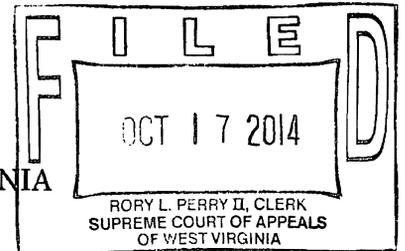


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0556



STATE AUTO PROPERTY AND CASUALTY
INSURANCE CO.,
Petitioner/Plaintiff Below,

vs.

AL-KO KOBER and KAUFMAN TRAILER,
Respondents/Defendants Below.

*Appeal from the April 30, 2014, Order of the Circuit Court of
Hampshire County, West Virginia
In Civil Action No. 13-C-113
Granting Defendants' Motions to Dismiss the Complaint*

BRIEF OF RESPONDENT, KAUFMAN TRAILERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

I. STATEMENT OF THE CASE1

 A. PROCEDURAL HISTORY1

 B. STATEMENT OF FACTS2

II. SUMMARY OF THE ARGUMENT.....3

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION4

IV. ARGUMENT4

 A. STANDARD OF REVIEW4

 B. THE CIRCUIT COURT CORRECTLY APPLIED THE LAW IN DISMISSING STATE
 AUTO’S CLAIMS FOR THE “MONIES PAID” TO JAMES COLEMAN5

 1. RANDY’S CONTRACTING DOES NOT HAVE A RIGHT OF IMPLIED
 INDEMNITY AGAINST KAUFMAN TRAILER OR AL-KO KOBER UNDER
 THE FACTS PLED IN THE COMPLAINT5

 2. THE LACK OF MUTUAL DUTIES TO THE VICTIM CIRCUIT COURT
 CORRECTLY APPLIED EQUITABLE PRINCIPLES RELATED TO NOTICE
 AND SETTLEMENT AND DISMISSED STATE AUTO’S COMPLAINT9

 3. THE CIRCUIT COURT CORRECTLY APPLIED EQUITABLE PRINCIPLES
 RELATED TO NOTICE AND SETTLEMENT AND DISMISSED STATE
 AUTO’S COMPLAINT11

 C. STATE AUTO’S CLAIMS FOR PROPERTY DAMAGE SUSTAINED BY RANDY’S
 CONTRACTING12

V. CONCLUSION.....13

VI. CERTIFICATE OF SERVICE14

TABLE OF AUTHORITIES

Cases

<i>Appalachian Regional Healthcare, Inc. v. West Virginia Dept. of Health and Human Resources</i> , 232 W. Va. 388, 752 S.E.2d 419 (2013)	4
<i>Barnett v. Wolfolk</i> , 149 W. Va. 246, 140 S.E.2d 466 (1965).....	5
<i>Capitol Fuels, Inc. v. Clark Equip. Co.</i> , 181 W. Va. 258, 382 S.E.2d 311 (1989).....	12
<i>Charleston Area Medical Center v. Parke-Davis</i> , 217 W. Va. 15, 614 S.E.2d 15 (2005)	1, 11
<i>Dunn v. Kanawha Cnty. Bd. of Educ.</i> , 194 W. Va. 40, 459 S.E.2d 151 (1995)	5-6
<i>Gentry v. Mangum</i> , 195 W. Va. 512, 466 S.E.2d 171 (1995).....	4
<i>Harvest Capital v. W. Virginia Dep't of Energy</i> , 211 W. Va. 34, 560 S.E.2d 509 (2002)	10
<i>Hill v. Joseph T. Ryerson & Son</i> , 165 W.Va. 22, 268 S.E.2d 296 (1980)	6-7, 9
<i>Hoover v. Moran</i> , 222 W. Va. 112, 662 S.E.2d 711 (2008) (<i>per curiam</i>).....	4
<i>Howell v. Lucky</i> , 205 W. Va. 445, 518 S.E.2d 873 (1999).....	2, 11
<i>Morningstar v. Black & Decker Mfg. Co.</i> , 162 W.Va. 857, 253 S.E.2d 666 (1979).....	6
<i>Murphy v. Smallridge</i> , 196 W. Va. 35, 468 S.E.2d 167 (1996).....	5
<i>Schmehl v. Helton</i> , 222 W. Va. 98, 662 S.E.2d 697 (2008).....	5
<i>Sitzes v. Anchor Motor Freight, Inc.</i> , 169 W.Va. 698, 289 S.E.2d 679 (1982).....	11
<i>Star Furniture Co. v. Pulaski Furniture Co.</i> , 171 W.Va. 79, 297 S.E.2d 854 (1982).....	12
<i>State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc.</i> , 194 W.Va. 770, 461 S.E.2d 516 (1995).....	4
<i>Sydenstricker v. Unipunch Products, Inc.</i> , 169 W. Va. 440, 288 S.E.2d 511 (1982).....	9
<i>W.Va. Human Rights Comm'n v. Garretson</i> , 196 W. Va. 118, 468 S.E.2d 733 (1996).....	4

Other Authorities

Restatement (First) of Restitution § 96.....	9
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I. STATEMENT OF THE CASE.

Kaufman Trailers of N.C., Inc. (“Kaufman”),¹ by and through counsel, files the following in response to the Petition for Appeal and Brief of Appellant, State Auto Property and Casualty Co.

A. PROCEDURAL HISTORY.

On August 5, 2013, State Auto Property and Casualty Company (“State Auto”) filed a subrogation action in the Circuit Court of Hampshire County, West Virginia. Appx. 1, 72. In its Complaint, State Auto sought to assert via subrogation strict liability and negligence claims against Kaufman and Al-Ko Kober (“Al-Ko”) for “its monies paid” to James M. Coleman (“Coleman”) and Randy’s Contracting Service (“Randy’s Contracting”). Appx. 4-5 (*Complaint*, ¶¶ 15, 20). State Auto did not specify in the Complaint whether it was making such claims pursuant to the doctrine of implied indemnity or the doctrine of inchoate contribution. *Id.*

State Auto seeks relief from the April 30, 2014, Order of the Circuit Court of Hampshire County, West Virginia, granting the Defendants’ Motions to Dismiss. Appx. 67-71. In its Order, the Circuit Court correctly determined that, pursuant to this Court’s in *Charleston Area Medical Center v. Parke-Davis*, 217 W. Va. 15, 614 S.E.2d 15 (2005) (“*CAMC*”), State Auto could not pursue a claim for inchoate contribution. Appx. 69. The Court then examined State Auto’s alternative claim (raised for the first time in its Response to the Motions to Dismiss) that it was pursuing its insured, Randy’s Contracting’s, claim for implied indemnity against the Defendants and correctly determined that the claims against the Defendants were not true indemnity claims. *Id.* at 69-71. Rather, the Circuit Court correctly analyzed this case under the same equitable principles applicable to an attempt one alleged tortfeasor to obtain common law contribution from another alleged tortfeasor in line with this Court’s opinions in *CAMC* and

¹ Kaufman Trailer is not a legal entity. The Answer and Motion to Dismiss were filed in the name of Kaufman Trailers of N.C., Inc., out of an abundance of caution. Kaufman reserved the right to make an appropriate motion of substitution should Plaintiff provide further details from which the appropriate intended entity could be determined.

Howell v. Lucky, 205 W. Va. 445, 518 S.E.2d 873 (1999). *Id.* Based upon this Court's opinions in *CAMC* and *Howell*, the Circuit Court dismissed State Auto's Complaint for failure to give notice of the claims for productive defect prior to its settlement with Mr. Coleman and the equitable considerations against allowing such a claim to go forward.

On appeal, State Auto now seeks to have this Honorable Court overturn that order and allow it to proceed to trial on what it calls an implied indemnity claim against the Defendants. As noted herein, the Circuit Court's decision to dismiss the instant Complaint was correct and must be upheld on appeal.

B. STATEMENT OF FACTS.

The instant action revolves around a motor vehicle accident that occurred on or about August 8, 2011. Appx. 1-2 (*Complaint*, ¶¶ 5-9). State Auto alleges that, on that date, an employee of Randy's Contracting was operating a company truck on U.S. Route 50 in the vicinity of Shanks, West Virginia and pulling a "2009 Kaufman utility trailer" with two lawn tractors on it. Appx. 2, ¶¶ 5-6. State Auto alleges that the trailer was manufactured by Kaufman and the axles were believed to have been manufactured by Al-Ko Kober. Appx. 2, ¶ 6.

In its Complaint, State Auto claimed that the trailer lost a wheel when the axle failed and the trailer veered into the oncoming lane of traffic, colliding with the vehicle being operated by James M. Coleman. Appx. 2, ¶¶ 7-8. Mr. Coleman sustained serious physical injuries and property damage as a result of the accident of August 8, 2011. Appx. 2, ¶ 9.

The gravamen of State Auto's Complaint is that, pursuant to a policy of liability insurance purchased by Randy's Contracting, it paid sums to James M. Coleman "for the property damage and personal injury damages incurred by Mr. Coleman." Appx. 3, ¶ 10, 12. In other words, State Auto settled **pre-suit** Mr. Coleman's claim against Randy's Contracting

related to the auto accident and now seeks to recove “its monies paid” to Coleman and Randy’s Contracting from Kaufman and Al-Ko. Appx. 4-5, ¶¶ 15, 20. State Auto alleges claims for strict liability, asserting that the axle on the subject Kaufman trailer “was defectively designed, tested, manufactured, and distributed in the sense that it was not reasonably safe for its intended use and unreasonably dangerous at the time it was made.” Appx. 3-4, ¶¶ 14, 17-18.

State Auto’s claim to a cause of action against the named Defendants was entirely based upon its purported right to subrogation in place of and with the same rights as Randy’s Contracting and upon its payment of sums to Mr. Coleman and Randy’s Contracting for the damage allegedly sustained in the accident of August 8, 2011. Appx. 4-5, ¶¶ 10, 15, 20.

II. SUMMARY OF THE ARGUMENT.

The Circuit Court correctly dismissed State Auto’s Complaint in this matter consistent with the equitable principles outlined by this Court in *Howell* and *CAMC*. Though State Auto takes issue with the Circuit Court’s reasoning, the ultimate decision was correct. When analyzed at its core, State Auto’s Complaint is nothing more than a claim by one alleged tortfeasor against another alleged tortfeasor. Contrary to its representation to this Court, State Auto did not allege the necessary elements of an implied indemnity claim. State Auto does not assert that it’s insured was required pursuant to some non-delegable duty to pay damages alleged caused by the Defendants. Instead, State Auto, on behalf of its insured, voluntarily paid a claim that its insured negligently caused the victim’s injuries. Moreover, the Circuit Court correctly analyzed the equitable considerations common to both implied indemnity and contribution claims to reach the conclusion that State Auto’s lack of notice to the Defendants was fatal to its claims. Finally, to the extent that State Auto is making a claim for purely economic and property damages sustained by its insured, such claims were not detailed in the Complaint and this Defendant

reserves the right to challenge the same upon clarification. For these reasons, the Circuit Court did not err when it dismissed the Complaint against these Defendants.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.

Should the Court desire to hear oral argument, this Respondent submits that argument would be most appropriate under Rule 19 of the West Virginia Rules of Appellate Procedure. Each of the assignments of error revolves around the exercise of judicial discretion and application of settled law, as referenced in Rule 19, and a Memorandum Decision is appropriate under the circumstances.

IV. ARGUMENT.

A. STANDARD OF REVIEW.

“Appellate review of a circuit court’s order granting a motion to dismiss a complaint is *de novo*.” Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995). *See also*, Syl. Pt. 1, *Appalachian Regional Healthcare, Inc. v. West Virginia Dept. of Health and Human Resources*, 232 W. Va. 388, 752 S.E.2d 419 (2013).

However, this Court has also stated that it may affirm a circuit court’s order under independently sufficient grounds. *See, W.Va. Human Rights Comm’n v. Garretson*, 196 W. Va. 118, 123, 468 S.E.2d 733, 738 (1996) (noting that “we may affirm a circuit court’s dismissal order under any independently sufficient grounds.”). “Further, our cases have made clear that ‘it is permissible for us to affirm the granting of [dismissal] on bases different or grounds other than those relied upon by the circuit court.’” *Hoover v. Moran*, 222 W. Va. 112, 119, 662 S.E.2d 711, 718 (2008) (*per curiam*), quoting, *Gentry v. Mangum*, 195 W. Va. 512, 519, 466 S.E.2d 171, 178 (1995). *See also*, *Schmehl v. Helton*, 222 W. Va. 98, 662 S.E.2d 697, 705, n. 7 (2008) (“this Court may in any event affirm the circuit court on any proper basis, whether relied upon by the

circuit court or not.”); *Murphy v. Smallridge*, 196 W. Va. 35, 36-7, 468 S.E.2d 167, 168-9 (1996) (“An appellate court is not limited to the legal grounds relied upon by the circuit court, but it may affirm or reverse a decision on any independently sufficient ground that has adequate support.”); Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965) (“This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.”).

B. THE CIRCUIT COURT CORRECTLY APPLIED THE LAW IN DISMISSING STATE AUTO’S CLAIMS FOR THE “MONIES PAID” TO JAMES COLEMAN.

Though it professes to draw a distinction between contribution and implied indemnity, State Auto, in reality, advocates before this Court for a blurred line between the two concepts, as far as the required pleadings of such claims. The Circuit Court correctly applied the equitable considerations applicable to both types of claims. Because it stands in the shoes of its insured, State Auto cannot be placed in a better position than that of its insured. Simply put, State Auto did not plead an implied indemnity claim on behalf of its insured, Randy’s Contracting, to which it can latch onto via subrogation and the Circuit Court did not err in dismissing the Complaint in this regard.

1. RANDY’S CONTRACTING DOES NOT HAVE A RIGHT OF IMPLIED INDEMNITY AGAINST KAUFMAN TRAILER OR AL-KO KOBER UNDER THE FACTS PLED IN THE COMPLAINT.

Randy’s Contracting did not owe a duty of strict product liability to James Coleman, the victim of the accident and State Auto did not plead an implied indemnity claim in this regard. “Product liability law in this State permits a plaintiff to recover where the plaintiff can prove a product was defective when it left the manufacturer and the defective product was the proximate cause of the plaintiff’s injuries.” *Dunn v. Kanawha Cnty. Bd. of Educ.*, 194 W. Va. 40, 46, 459

S.E.2d 151, 157 (1995), citing, *Morningstar v. Black & Decker Mfg. Co.*, 162 W.Va. 857, 253 S.E.2d 666, 677 (1979).

Strict liability in tort relieves the plaintiff from proving the manufacturer was negligent, and instead permits proof of the defective condition of the product as the basis for liability. Because the product manufacturer is not always accessible to the plaintiff, **strict liability extends to those in the product's chain of distribution**. Thus, an innocent seller can be subject to liability that is entirely derivative simply by virtue of being present in the **chain of distribution of the defective product**.

Dunn, 194 W. Va. at 46, 459 S.E.2d at 157. (Emphasis added).

Extending liability to those in the chain of distribution in this manner is meant to further the public policy that an injured party not have to bear the cost of his injuries simply because the product manufacturer is out of reach. The liability of a party in the chain of distribution is based solely upon its relationship to the product and is not related to any negligence or malfeasance. For this reason, this Court acknowledged the right of implied indemnity in note 22 of *Morningstar*, *supra*. In syllabus point 1 of *Hill v. Joseph T. Ryerson & Son*, 165 W.Va. 22, 268 S.E.2d 296 (1980), we held that “[a] seller who does not contribute to the defect in a product may have an implied indemnity remedy against the manufacturer of the product, when the seller is sued by the user.”

Id., 194 W. Va. at 46-47, 459 S.E.2d at 157-58.

But, the right of implied indemnity in the products liability context is limited to that situation – where the innocent party in the “chain of distribution” has been held strictly liable as a matter of public policy. “[I]n the field of product liability, the concept underlying allowance of indemnity is that the indemnitee has been rendered liable because of a **nondelegable duty** arising out of common or statutory law, but the actual cause of the injury has been the act of another person.” *Hill v. Joseph T. Ryerson & Son*, 165 W.Va. 22, 27, 268 S.E.2d 296, 301 (1980) (Emphasis added).

Randy’s Contracting was not in the “chain of distribution” for the 2009 Kaufman Trailer and, thus, could not be held liable to James Coleman for strict products liability. Randy’s Contracting could only be held liable to James Coleman if Randy’s Contracting, or its

employees, were negligent or otherwise culpable with regard to the automobile accident in which Mr. Coleman was injured. Randy's Contracting was not liable to James Coleman because of a "nondelegable duty arising out of common or statutory law." *Id.* Therefore, Randy's Contracting had and has no implied indemnity rights against Defendants Kaufman Trailer and/or Al-Ko Kober for products liability leading to the injuries sustained by James Coleman.

In its Complaint, State Auto did not state any claim that Randy's Contracting was **required** to compensate Mr. Coleman under the doctrine of strict product liability. To the contrary, the allegations in the Complaint can only be read to the effect that State Auto paid the negligence claim of James Coleman, an auto accident victim, pursuant to Randy's Contracting's policy of insurance purchased to cover such a risk. Consequently, State Auto could not plead a claim for implied indemnity against Kaufman Trailer or Al-Ko Kober.

The primary case cited by State Auto, *Hill v. Joseph T. Ryerson & Son*, is not on point with this case. In *Hill*, the implied indemnity claim was asserted by the seller of the product against the manufacturer **in a third-party complaint**. *Hill*, 165 W. Va. at 24-25, 268 S.E.2d at 300. (Emphasis added). As this Court noted, "[t]he *issues in the present case* do not relate to the correctness of the underlying product liability law, but rather *involve the question of available defenses in a third-party action* where the *seller* of a defective product *seeks indemnity from the manufacturer*." *Id.*, 165 W. Va. at 25, 268 S.E.2d at 300. (Emphasis added). "U.S. Steel does not contest Ryerson's right to claim implied indemnity. Rather, it seeks to bar the claim by raising certain defenses to it." *Id.*, 165 W. Va. at 28, 268 S.E.2d at 301.

Such is not the case here. State Auto did not allege that Randy's Contracting was a commercial seller of utility trailers. Likewise, State Auto did not allege that Randy's Contracting was strictly liable or otherwise liable to pay Mr. Coleman because of some non-

delegable duty under the law and, thus, entitled to assert a products liability implied indemnity claim against the Defendants. This Court in *Hill* did not address the situation at hand in the instant underlying action – where an alleged tortfeasor owing nothing more than a duty to refrain from negligence settles a claim with the third-party victim and then attempts to assert the completely different theory of product liability against manufacturers under the doctrine of implied indemnity. Instead, such issues were subsequently addressed by this Court in *Howell* and *CAMC* in the proper framework. In those cases, these types of claims were analyzed for what they really are – claims for comparative contribution between putative joint tortfeasors.

This Court has never recognized a right of implied indemnity on the part of a purchaser of an allegedly defective product. The reasoning is clear. A purchaser does not warrant or otherwise represent that the product is free from defects, such as in the case of a seller. The purchaser is only liable for injuries to a third-party for which the purchaser was negligent. Randy's Contracting is not a company that could be held strictly liable to someone like James Coleman under products liability theory. Randy's Contracting and its employees owed a separate and independent duty to James Coleman to refrain from negligence or other wrongful conduct that would have proximately led to the accident and injuries sustained by Mr. Coleman.

That separate duty to the third-party victim and the lack of strict liability on the part of the purchaser is what distinguishes the instant claim brought by State Auto from that analyzed by this Court in *Hill*. The Circuit Court correctly applied the law of *Howell* and *CAMC* to hold that State Auto could not pursue such claims outside the original action and, therefore, State Auto's claims were properly dismissed.

2. THE LACK OF MUTUAL DUTIES TO THE VICTIM CIRCUIT COURT CORRECTLY APPLIED EQUITABLE PRINCIPLES RELATED TO NOTICE AND SETTLEMENT AND DISMISSED STATE AUTO'S COMPLAINT.

Because Randy's Contracting is not a link in the "chain of distribution" it would have no right of implied indemnity under strict liability/products liability theory against either Kaufman Trailers or Al-Ko Kober. This Court has only recognized the right of implied indemnity in strict liability/products liability on the part of a seller or other party in the "chain of distribution."

To permit someone outside the "chain of distribution" to assert a claim for implied indemnity under the strict liability/products liability framework would be counterintuitive. "[T]he concept of implied indemnity is based on equitable principles arising from the special nature of the relationship between the parties." *Sydenstricker v. Unipunch Products, Inc.*, 169 W. Va. 440, 445, 288 S.E.2d 511, 515 (1982). As this Court noted in *Hill*,

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."

Hill, 165 W. Va. at 27, 268 S.E.2d at 301, quoting, *Restatement of Restitution* § 96 (1937).

The Comment to the *Restatement* § 96, cited with approval in *Hill*, goes on to note that:

The situations to which the rule most frequently applies are those in which a person is made responsible for the conduct of another who is engaged in conducting matters on his account. Thus the rule applies to require a servant or other agent to indemnify his master or principal who has paid damages to a third person injured by the unauthorized tort of the servant or other agent, under the rules stated in the *Restatement of Agency*, §§ 219-267. The rule also applies to situations in which an employer is made responsible for the negligent conduct of an independent contractor under the rules stated in the *Restatement of Torts*, §§ 409-429. The rule applies likewise to other situations in which, by statute or otherwise, a person without fault is *responsible* for the conduct of another.

Restatement (First) of Restitution § 96 (1937), *comment a.* (Emphasis added).

Implied indemnity requires a common duty to a third-party owed by the alleged indemnitee and indemnitor borne out of the relationship between the two.

The requisite elements of an implied indemnity claim in West Virginia are a showing that: (1) an injury was sustained by a third party; (2) for which a putative indemnitee has become subject to liability because of a positive duty created by statute or common law, but whose independent actions did not contribute to the injury; and (3) for which a putative indemnitor should bear fault for causing because of the relationship the indemnitor and indemnitee share.

Syl. Pt. 4, *Harvest Capital v. W. Virginia Dep't of Energy*, 211 W. Va. 34, 560 S.E.2d 509 (2002) (Emphasis added).

This common duty forms the basis of the implied indemnity relationship. Without such a common duty, each of these alleged defendants are nothing more than joint tortfeasors to the third-party injured victim. As such, their rights against each other are limited to claims of comparative contribution under West Virginia law.

That is exactly what State Auto attempted to assert against Defendants Kaufman Trailer and Al-Ko Kober in the underlying action. State Auto merely alleged that Al-Ko Kober and Kaufman Trailer owed a duty of strict products liability with regard to the 2009 trailer. Liability for the actions or inactions of Defendants Kaufman Trailer or Al-Ko Kober was not heaped upon Randy's Contracting by operation of law, much less asserted by Mr. Coleman. Strict products liability merely *could have* served as a theory of liability for the injuries of James Coleman, had Mr. Coleman chosen to bring such a claim against Kaufman Trailers and/or Al-Ko Kober. Randy's Contracting, through its employees, would have been nothing more than a joint tortfeasor with Defendants Kaufman Trailers and Al-Ko Kober in such a circumstance – with each being sued under different theories of liability for the same injuries to Mr. Coleman.

As such, the settlement by State Auto was a voluntary settlement of an arguable claim of negligence against its insured, separate and apart from any claim of product defect. The

assertion of what would have been cross-claim by Randy's Contracting is nothing more than a claim for contribution brought on behalf of a putative joint tortfeasor to which the equitable rules announced in *Howell* and *CAMC* apply. Under *Howell*, State Auto is not permitted to assert a separate action on behalf of its insured, Randy's Contracting, for comparative contribution. "Because the right of comparative contribution is designed for the benefit of defendant joint tortfeasors, it can only be invoked by one of the joint tortfeasors in the litigation." *Howell*, 205 W. Va. at 448, 518 S.E.2d at 876, quoting, *Sitzes v. Anchor Motor Freight, Inc.*, 169 W.Va. 698, 713, 289 S.E.2d 679, 688 (1982). And, as this Court held in *CAMC*, "[c]onsequently, a tortfeasor who negotiates and consummates a settlement with an injured party on behalf of itself before any lawsuit is filed cannot subsequently bring an action seeking contribution from a tortfeasor who was not apprised of and not a party to the settlement negotiations and agreement." Syl. Pt. 6, *CAMC*, 217 W. Va. 15, 614 S.E.2d 15.

Thus, State Auto was required to bring Defendants Kaufman Trailer and Al-Ko Kober to the table if it intended to enforce some right of contribution against them for the amounts paid to victim James M. Coleman. State Auto's failure in that regard is fatal to its claims against Kaufman Trailers and Al-Ko Kober.

3. THE CIRCUIT COURT CORRECTLY APPLIED EQUITABLE PRINCIPLES RELATED TO NOTICE AND SETTLEMENT AND DISMISSED STATE AUTO'S COMPLAINT.

As the doctrine of implied indemnity is an equitable concept, the Circuit Court was correct to note that:

To address this matter now, undermines judicial economy, and places Mr. Coleman in an awkward position which would require his participation at trial. Moreover, the dynamics of the process may have changed since settlement with Mr. Coleman, and as such, may alter or skew the manner in which the evidence is presented to the trier of fact. . . . There are equitable considerations here, but the

semantic distinction between contribution and indemnity are limited and the issue is more procedural than substantive.

Appx. 71, ¶¶ 13-14.

Because the rights being asserted by State Auto in the underlying action were admittedly equitable in nature, the Circuit Court was correct in looking to the inequity that would have been at play in forcing Mr. Coleman to appear for a trial on a matter not of his own making (whether by assignment of right or direct action). It was equally correct for the Circuit Court to look to the inequity of waiting until after State Auto settled Mr. Coleman's claims against Randy's Contracting to assert an equitable remedy against parties who were not involved in the negotiation process but who are alleged to be entirely at fault

For these reasons, Defendants Kaufman Trailers and Al-Ko Kober were entitled to dismissal of the Complaint and the Circuit Court did not err in this regard.

C. STATE AUTO'S CLAIMS FOR PROPERTY DAMAGE SUSTAINED BY RANDY'S CONTRACTING.

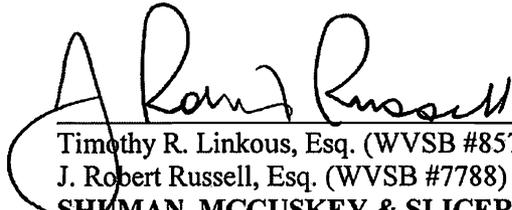
With regard to claim for the damages sustained by its insured, Randy's Contracting, the Circuit Court admittedly failed to address such claims in its Order. However, State Auto failed to specify these claims in any detail. It is not clear from the Complaint if these claims were meant to encompass merely injuries to the product itself, from which an analysis of the claim would have to be done through the prism of this Court's decisions in *Star Furniture Co. v. Pulaski Furniture Co.*, 171 W.Va. 79, 297 S.E.2d 854 (1982) and *Capitol Fuels, Inc. v. Clark Equip. Co.*, 181 W. Va. 258, 382 S.E.2d 311 (1989), or if they were meant to encompass injuries to other property owned by State Auto's insured. Likewise, State Auto did not address this issue to the Circuit Court or otherwise seek clarification from the Circuit Court in this regard. For

these reasons, Defendant Kaufman Trailers reserves the right to challenge the same should this Court grant State Auto's appeal in this regard and reinstate such claims.

V. CONCLUSION

For all the reasons enumerated herein, Defendant Kaufman Trailers of N.C., Inc., incorrectly denominated as Kaufman Trailer, respectfully requests that this Honorable Court uphold the Order of the Circuit Court of Hampshire County, West Virginia, and deny Petitioner's appeal.

**KAUFMAN TRAILERS OF N.C., INC.,
incorrectly denominated as Kaufman Trailer,
By Counsel,**

A handwritten signature in black ink, appearing to read "J. Robert Russell", is written over a horizontal line. The signature is cursive and somewhat stylized.

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CERTIFICATE OF SERVICE

The undersigned, counsel for Kaufman Trailers of N.C., Inc., hereby certifies that on this 17th day of October, 2014, a copy of the foregoing "*Brief of Respondent, Kaufman Trailers*", was served upon counsel of record, by depositing a true and exact copy thereof in the U. S. mail, postage prepaid, in an envelope properly addressed and stamped as follows:

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