va. 2004) (quoting Restatement (Second) of Torts § 540 (1977)).

There are sound reasons for this bedrock principle: To allow a defendant "to assert the very weakness he has exploited as a ground for limiting the defrauded party's claim . . . would merely insulate one who has committed an intentional, antisocial act from accounting to the person he has injured for all of the consequences flowing from that act, and thus might have the undesired secondary effect of promoting fraudulent activity." *Morgan, Olmstead, Kennedy & Gardner Inc. v. Schipa*, 585 F. Supp. 245, 249 (S.D.N.Y. 1984); *see also Mayer v. Spanel Int'l Ltd.*, 51 F.3d 670, 675 (7th Cir. 1995) ("Tolerating fraud by excusing deceit when the victim is too easily gulled increases both the volume of fraud and expenditures on self-defense."). In short, the rule "makes promises credible by making it costly for liars to escape liability later." *United States v. Rosby*, 454 F.3d 670, 677 (7th Cir. 2006).

United States v. Berman, 21 F.3d 753 (7th Cir. 1994) (Posner, J.), illustrates the application of the rule in circumstances similar to those here. A bank's negligent mishandling of certain auction proceeds had allowed the defendants—the heads of a nationwide auction firm—to steal those proceeds, thus injuring the unsecured creditors of the company whose property was being auctioned. *See Berman*, 21 F.3d at 755, 757. The defendants objected to paying restitution to the creditors, arguing that they already had "been made whole through a suit that [the company] brought against [the bank] for [its negligence]." *Id.* at 757. The

Seventh Circuit rejected the argument, noting that "at most all that this implies is that" the bank, not the unsecured creditors, was entitled to the restitution. *Id.* "For even if the bank was negligent," the court reasoned, "it would be entitled to restitution from a deliberate wrongdoer; contributory negligence is not a defense to fraud." *Id.*

Here, likewise, the mere fact that Grant Thornton was deemed negligent in its audit of Keystone does not absolve Kutak from liability for its intentional wrongdoing against Grant Thornton. *Cf.* Syl. Pt. 10, *Kidd,* 595 S.E.2d at 317 ("doctrine of constructive notice will not defeat a cause of action for fraud or negligent misrepresentation where the entity asserting the cause of action did not undertake independent investigation to ascertain the truth of the allegedly fraudulent representation").[10]

3. Finally, the circuit court was wrong that allowing Grant Thornton's claims to proceed "would place a chilling effect on settlements, and settlements would cease to exist." Order at 14. As the Fifth Circuit explained in *Liberty Seafood,* "once it is recognized that [the tortfeasor that settled] in fact had two

[10] Grant Thornton's negligence also does not affect the viability of its claim for negligent misrepresentation, as "a party is not barred from recovering damages in a tort action so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident." *Bradley,* 256 S.E.2d at 885. It is for a jury to evaluate the relative negligence of Grant Thornton and Kutak.

separate grounds of liability to the [nonsettling joint tortfeasor], it becomes clear that settlement policy is not implicated." 38 F.3d at 759. A ruling permitting Grant Thornton's direct claims would have no effect on West Virginia's public policy favoring settlement. A tortfeasor would remain just as able to rely on settlement with the plaintiff to buy complete peace from further claims by the plaintiff or the derivative claims of joint tortfeasors. The tortfeasor simply would be unable to use such a settlement to escape its liability to third parties on independent claims.

In fact, a clear rule distinguishing between direct claims and claims for contribution or indemnity "should" "advance[]," *id.*, West Virginia's settlement policy by encouraging all parties "to work together to reach settlement of all claims, and thus avoid any further litigation." *Bertram*, 35 F.3d at 1017. Adoption of the circuit court's approach, by contrast, would have a number of undesirable consequences. It would encourage tortfeasors to settle strategically with plaintiffs in order to divest joint tortfeasors of any direct claims. It also would overcompensate plaintiffs by giving them additional leverage in settlement negotiations; plaintiffs would have the power to extinguish not only their own and any derivative claims by or against the negotiating defendant, but also direct claims by joint tortfeasors against that defendant.

Finally, the circuit court's approach would allow attorneys (and others) to engage with impunity in misconduct against third parties involved in a common engagement. This Court should not empower wrongdoers to escape responsibility for the harm that they directly cause third parties by settling with the plaintiff—who has no incentive to protect the third party's independent rights.[11]

II. Grant Thornton Can Recover Its Collateral Litigation Expenses

The circuit court also erred in ruling that Grant Thornton's Keystone-related litigation expenses were not, as a matter of law, "the natural and necessary consequence of any actions by Kutak," and thus not recoverable. Order at 12 (internal quotation marks omitted).

"[C]osts and expenses incurred in collateral litigation may be recovered when they are a proximate result of the fraud." *Thomason v. Mosrie*, 60 S.E.2d 699, 706 (W. Va. 1950); *see also* Restatement (Second) of Torts § 914(2) (1979). This case presents a material issue of fact regarding whether Kutak's misconduct was a proximate cause of the Keystone-related litigation. Instead of examining the evidence, the circuit court invented a *per se* rule that a party may not recover

[11] The circuit court also indicated that Grant Thornton's claims were barred to the extent they were claims for implied indemnity. *See* Order at 10. As noted, Grant Thornton has not brought any indemnity claims.

collateral litigation expenses if it engaged in "wrongdoing" and has incurred the expenses "voluntarily." Order at 11-12. This holding is wrong for the following reasons.

First, the circuit court misstated the standard for recovering collateral litigation expenses; in fact, such expenses are recoverable even if they are merely the "natural ***but not the necessary*** result of the facts alleged." *Thomason*, 60 S.E.2d at 706 (emphasis added). Second, the circuit court incorrectly characterized Grant Thornton's litigation expenses as "voluntary." Grant Thornton did not choose to be sued by the FDIC, and it had a due process right to defend rather than settle the FDIC's claims. *Cf. Elijah v. Fender*, 674 P.2d 946, 951 (Colo. 1984) (en banc) (noting that "[a] party may be placed in a position of having to bring suit as plaintiff to defend his rights"). In fact, Grant Thornton was partially vindicated: The district court awarded the FDIC much less in damages than it had sought in litigation or in settlement, and also rejected the FDIC's theory that Grant Thornton acted recklessly. *Compare Grant Thornton, LLP v. FDIC*, 535 F. Supp. 2d 676 (S.D. W. Va. 2007), *rev'd in part on other grounds sub nom., Ellis v. Grant Thornton LLP*, 530 F.3d 280 (4th Cir. 2008), *with* GT Ex. A ¶¶ 150-155.

Third, *Thomason* implicitly rejects the *per se* rule adopted by the circuit court. In that case, this Court allowed the plaintiffs' claims for "costs and attorney fees" to proceed, 60 S.E.2d at 706, even though their liability was at least partially due to their own wrongdoing, *see id.* at 704; and, by litigating rather than settling, the plaintiffs "voluntarily" incurred the fees and costs at issue. Other jurisdictions have likewise rejected the proposition that a party with some fault cannot recover collateral litigation expenses. *See Collins v. First Fin. Servs., Inc.*, 815 P.2d 411, 412-15 (Ariz. Ct. App. 1991) (permitting plaintiff to recover reasonable attorneys' fees it incurred in defending quiet title action, even though plaintiff had lost that action).[12] Because Kutak's fraudulent conduct was the "very cause" of Grant Thornton's defeat in the FDIC action, the fact that Grant Thornton "did not prevail" in that action should not "affect" its "entitlement to the attorneys' fees." *Collins*, 815 P.2d at 415.

CONCLUSION

For the reasons discussed above, 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.

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[12] As the *Collins* court noted, cases that have indicated the existence of a *per se* rule barring recovery of collateral litigation expenses by parties with some fault have involved "claims for indemnity and contribution among joint tortfeasors," not direct claims. 815 P.2d at 414 (citing *Brochner v. W. Ins. Co.*, 724 P.2d 1293, 1300 (Colo. 1986) (en banc); *Conrad v. Suhr*, 274 N.W. 2d 571 (N.D. 1979)).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John H. Tinney, counsel for Grant Thornton LLP, hereby certify that on the 1st day of July, 2011, **"Grant Thornton LLP's Supplemental Brief"** was served upon Defendant Kutak Rock LLP by hand delivery to counsel as follows:

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