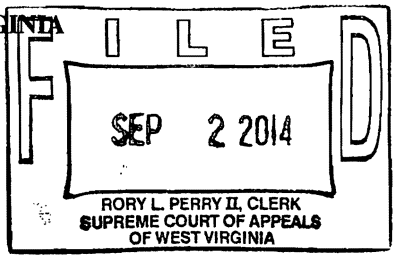
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DOCKET NO. 14-0556

STATE AUTO PROPERTY AND CASUALTY INSURANCE CO., AS SUBROGEE OF RANDALL BUCKLEY, D/B/A RANDY'S CONTRACTING SERVICE,
Petitioner

V.)

AL-KO KOBER, AND KAUFMAN TRAILER,
Respondents.

Appeal from a final order
of the Circuit Court of Hampshire County (13-C-113)

Petitioner's Brief

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ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT APPLIED AN IMPROPER "NOTICE REQUIREMENT" WHEN DISMISSING STATE AUTO'S CLAIM FOR IMPLIED INDEMNITY.

2. THE CIRCUIT COURT IMPROPERLY DISMISSED THE ACTION IN ITS ENTIRETY WHERE PETITIONER COULD STATE INDEPENDENT CAUSES OF ACTION FOR STRICT LIABILITY AND NEGLIGENCE FOR MONIES IT PAID TO ITS INSURED, RANDALL BUCKLEY DBA RANDY'S CONTRACTING SERVICE.

STATEMENT OF THE CASE

On or about August 8, 2011, Eric Connell, an employee of Randy's Contracting, was driving a 2000 F-250 owned by his employer. App. at 2, ¶ 5. Mr. Connell was traveling on U.S. Route 50 outside/near the community of Shanks, West Virginia. *Id.* At the same time that he was driving on U.S. Route 50 traveling eastbound, Mr. Connell was pulling a 2009 Kaufman utility trailer manufactured by Kaufman Trailer. *Id.* at 2, ¶ 6. The utility trailer had two lawn tractors on it as Mr. Connell was driving for a work assignment. *Id.* The Kaufman trailer had axles that are believed to have been manufactured by Al-Ko Kober. As Mr. Connell was traveling east on U.S. Route 50, the Kaufman trailer being towed lost a wheel when the axle failed. *Id.* at 2, ¶ 7. This caused the trailer to fishtail and eventually enter the westbound lane of traffic. *Id.* When the Kaufman trailer entered the westbound lane of traffic, it struck the 2002 F-250 Ford truck being operated by James M. Coleman. *Id.* at 2, ¶ 8. Due to his vehicle being struck by the trailer, Mr. Coleman's vehicle sustained property damage. *Id.* at 2, ¶ 9. Additionally, Mr. Coleman suffered serious physical injuries causing him to incur medical expenses and lost income. *Id.*

State Auto issued a policy of insurance to Randy's Contracting. *Id.* at 3, ¶ 10. This policy of insurance provided liability insurance for vehicles owned and operated by Randy's

Contracting. *Id.* As the insurer for Randy's Contracting, State Auto has paid for the property damage and personal injury damages incurred by Mr. Coleman. *Id.* at 3, ¶ 10. The policy of insurance issued by State Auto permits it to recover amounts paid by way of contractual rights of subrogation. Id. at 3, ¶ 10.

In asserting its contractual right of subrogation, State Auto sought to recover from Kaufman Trailer and Al-Ko Kober monies it paid to Mr. Coleman. *Id.* at 3-4, ¶ 11-20. State Auto asserts that Kaufman Trailer and Al-Ko Kober would be strictly liable and/or liable in negligence for any and all damages flowing from the axle at issue in this matter, which was defectively designed, tested, manufactured, and distributed in the sense that it was not reasonably safe for its intended use and was unreasonably dangerous at the time it was made. *Id.* Further, State Auto also asserted direct causes of actions against Kaufman Trailer and Al-Ko Kober for property damage it paid to its insured. *Id.*

Both Kaufman Trailer and Al-Ko Kober moved to dismiss State Auto's complaint, arguing that State Auto sought contribution from Kaufman Trailer and Al-Ko Kober, which, pursuant to this Court's decision in *Charleston Area Medical Center, Inc. v. Parke Davis,* 217 W. Va. 15, 614 S.E.2d 15 (2005), is precluded where a tortfeasor who negotiates and consummates a settlement with an injured party on behalf of itself before any lawsuit is filed and did not apprise another party of the settlement and/or make them a party to the settlement negotiations and agreement. *See* App. at 30-52. State Auto opposed this motion to dismiss, conceding that while the *Charleston Area Medical Center* decision may bar any cause of action it may have for contribution against Kaufman Trailer and Al-Ko Kober for monies it paid to Mr. Coleman, it did not bar all claims it possessed against said Defendants/Respondents. *See* App. at 53-65. On the contrary, pursuant to *Hill v. Ryerson & Son, Inc.*, 165 W. Va. 22, 29, 268 S.E.2d

296, 300 (1980), State Auto possesses a cognizable claim against Kaufman Trailer and Al-Ko Kober for implied indemnification. *Id.* Further, State Auto also noted that it had asserted and could maintain direct causes of action against Kaufman Trailer and Al-Ko Kober for monies it paid to its insured. *Id.*

By Order filed on May 1, 2014, the Court erroneously granted Kaufman Trailer and Al-Kober's motion to dismiss by ignoring the clear principles of law set forth in the *Hill* decision and incorrectly relying on *Howell v. Luckey*, 205 W. Va. 445, 518 S.E.2d 873 (1999), a case which proceeded only on a theory of contribution, to impose an improper notice requirement upon a claim for implied indemnification. App. at 66-71. Further, the Court, in dismissing the action in its entirety failed to recognize State Auto's direct causes of action against Kaufman Trailer and Al-Ko Kober for monies it paid to its insured, Randall Buckley dba Randy's Contracting Service, which in no way can be said to be barred either by the decision in *Charleston Area Medical Center* or the incorrect notice requirement announced by the Court with regard to claims for implied indemnification. *See id.*

SUMMARY OF ARGUMENT

In West Virginia, an action for implied indemnity may not be defeated by asserting a defense of failure to receive timely notice from the indemnitee of a plaintiff's claim for injuries arising out of a defective product. The Supreme Court of Appeals of West Virginia has found that the lack of notice by the indemnitee to the indemnitor concerning the injured plaintiff's claim does not defeat an implied indemnity action that is timely filed. *Hill v. Ryerson & Son, Inc.*, 165 W. Va. 22, 29, 268 S.E.2d 296, 300 (1980). Rather, it simply means that if the indemnitor has not received any notice and has not been impleaded by an indemnitee into an original lawsuit brought against the indemnitee by a plaintiff, or in this case involved in a

settlement between a plaintiff and the indemnitee, then the indemnitor cannot be bound by the judgment, or in this case the settlement, which resolved the original claim. *See id.* Instead, litigation to establish all of the actionable facts is to take place. *See id.* Accordingly, Kaufman Trailer's and Al-Ko Kober's motions to dismiss should have been denied and State Auto should have been allowed to pursue recovery of monies it paid to Mr. Coleman against Kaufman Trailer and Al-Ko Kober under the theory of implied indemnification.

In addition to maintaining a claim for implied indemnification against Kaufman Trailer and Al-Ko Kober, State Auto, as subrogee of Randall Buckley dba Randy's Contracting Service, also asserted and could maintain direct causes of action against Kaufman Trailer and Al-Ko Kober for monies it paid to its insured. State Auto's claims for strict liability and negligence as to the monies it paid to its insured for damages it sustained in the underlying accident are also independent causes of action, which its insured could have maintained against Al-Ko Kober and Kaufman Trailer, directly. Indeed, neither of these claims are barred by the decision in *Charleston Area Medical Center* or the circuit court's erroneous application of a notice requirement to an implied indemnification claim as these claim are neither for contribution nor implied indemnification.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument in this case is unnecessary because the principle issues in this case have been authoritatively decided previously, and the facts and legal arguments are adequately presented in this brief and the record on appeal. If the Court determines that oral argument is necessary, this case is appropriate for a West Virginia Rule of Appellate Procedure 19 argument and disposition by memorandum decision.

ARGUMENT

I. THE CIRCUIT COURT APPLIED AN IMPROPER "NOTICE REQUIREMENT" WHEN DISMISSING STATE AUTO'S CLAIM FOR IMPLIED INDEMNITY.

The Hampshire Circuit Court properly recognized that State Auto had clearly alleged a cognizable claim for implied indemnification against Kaufman Trailer and Al-Ko Kober for monies it paid to Mr. Coleman for the property damage and personal injury damages incurred by him as a result of the subject accident. However, in direct contravention of established West Virginia law, the Court erroneously dismissed State Auto's claim for implied indemnification, when it found that State Auto failed to give notice to Kaufman Trailer and Al-Ko Kober and/or make them a party to any settlement or litigation.

In *Hill v. Ryerson & Son, Inc.*, the Supreme Court of Appeals of West Virginia was presented with the opportunity to consider the nature of the right to implied indemnity in products liability cases. 165 W. Va. at 25, 268 S.E.2d at 300. In *Hill*, the West Virginia Supreme Court of Appeals noted:

> The remedy of implied indemnity is an independent cause of action based primarily on principles of restitution:
>
> "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).

Id. at 27, 268 S.E.2d at 301 (footnote omitted). Further, the Court concluded that an action for implied indemnity could not be defeated by asserting a defense of failure to receive timely notice from the indemnitee of a plaintiff's claim for injuries arising out of a defective product. *Id.* at 27-30, 268 S.E.2d at 301-02. Indeed, in *Hill*, the Court found:

> Under the principles of implied indemnity, however, notice to the indemnitor is not required unless the indemnitee seeks to bind the indemnitor to the original judgment. *McStain Corp. v. Elfline Plumbing & Heating, Inc.*, 38 Colo.App. 473, 558 P.2d 588 (1976); *Insurance Company of North America v. Hawkins*, 197 Neb. 126, 246 N.W.2d 878 (1976); *Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola*, 144 N.Y. 663, 39 N.E. 360 (1895); 42 C.J.S. Indemnity § 26 (1944). This matter is treated at some length in *Illinois Central Railroad v. Blaha*, 3 Wis.2d 638, 646-47, 89 N.W.2d 197, 201-02 (1958), where the court quoted this statement from 42 C.J.S. Indemnity § 32a(2) (1944):
>
> "The omission to give notice to the indemnitor, however, does not affect the right of action against him, but simply changes the burden of proof and imposes on the indemnitee the necessity of again litigating and establishing all of the actionable facts. . . ."

Id. at 28, 268 S.E.2d at 301-02.

The Court, further favorably quoting 42 C.J.S. Indemnity § 32a(2) (1944), noted:

> Where an indemnitor has notice of a suit against his indemnitee and has been afforded an opportunity to appear and defend, a judgment therein rendered against the indemnitee, if without fraud or collusion, is conclusive against the indemnitor or respect of all questions therein determined and material in a subsequent suit by indemnitor, whether or not the indemnitor actually appears and defends in the prior suit, and this rule applies irrespective of any agreement making the judgment conclusive. However, the former judgment is not conclusive on the indemnitor where it is the result of fraud or where it was entered by consent or settlement in which the indemnitor fails to acquiesce.

Id. at 28, 268 S.E.2d at 302. The Court went on to note that "[i]ndependently of a written notice, it is clear that an indemnitor can be bound to the indemnitee's judgment if he is brought into the original case as a third-party defendant under Rule 14 of the West Virginia Rules of Civil Procedure." *Id.* at 29, 268 S.E.2d at 302. The Court noted that this was the method chosen by Ryerson in the present case. *Id.*

In so finding, the Court explained that "[t]hese foregoing authorities make it clear that lack of notice by the indemnitee to the indemnitor concerning the injured plaintiff's claim will not defeat an implied indemnity action that is timely filed. If, however, the indemnitor has received no notice and has not been impleaded by the indemnitee into the original suit brought against the indemnitee by the plaintiff, then the indemnitor is not bound by the judgment rendered against the indemnitee in the plaintiff's action." *Id.*

Accordingly, the Circuit Court's finding that State Auto's independent cause of action for indemnification was extinguished when the Plaintiff failed to give notice to the Kaufman Trailer and Al-Ko Kober is plainly wrong. Pursuant to this Court's decision in *Hill*, it is clear that the lack of notice by the indemnitee to the indemnitor concerning an injured plaintiff's claim does not defeat an implied indemnity action that is timely filed. *See id.* at 28-29, 268 S.E.2d at 301-02. Rather, it simply means that if the indemnitor has not received any notice and has not been impleaded by an indemnitee into an original lawsuit brought against the indemnitee by a plaintiff, or in this case involved in a settlement between a plaintiff and the indemnitee, then the indemnitor cannot be bound by the judgment, or in this case the settlement, which resolved the original claim. See *id.* Instead, litigation to establish all of the actionable facts is to take place. See *id.*

The Circuit Court ignored these clear and unambiguous findings when it sought to distinguish the *Hill* decision from the current case by stating, "[t]he reliance by the Plaintiff in *Hill v. Ryerson & Son Inc.*, 268 S.E.2d 296, 165 W. Va. 22 (1980), is misplaced because there was, in fact, a third party complaint filed against the purported indemnitor. The timely filing of an indemnity action meets the notice requirement." Said finding is a glaring misstatement of the Court's decision in *Hill* and completely ignores this Court's holding, which, as noted previously,

found that the authorities that recognized notice and/or the act of impleading an indemnitor into an original lawsuit could bind the indemnitor to the indemnitee's judgment, also made it "clear that lack of notice by the indemnitee to the indemnitor concerning the injured plaintiff's claim will not defeat an implied indemnity action". *Id.* This Court unambiguously rejected the very notice requirement the Circuit Court imposed upon State Auto when the Circuit Court dismissed State Auto's implied indemnification claim.

Additionally, the Circuit Court's reliance on the *Howell v. Luckey*, 205 W. Va. 445, 518 S.E.2d 873 (1999) decision is misplaced given that the Court's decision there addressed only a claim for contribution and not implied indemnification. Indeed, as the Circuit Court, in its Order pointed out, although Plaintiff had initially filed claims for both express or implied indemnification and contribution, Plaintiff withdrew his indemnification claim, proceeding only on the theory of contribution. App. at 70, ¶ 16. This Court specifically stated in the *Howell* decision that "[t]he question presented in this case is whether the failure of a tortfeasor to implead, for purposes of inchoate contribution, a third party not sued by the plaintiff in the underlying case forecloses a separate action for contribution against that third party after judgment had been rendered in the original suit." *Howell*, 205 W. Va. 445, 518 S.E.2d at 875-76. Further, in its decision the Court opined that "a defendant may not pursue a separate cause of action against a joint tortfeasor **for contribution** after judgment has been rendered in the underling case, when that joint tortfeasor was not a party to 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." *Id.* 205 W. Va. 445, 518 S.E.2d at 877. (emphasis supplied) This is different from the proposition set forth in the Circuit Court's order, which fails to accurately reflect the *Howell* decision, which limited its holding only to claims for contribution. *Compare* App. at 70,

¶ 16 to *Howell*, 205 W. Va. 445, 518 S.E.2d at 877. The Circuit Court fails to articulate any valid legal authority that supports the rule of law it pronounced in numbered paragraph 16 of its Order.

Under these circumstances, Kaufman Trailer's and Al-Ko Kober's motion to dismiss should have been denied and litigation to establish all of the actionable facts, pursuant to *Hill*, should have been allowed to proceed.

II. THE CIRCUIT COURT IMPROPERLY DISMISSED THE ACTION IN ITS ENTIRETY WHERE PETITIONER COULD STATE INDEPENDENT CAUSES OF ACTION FOR STRICT LIABILITY AND NEGLIGENCE FOR MONIES IT PAID TO ITS INSURED, RANDALL BUCKLEY DBA RANDY'S CONTRACTING SERVICE.

In addition to maintaining a claim for implied indemnification against Kaufman Trailer and Al-Ko Kober, State Auto, as subrogee of Randall Buckley dba Randy's Contracting Service, alleged and can maintain direct causes of action, based upon any theory of liability Mr. Buckley could have asserted, against Kaufman Trailer and Al-Ko Kober for monies it paid to Mr. Buckley. Notably, however, the Circuit Court dismissed these claims without any explanation whenever it directed the Clerk of the Court to place this matter among the causes ended.

As stated in *Grayam v. Dept. of Health & Human Resources*, 201 W. Va. 444, 498 S.E.2d 12, 16 (1997), the doctrine of subrogation provides an equitable remedy to "'one secondarily liable who has paid the debt of another and to whom in equity and good conscience should be assigned the rights and remedies of the original creditor.'" (quoting *Kittle v. Icard*, 185 W.Va. 126, 130, 405 S.E.2d 456, 460 (1991) (quoting *State Farm Mut. Auto. Ins. Co. v. Foundation Reserve Ins. Co.*, 78 N.M. 359, 363, 431 P.2d 737, 741 (1967)). There, this Court acknowledged that, in other words, as stated in syllabus point four of *Ray v. Donohew*, 177 W.Va. 441, 352 S.E.2d 729 (1986): "'The doctrine of subrogation is that one who has the right to pay, and does

pay, a debt which ought to have been paid by another is entitled to exercise all the remedies which the creditor possessed against that other.' (citing syl. pt. 1, *Bassett v. Streight*, 78 W.Va. 262, 88 S.E. 848 (1916)." *Id. See also Travelers Indem. Co. v. Rader*, 152 W.Va. 699, 703, 166 S.E.2d 157, 160 (1969) ("'subrogation is an equitable right which arises out of the facts and which entitles the subrogee to collect that which he has advanced'") (quoting *Busch v. Home Ins. Co.*, 97 N.J.Super. 54, 56, 234 A.2d 250, 251 (1967)).

Here, Randall Buckley dba Randy's Contracting Service could have asserted claims for strict liability and negligence against Kaufman Trailer and Al-Ko Kober for property damages it sustained as a result of the subject accident. However, pursuant to its policy of insurance issued to Mr. Buckley, State Auto paid Mr. Buckley's property damages claim. As a result, under West Virginia law, State Auto became subrogated to the rights of its insured, Mr. Buckley, and can now assert any causes of action Mr. Buckley could have asserted, himself. State Auto's claims for strict liability and negligence as to the monies it paid to its insured for damages it sustained in the underlying accident are independent causes of action, which its insured could have maintained against Al-Ko Kober and Kaufman Trailer. Accordingly, the Court set forth no basis, and can set forth no basis, for its dismissal of these claims by State Auto.

CONCLUSION

The Circuit Court's order granting dismissal should be reversed, and this matter should be remanded for further proceedings.

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I hereby certify that on this 29th day of August, 2014, true and accurate copies of the foregoing **Petitioner's Brief** and **Appendix of Exhibit** were served via Federal Express in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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