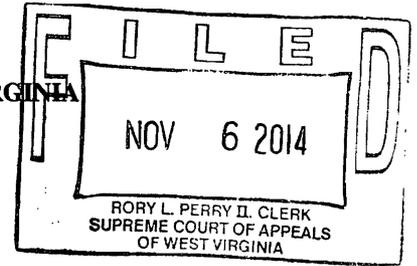


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0556



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

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

V.)

**AL-KO KOBER, AND KAUFMAN
TRAILER,
Respondents.**

Petitioner's Reply Brief

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Co., as subrogee of Randall Buckley, d/b/a Randy's Contracting
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SUMMARY OF ARGUMENT

First, Kaufman Trailer and Al-Ko Kober essentially concede that the Circuit Court improperly dismissed State Auto's claims against them for the sums it paid to its insured, Randy's Contracting, for property damage Randy's Contracting sustained in the subject accident. On appeal, Kaufman Trailer concedes that the "Circuit Court admittedly failed to address such claims in its Order." At no time does Kaufman Trailer advance any argument as to why the Circuit Court's dismissal of State Auto's claims for the sums it paid to Randy's Contracting was proper. Further, Al-Ko Kober fails to even address State Auto's second assignment of error in its entirety. Pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure if a respondent's brief fails to respond to an assignment of error, then the Court will assume that the respondent agrees with the petitioner's view of the issue. Accordingly, for the reasons set forth herein and in Petitioner's Brief, the Circuit Court's *sua sponte* dismissal of these claims was plainly wrong.

Second, any arguments advanced by Kaufman Trailer and Al-Ko Kober to justify the Circuit Court's dismissal of State Auto's claim for recovery of monies it paid to Mr. Coleman against Kaufman Trailer and Al-Ko Kober under the theory of implied indemnification should not be considered by this Court because they have been raised for the first time on appeal. However, even if this Court should choose to consider these arguments, this Court should reject the same because State Auto's subrogor, Randy's Contracting, was in the chain of distribution. Randy's Contracting is a commercial entity who was the end-user of a defectively designed, tested, manufactured and distributed product. At no time in their briefs, does either Kaufman Trailer or Al-Ko Kober point to any West Virginia law that would indicate Randy's Contracting's liability and/or right to implied indemnity are different from that of any other individual or entity in the chain of distribution. This Court already decided this issue in *Dunn v.*

Kanawha Cnty. Bd. of Educ., 194 W. Va. 40, 46, 459 S.E.2d 151, 157 (1995) when it recognized the Board of Education's (an apparent end-user) right to maintain such claim despite a good faith settlement between the plaintiffs and the manufacturers.

Finally, Kaufman Trailer's and Al-Ko Kober's arguments that the Circuit Court's properly considered equitable factors when dismissing State Auto's implied indemnity claim for monies it paid to Mr. Coleman is clearly wrong and is contrary to the weight of West Virginia authority. It is evident from this Court's decision in *Hill v. Ryerson & Son, Inc.*, 165 W. Va. 22, 29, 268 S.E.2d 296, 300 (1980), that consideration was given to these notions of purported inequity, but were found to be outweighed by an indemnitee's right to seek implied indemnification in a products liability matter.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner's statement regarding oral argument and decision in this matter remains unchanged from its Petition, and therefore, Petition reincorporates its statement in this regard as set forth in its Petition.

ARGUMENT

- I. BOTH KAUFMAN TRAILER AND AL-KO KOBER CONCEDE THAT THE CIRCUIT COURT IMPROPERLY DISMISSED STATE AUTO'S CLAIMS AGAINST THEM FOR DAMAGES SUSTAINED BY ITS INSURED, RANDY'S CONTRACTING, FOR WHICH STATE AUTO PAID.**

It is important to note that, at the Circuit Court level, Kaufman Trailer did not move for dismissal of State Auto's claims for the sums it paid to Randy's Contracting for property damage. *See generally*, App. at 32-40. Further, there can be no doubt that Kaufman Trailer was aware that State Auto asserted claims for these sums as Kaufman Trailer acknowledged these claims in its motion to dismiss. *Id.* at 32-33. Similarly, while Al-Ko Kober requested that State

Auto's claims for damages paid to James M. Coleman be dismissed, at no time did Al-Ko Kober advance any argument in support of dismissal of State Auto's claims for the sums paid to Randy's Contracting for property damage. *See generally*, App. at 41-52.¹ Notably, despite the absence of these arguments by either Kaufman Trailer and/or Al-Ko Kober, State Auto explained to the Circuit Court that it was authorized under West Virginia law to maintain these direct causes of action. *See* App. at 8. Under these circumstances, the Circuit Court's *sua sponte* dismissal of State Auto's claims for the sums it paid to Randy's Contracting for property damage, without any explanation, was erroneous and plainly wrong.

The Circuit Court's error in this regard is made even clearer on appeal. There, Kaufman Trailer concedes that the "Circuit Court admittedly failed to address such claims in its Order." *See* Kaufman Trailer's Response to Petitioner's Brief at 12. At no time does Kaufman Trailer advance any argument as to why the Circuit Court's dismissal of State Auto's claims for the sums it paid to Randy's Contracting was proper. *Id.* at 12-13. Rather, Kaufman Trailer notes only that it is unclear whether State Auto's claims in this regard encompass injuries to the product itself, or whether said claims encompass injuries to other property owned by State Auto's insured. *Id.* This was not an issue addressed to the Circuit Court below²; and obviously,

¹ State Auto acknowledges that, below, Al-Ko Kober also argued in its Motion to Dismiss that the claims against it should be dismissed due to alleged spoliation of evidence. *See* App. at 46-51. Notably, however, this argument was not addressed by the Circuit Court in its May 1, 2014, Order. *Id.* at 66-71. Further, Al-Ko Kober has raised no assignments of error in this regard. As a result, said argument is not relevant to the assignments of error, which are currently before this Court. At no time below did Al-Ko Kober argue that West Virginia law precluded State Auto from maintaining claims for the sums paid to Randy's Contracting for property damage.

² Even if this argument raised some grounds for why the Circuit Court's dismissal of State Auto's claim for monies to Randy's Contracting was proper, which it does not, it could not be considered by this Court. It is a longstanding common law rule of this Court that it will not consider arguments or pass upon issues raised for the first time on appeal. *State v. Hughes*, 225 W. Va. 218, 691 S.E.2d 813, 825 (2010) (citing *Mayhew v. Mayhew*, 205 W.Va. 490, 506, 519 S.E.2d 188, 204 (1999)); *State v. DeGraw*, 196 W. Va. 261, 272, 470 S.E.2d 215, 226 (1996) ("We agree with the State's contention that the Appellant's claim of error under Rule 404(b) is precluded from appellate review based on his failure to state this authority as ground for his objection before the trial court."); Syl. pt. 17, in part, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974) ("Errors assigned for the first time in an

the scope of injury and/or damages sustained by State Auto in this regard is not grounds for dismissal of these claims, but rather matters for discovery.

West Virginia is a notice pleadings state, and, State Auto included language in its Complaint setting forth its right, as subrogee of Randall Buckley dba Randy's Contracting Service, to maintain direct causes of action against Kaufman Trailer and Al-Ko Kober for monies it paid to its insured, effectively putting Kaufman Trailer and Al-Ko Kober on notice of said claims. *See Tribeca Lending Corp. v. McCormick*, 231 W. Va. 455, 745 S.E.2d 493, 504-505 (2013) (citing *Forshey v. Jackson*, 222 W. Va. 743, 750, 671 S.E.2d 748, 755 (2008) (““Complaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure.” *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W. Va. 221, 488 S.E.2d 901 (1997) (quoting *State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc.*, 194 W.Va. [770], 776, 461 S.E.2d [516], 522 [(1995)]).”); *Accord Whorton v. Malone*, 209 W.Va. 384, 390 n. 6, 549 S.E.2d 57, 63 n. 6 (2001); *See also Bowers v. Wurzburg*, 205 W.Va. 450, 462, 519 S.E.2d 148, 160 (1999) (commenting that, “[g]enerally, the allegations contained in a complaint are to consist of ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ W. Va. R. Civ. P. 8(a)(1), in order to place a potential defendant on notice as to the nature of the claim(s) asserted against him/her” and noting that, “[i]n construing the adequacy of a complaint, the allegations contained therein are viewed liberally in favor of the plaintiff” (citations omitted))). The Circuit Court cannot simply choose to ignore the words that State Auto included in its complaint, which clearly evidenced that it was

appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court if objected to there.”); *see also Shaffer v. Acme Limestone Co., Inc.*, 206 W. Va. 333, 349 n. 20, 524 S.E.2d 688, 704 n. 20 (1999).

seeking recoupment for monies it paid to its insured. *See Tribeca Lending Corp. v. McCormick*, 231 W. Va. 455, 745 S.E.2d at 504-505.

Additionally, it should be noted that, in its Response, Al-Ko Kober fails to even address State Auto's second assignment of error in its entirety. *See generally*, Al-Ko Kober's Response to Petitioner's Brief. At no time in its response does Al-Ko Kober explain why the Circuit Court's dismissal of State Auto's independent causes of action for strict liability and negligence for monies it paid to its insured was proper. *See generally, id.* Pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure, the argument section of a respondent's brief must specifically respond to each assignment of error, to the fullest extent possible. W. Va. R. App. P. 10(d). If a respondent's brief fails to respond to an assignment of error, then "the Court will assume that the respondent agrees with the petitioner's view of the issue." *Id.* Given Al-Ko Kober's failure to respond in any way to State Auto's second assignment of error clearly set forth in its Petition, this Court must assume that Al-Ko Kober agrees with State Auto's view of this issue. Under these circumstances, both Kaufman Trailer and Al-Ko Kober concede that the Circuit Court improperly dismissed State Auto's claims against them for damages sustained by its insured for which State Auto paid.

Accordingly, there can be no doubt that, when State Auto paid Randy's Contracting's property damages claim pursuant to its policy of insurance issued to Randy's Contracting, under West Virginia law, State Auto became subrogated to the rights of its insured, Randy's Contracting; and as a result, State Auto can now assert, and did assert in its Complaint, causes of action Randy's Contracting could have asserted, itself. *See Grayam v. Dept. of Health & Human Resources*, 201 W. Va. 444, 498 S.E.2d 12, 16 (1997). Again, the Circuit Court's *sua sponte*

dismissal of these claims was clearly wrong. This Court must reverse this decision of the Circuit Court, and remand this matter for further proceedings.

II. STATE AUTO HAS A RIGHT TO IMPLIED INDEMNITY AGAINST KAUFMAN TRAILER AND AL-KO KOBER FOR MONIES IT PAID ON BEHALF OF ITS INSURED TO MR. COLEMAN.

A. KAUFMAN TRAILER AND AL-KO KOBER IMPROPERLY RAISE CHALLENGES TO STATE AUTO'S COMPLAINT FOR THE FIRST TIME ON APPEAL.

Much of Respondents Kaufman Trailer's and Al-Ko Kober's Responses to Petitioner's Brief consist of irrelevant arguments introduced for the purpose of diverting this Court's attention from the original issue decided by the Circuit Court. The West Virginia Supreme Court of Appeals' law is clear in this regard. As a general rule, this Court will not pass upon an issue raised for the first time on appeal. *State v. Hughes*, 225 W. Va. 218, 691 S.E.2d 813, 825 (2010) (citing *Mayhew v. Mayhew*, 205 W.Va. 490, 506, 519 S.E.2d 188, 204 (1999); *State v. DeGraw*, 196 W. Va. 261, 272, 470 S.E.2d 215, 226 (1996) ("We agree with the State's contention that the Appellant's claim of error under Rule 404(b) is precluded from appellate review based on his failure to state this authority as ground for his objection before the trial court."); Syl. pt. 17, in part, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974) ("Errors assigned for the first time in an appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court if objected to there.")); *see also Shaffer v. Acme Limestone Co., Inc.*, 206 W. Va. 333, 349 n. 20, 524 S.E.2d 688, 704 n. 20 (1999).

Here, the only other question before this Court is whether the Circuit Court applied an improper "notice requirement" when dismissing State Auto's claim for implied indemnity. However, both Kaufman Trailer's and Al-Ko Kober's Responses set forth a number of additional grounds for dismissing State Auto's Complaint, which were not raised below, and therefore,

were never considered by the Circuit Court. In their motions to dismiss, Kaufman Trailer and Al-Ko Kober made a single argument for dismissal of State Auto's complaint for which the Court considered.³ Their argument was that State Auto's claim for the sums paid to James M. Coleman must be dismissed because West Virginia law does not recognize a stand-alone claim for contribution. Under the sound principles of law set forth by this Court, on appeal, when resolving the issue of whether the Circuit Court applied an improper "notice requirement" when dismissing State Auto's claim for implied indemnity, this Court must decline to address any new arguments advanced by Kaufman Trailer and Al-Ko Kober that were not raised below. *Id.* Accordingly, these new arguments set forth by Kaufman Trailer and Al-Ko Kober were waived.

In *State v. Hughes*, the defendant argued that the circuit court should have struck a juror, Dorothy Alpaugh, for cause as a result of a statement she made suggesting that a person charged with a crime is probably guilty. *Id.* However, the State pointed out that the defendant did not seek to have Ms. Alpaugh struck because of this statement at the circuit court level. *Id.* The West Virginia Supreme Court of Appeals noted that the record in the case indicated that the defendant sought to have Ms. Alpaugh removed for cause on the grounds that she knew a potential witness that was going to be called by the State. *Id.* As such, this Court concluded that because the defendant was attempting to assert, for the first time on appeal, a ground for striking Ms. Alpaugh that was not asserted below, it would not address the new basis for striking her. *Id.* As noted previously, Kaufman Trailer and Al-Ko Kober made but one argument below upon which to dismiss State Auto's complaint. Accordingly, like in *State v. Hughes*, any arguments set forth in its appellate brief expanding beyond this argument must not be considered by this

³ State Auto acknowledges that, below, Al-Ko Kober also argued in its Motion to Dismiss that the claims against it should be dismissed due to alleged spoliation of evidence. *See* App. at 46-51. Notably, however, this argument was not addressed by the Circuit Court in its May 1, 2014, Order. *Id.* at 66-71. Further, Al-Ko Kober has raised no assignments of error in this regard. As a result, said argument is not relevant to the assignments of error, which are currently before this Court.

Court. As such, those arguments set forth in Sections IV.B.1. through 3 of Kaufman Trailer's Response and the single argument set forth in Al-Ko Kober's Response should not be considered by this Court. However, should the Court stray from its longstanding law in this regard, and consider some or all of these arguments, then the Court should also consider the following in opposition to the same.

B. RANDY'S CONTRACTING WAS THE ENDUSER OF THE DEFECTIVE PRODUCT.

Randy's Contracting was in the chain of distribution. Indeed, Randy's Contracting is a commercial entity who was the end-user of a defectively designed, tested, manufactured and distributed product. At no time in their briefs, does either Kaufman Trailer or Al-Ko Kober point to any West Virginia law that would indicate Randy's Contracting's liability and/or right to implied indemnity are different from that of any other individual or entity in the chain of distribution. As Kaufman Trailer aptly points out in its Response to State Auto's brief, the right to implied indemnity extends to those in the product's chain of distribution. *See Kaufman Trailers Response to Petitioner's Brief at 5-6 (citing Hill v. Joseph T. Ryerson & Son, 165 W. Va. 22, 27, 268 S.E.2d 296, 301 (1980); Dunn v. Kanawha Cnty. Bd. of Educ., 194 W. Va. 40, 46, 459 S.E.2d 151, 157 (1995))*. In that regard, Randy's Contracting is no different than Kaufman Trailer who asserted its own claim for implied indemnity in its cross-claim against Al-Ko Kober and all other defendants. *See App. at 18-19*. Accordingly, just as Kaufman Trailer asserts that it is entitled to implied indemnity, Randy's Contracting, who was in the chain of distribution, is entitled to implied indemnity.

Randy's Contracting was further exposed to liability through no fault of its own as the end-user of a defectively designed, tested, manufactured and distributed product when said product rendered its combination of vehicles, *i.e.*, the truck and trailer, unsafe, endangering other

persons. *See* W. Va. Code § 17C-15-1(a). In West Virginia, “[i]t is a misdemeanor for any person to drive or move or for the owner to cause or knowingly permit on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person.”

Id. Under West Virginia law, where a statute imposes a duty on a person for the protection of others, such law is a public safety statute and a violation of such a statute is prima facie evidence of negligence. Syl. pt. 7, *Shaffer v. Acme Limestone Co., Inc.*, 206 W. Va. 333, 524 S.E.2d 688 (1999). Here, unbeknownst to Randy’s Contracting and its employees, the mere operation of the combination of vehicles on the highway subjected Randy’s Contracting to liability. However, the defective product, which caused the subject accident, was not the fault of Randy’s Contracting, but rather that of Kaufman Trailer and Al-Ko Kober.

The defective axle in this case is not unlike failing brakes or self-accelerating vehicles, which result from defectively designed, tested, manufactured and distributed products. All such products subject their end-users to liability by third-parties, given their placement in the chain of distribution, even though the unsafe condition is created by no fault of their own, but rather the act of another. Said claims fall squarely within and were contemplated by the implied indemnity cause of action recognized in *Hill v. Joseph T. Ryerson & Son*, 165 W. Va. 22, 268 S.E.2d 296 (1980). There, the Court held in syllabus point 2 that, “the general principle of implied indemnity arises from equitable considerations. At the heart of the doctrine is the premise that the person seeking to assert implied indemnity the indemnitee has been required to pay damages caused by a third party the indemnitor. **In the typical case**, the indemnitee is made liable to the injured party because of some positive duty created by statute or the common law, but the actual cause of the injury was the act of the indemnitor.” Syl. pt. 2, *Hill*, 165 W. Va. 22, 268 S.E.2d

296 (Emphasis supplied); *see also Dunn v. Kanawha County Bd. of Educ.*, 194 W. Va. 40, 459 S.E.2d 151 (1995). The present case is the typical case.

In fact, this Court has already addressed this very issue in *Dunn v. Kanawha County Bd. of Educ.*, 194 W. Va. 40, 459 S.E.2d 151 (1995).⁴ There, plaintiffs were students, parents, teachers, and others who alleged injuries resulting from exposure to toxic substances at Andrew Jackson Junior High School, in Cross Lanes, West Virginia. *Id.* 194 W. Va. 40, 459 S.E.2d at 154. The plaintiffs asserted numerous theories of liability against various defendants, including negligence, willful, wanton, and reckless misconduct, breach of warranty, strict product liability, and deliberate intent to injure an employee. *Id.* However, the focus of the certified question this Court considered was the plaintiffs' product liability claim against Velsicol Chemical Corporation. *Id.* In addition to suing Velsicol, the plaintiffs also pursued product liability claims against others in the chain of distribution, including distributors and applicators of chlordane, and apparent end-users such as the Kanawha County Board of Education and Robert Klatzkin. The Board of Education and Mr. Klatzkin, a former principal at Andrew Jackson Junior High School, contended that the defendant manufacturer Velsicol was solely responsible for damages caused by its defective product. *Id.*

There, the plaintiffs had reached a settlement with Velsicol. *Id.* Velsicol intended for the settlement, reached prior to a judicial determination of liability, to extinguish all potential claims arising from this lawsuit, including claims for implied indemnity. *Id.* Velsicol's settlement agreement did not include a release from liability for the non-settling defendants in the chain of

⁴ Although State Auto raises the *Dunn* decision for the first time on appeal, it is important to note that at no time prior to this appeal did either Kaufman Trailer or Al-Ko Kober challenge State Auto's right to assert an implied indemnity claim. As noted *supra*, II.A., this Court should not consider Sections IV.B.1. through 3 of Kaufman Trailer's Response and the single argument set forth in Al-Ko Kober's Response. Nevertheless, should this Court choose to consider these arguments, it should also consider the rebuttal arguments of State Auto, including the *Dunn* decision.

distribution who wished to seek indemnification from Velsicol if they were subsequently made to pay damages to the plaintiffs. *Id.* The plaintiffs and Velsicol contended that the fact that their settlement was in good faith extinguished all contribution and indemnification claims the non-settling defendants might wish to assert against Velsicol. *Id.* 194 W. Va. 40, 459 S.E.2d at 155. The Board of Education, the apparent end-user in this matter, argued, and this Court agreed, that the plaintiffs and Velsicol, much like Kaufman Trailer and Al-Ko Kober in this matter, “confused the issues by treating contribution and indemnification as identical legal concepts, when, in fact, ‘the concept of indemnification plays a unique role and is clearly distinct from contribution in product liability cases.’” *Id.*

This Court held that “indemnification and contribution are separate and distinct legal concepts.” *Id.* “The idea of indemnity implies a primary or basic liability in one person, though a second person is also for some reason liable with the first, or even without the first, to a third person. Discharge of the obligation by the second person leaves him with a right to secure compensation from the one who, as between themselves, is primarily liable.” *Id.* The Court concluded that “[i]n a multiparty product liability lawsuit, a good faith settlement between the plaintiff(s) and the manufacturing defendant who is responsible for the defective product will not extinguish the right of a non-settling defendant to seek implied indemnification when the liability of the non-settling defendant is predicated not on its own independent fault or negligence.” *Id.* at 194 W. Va. 40, 459 S.E.2d at 158. In so finding, the Court reasoned that the argument that both contribution and implied indemnity claims are extinguished by a good faith settlement ignores the substantive differences between the two legal concepts. *Id.* 194 W. Va. 40, 459 S.E.2d at 157. The Court explained that “[w]hile contribution permits one tortfeasor to shift a part of the loss to another, the purpose of indemnity is to shift the whole loss.” *Id.*

Here, State Auto, subrogee of Randy's Contracting, it appears not unlike the Board of Education in *Dunn*, has asserted a claim for implied indemnification where its liability is not predicated on its own independent fault or negligence. In *Dunn*, this Court recognized the Board of Education's right to assert such a claim. Moreover, this Court concluded that the indemnitor, Velsicol, could not escape liability under said theory by negotiating a settlement with the plaintiffs. This case is no different. Kaufman Trailer and Al-Ko Kober cannot escape liability under the implied indemnity theory in this products liability matter.

C. UNDER *HILL V. RYERSON & SON, INC.*, EQUITABLE CONSIDERATIONS HAVE NO IMPACT ON A PARTY'S RIGHT TO IMPLIED INDEMNITY IN PRODUCTS LIABILITY CASES.

The purported inequity considered by the Circuit Court in having Mr. Coleman to appear for a trial in this matter, and/or asserting a claim against Kaufman Trailer and Al-Ko Kober after a settlement was reached with Mr. Coleman has no bearing on whether State Auto may assert a claim for implied indemnity with regard to Kaufman Trailer's and Al-Ko Kober's defective product. The Circuit Court's consideration of these factors is against the clear weight of West Virginia authority. The Circuit Court's consideration of these factors was improper and only compounded the Circuit Court's erroneous dismissal of State Auto's Complaint. It is evident from this Court's decision in *Hill v. Ryerson & Son, Inc.*, 165 W. Va. 22, 29, 268 S.E.2d 296, 300 (1980), that consideration was given to these notions of purported inequitable nesses, but were found to be outweighed by an indemnitee's right to seek implied indemnification in a products liability matter.

In Responses to State Auto's Brief, Kaufman Trailer and Al-Ko Kober devote a number of pages to explaining the applicability of the principles set forth in *Board of Education of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 390 S.E.2d 796 (1990),

Howell v. Luckey, 205 W. Va. 445, 318 S.E.2d 873, 877 (1999) and *Charleston Area Medical Center, Inc. v. Parke Davis*, 217 W. Va. 15, 614 S.E.2d 15 (2005) to contribution where one party is forced to pay more than his *pro tanto* share of the obligation. See Al-Ko Kober's Response to Petitioner's Brief at 4-11; see also Kaufman Trailer's Response to Petitioner's Brief. However, they go one step further and argue those principles are equally applicable to claims for implied indemnity and this matter. *Id.* In so arguing, Kaufman Trailer and Al-Ko Kober loses sight of the uniqueness of the implied indemnity claim, especially in products liability matters. West Virginia law has recognized that individuals and/or entities in the chain of distribution have a right to implied indemnity where such individual or entity has been rendered liable through no fault of his/her/its own, but rather the actions of another. The *Hill* and *Dunn* decisions make it clear that the principles set forth in *Zando*, *Howell* and *Charleston Area Medical Center* are not applicable in products liability matters.

Pursuant to this Court's decision in *Hill*, 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. *Hill*, at 28-29, 268 S.E.2d at 301-02. Instead, litigation to establish all of the actionable facts is to take place. See *id.* In so finding, it is evident that this Court considered any potential inequity that may result from allowing an implied indemnity claim to be filed after resolution of an underlying claim. By finding that if no notice has been given to the potential indemnitor, then additional litigation is to occur, this Court found that the rights of innocent indemnitees to maintain a claim for implied indemnity outweighs any purported inequity to either the potential indemnitor or the plaintiff in the underlying litigation. This Court recognized

the importance of holding innocent indemnitees harmless for the negligent actions of others so much so, that, in products liability cases, it established implied indemnity as a separate cause of action that can be asserted either within the underlying action or once it has been resolved. In fact, to conclude otherwise would render this Court's decision in *Hill* meaningless.

Indeed, the Court's consideration of these concerns is made even clearer in *Dunn*, which cites to the *Hill* decision. There, the Court drew a clear distinction between contribution and implied indemnity, noting that such equitable considerations have no bearing in implied indemnity matters. See *Dunn v. Kanawha Cnty. Bd. of Educ.*, 194 W. Va. 40, 46, 459 S.E.2d 151, 157 (1995). As noted previously, in *Dunn*, this Court held that "indemnification and contribution are separate and distinct legal concepts." *Id.* at 194 W. Va. 40, 459 S.E.2d at 155. The Court explained that "[w]hile contribution permits one tortfeasor to shift a part of the loss to another, the purpose of indemnity is to shift the whole loss." *Id.* at 194 W. Va. 40, 459 S.E.2d at 157. The Court noted the following:

a fundamental distinction between indemnity and contribution is the absence of fault on the part of the party who seeks indemnification. Contribution claims involve joint tortfeasors who share some degree of fault; their liability is premised upon independent negligent acts. However, the only real tortfeasor in an implied indemnity action is the indemnitor, who commits the tort which causes injury.

Id. The Court concluded that indemnification is a remedy available to innocent parties who have been made to pay for injuries caused by others. As such, it would defeat all notions of fairness and equity to deprive an innocent party of the means to seek reimbursement from a culpable manufacturer simply because that manufacturer reached a "good faith" settlement with the injured plaintiff. *Id.* at 194 W. Va. 40, 459 S.E.2d at 158. Under these circumstances, it is evident the Court has weighed the equitable considerations identified by *Kaufman Trailer* and *Al-Ko Kober*, finding they have no bearing on an innocent parties right to seek implied

indemnification. If anything, this Court has concluded such considerations cut in favor of the indemnitee.

As such, neither Defendant Kaufman nor Al-Ko Kober were entitled to dismissal of State Auto's Complaint. As evidence above and in Petitioner's brief, State Auto can make a claim for implied indemnity and the Circuit Court erred when applying equitable principles to said claim.

CONCLUSION

For all the foregoing reasons and for those reasons set forth in Petitioner's Brief, the Circuit Court's order granting dismissal should be reversed, and this matter should be remanded for further proceedings. State Auto, as subrogee of Randall Buckley dba Randy's Contracting Service, can 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 independent causes of action, which its insured could have maintained against Kaufman Trailer and Al-Ko Kober, directly, and should not have been dismissed by this Court. Second, State Auto can also maintain a claim for implied indemnity for the monies it paid to Mr. Coleman for injuries he sustained in the accident. Neither Kaufman Trailer nor Al-Ko Kober may defeat this later action asserting said claim 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. Indeed, implied indemnity in a products liability matter is a separate and independent claim that may be maintained in its own civil litigation.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November, 2014, true and accurate copies of the foregoing **Petitioner's Reply Brief** 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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