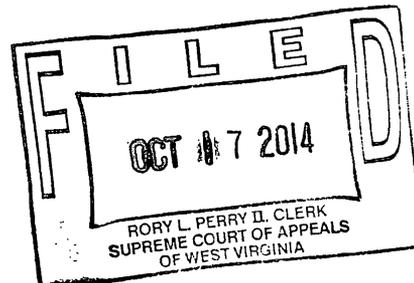


IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

No. 14-0556



STATE AUTO PROPERTY AND
CASUALTY INSURANCE COMPANY, as
Subrogee of RANDALL BUCKLEY d/b/a
RANDY'S CONTRACTING SERVICE,

Petitioner

v.

Civil Action No.: 13-C-113
Judge Charles E. Parsons

AL-KO KOBER and
KAUFMAN TRAILER,

Respondents.

RESPONSE OF AL-KO KOBER TO PETITIONER'S BRIEF ON APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... i

STATEMENT OF CASE 1

SUMMARY OF ARGUMENT..... 3

STATEMENT REGARDING ORAL ARGUMENT AND DECISION..... 4

ARGUMENT 4

**The Circuit Court Did Not Apply and Improper “Notice Requirement”
When Dismissing State Auto’s Claim for Implied Indemnity.**

CONCLUSION 11

CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

CASES

<u>Board of Education of McDowell County v. Zando Martin & Milstead, Inc.</u> 182 W.Va. 597, 390 S.E.2d 796 (1990)	7, 10, 11
<u>Bowman v. Barnes</u> 168 W.Va. 111, 282 S.E.2d 613 (1981).....	7
<u>Charleston Area Medical Center, Inc. v. Parke Davis</u> 217 W.Va. 15, 614 S.E.2d 15 (2005).....	2, 3, 7, 8, 9, 10, 11
<u>Dimon v. Mansy</u> 198 W.Va. 40, 48 479 S.E.2d 339 (1996).....	11
<u>GAF Corp. v. Tolar Const. Co.</u> 246 GA. 411, 271 S.E.2d 811 (Ga. 1980).....	9
<u>Harrison v. Davis</u> 197 W.Va. 651, 478 S.E.2d 104 (W.Va.1996).....	11
<u>Hill v. Ryerson & Son</u> 165 W.Va. 22, 268 S.E.2d 296 (1980).....	4, 5, 6
<u>Howell v. Luckey</u> 205 W.Va. 445, 518 S.E.2d 873 (1999).....	7, 10, 11
<u>Merchants Bank of New York v. Credit Suisse Bank</u> 585 F.Supp. 304 (S.D.N.Y.1984).....	9
<u>Sitzes v. Anchor Motor Freight, Inc.</u> 169 W.Va. 698, 289 S.E.2d 679 (1982).....	7
<u>Sydenstrickter v. Unipunch Products, Inc. et al.</u> 169 W.Va. 440, 288 S.E.2d 511 (1982).....	6, 8

RULES

Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.....	11
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RESPONSE OF AL-KO KOBER TO PETITIONER'S BRIEF

Comes now, Respondent Al-Ko Kober (hereinafter sometimes referred to as "Al-Ko"), by counsel, Scott L. Summers, Esquire, and Summers Law Office, PLLC pursuant to the West Virginia Rules of Appellate Procedure and respectfully files this Response to the Petitioner's Brief on Appeal filed on behalf of State Auto Property and Casualty Insurance Company, as subrogee of Randall Buckley d/b/a Randy's Contracting Service (hereinafter sometimes referred to as "State Auto").

STATEMENT OF CASE

State Auto's appeal is taken from an Order of the circuit court of Hampshire County, West Virginia, entered on April 30, 2014. Said Order granted Respondents Al-Ko Kober's and Kaufman Trailers' motions to dismiss the Complaint filed by State Auto Property and Casualty Insurance Company, as subrogee of Randall Buckley d/b/a Randy's Contracting Service.

State Auto's claim arises out of an automobile accident which occurred on August 8, 2011 when a trailer being pulled by an employee of Randy's Contracting struck a vehicle being operated by James M. Coleman (hereinafter sometimes referred to as "Coleman" or "injured party"). (*See* paragraphs 5 through 9 of the Complaint) (Appendix of Exhibits at Page 2 – hereinafter "App. at p. __.")

State Auto settled Coleman's pre-suit claim on behalf of Randy's Contracting without any knowledge, input, or participation from Al-Ko or Kaufman Trailers.

On August 5, 2013, State Auto Property and Casualty Insurance Company, as subrogee of Randall Buckley d/b/a Randy's Contracting Service filed its action seeking "an award of all amounts incurred by Plaintiff as a result of Defendant's defective product" and asking that "Plaintiff be compensated for its attorney's fees, costs, and expenses incurred ..." (See "Wherefore" clause of Plaintiff's Complaint) (App. at p. 5.)

With regard to State Auto's assertion that the trailer axle at issue in the underlying case was manufactured by Al-Ko Kober, this allegation has been denied. Further, with regard to the allegations made by State Auto that the axle at issue in the underlying case 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, those allegations have also been denied. (See generally *Answer of Defendant Al-Ko Kober and Cross-Claim of Defendant Al-Ko Kober Against Kaufman Trailers of N.C., Inc.*) (App. at p. 21-29)

State Auto Property and Casualty Insurance Company alleged in its Complaint that it has incurred damage due to the fact that it settled Mr. Coleman's pre-suit claim for personal injury and property damage against Randy's Contracting pursuant to its obligations under the policy of insurance it issued to Randy's Contracting. (See paragraphs 10, 12, 15 and 20 of the Complaint) (App. at p. 3 – 4)

Relying on this Court holding in Charleston Area Medical Center, Inc v. Parke Davis, 217 W.Va. 15, 614 S.E.2d 15 (2005), and pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, Al-Ko and Kaufman Trailers moved the circuit court to dismiss State Auto's Complaint for failure to state a claim upon which relief may be granted. (App. at pgs. 30 through 52)

The circuit court of Hampshire County granted the motions to dismiss finding, *inter alia*, that:

[T]he Defendants [Respondents herein] received no notice of the settlement with Mr. Coleman, and there was no litigation involving indemnification in the form of a third party compliant. Thus, the Defendants had no input in the merits of the negotiations. (App. at p. 69)

To address this matter now, undermines judicial economy, and places Mr. Coleman in an awkward position which would require his participation in a trial. Moreover, the dynamics of the process may have changed since the settlement with Mr. Coleman, and as such, may alter or skew the manner in which the evidence is presented to the trier of fact.” (App. at p. 70)

Whether in the form of negligence or strict liability, the Plaintiff’s independent cause of action for indemnification was extinguished when the Plaintiff failed to give notice to the Defendants [Respondents herein] or make them a party to any settlement or litigation. (App. at p. 71)

SUMMARY OF ARGUMENT

The circuit court of Hampshire County, West Virginia did not commit error when it dismissed the Complaint filed by Petitioner seeking implied indemnification from the Respondents.

In order to assert a claim for implied indemnity against the Respondents for recovery of monies paid to an injured party in a pre-suit settlement, equitable principles dictate that Petitioner was required to provide notice of the underlying claim to Respondents. Petitioner was also required to provide notice of Petitioner’s intention to seek implied indemnity from the Respondents. Both of these notice requirements would have permitted Respondents with an opportunity to participate in the injured party’s claim investigation and settlement negotiations.

In the context of the equitable principle of inchoate contribution, this Court, in Syllabus Point 6 of Charleston Area Medical Center, Inc v. Parke Davis, 217 W.Va. 15, 614 S.E.2d 15 (2005) held:

The inchoate right of contribution recognized by this state can only be asserted by means of a third-party impleader in an action brought by the injured party against a tortfeasor. Consequently, 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.

The rationale used by this Court in the Charleston Area Medical Center case is equally applicable to the case at bar. As the circuit Court of Hampshire County noted in paragraph 14 of its Order dismissing Petitioner’s Complaint. “There are equitable considerations here, but the semantic

distinction between contribution and indemnity are limited and the issue is more procedural than substantive.” (App. at p. 70.)

Petitioner’s claim against the Respondents was extinguished when Petitioner settled the claims of the injured party without providing notice to the Respondents thereby foreclosing Respondents’ opportunity to participate in the underlying claim.

The Order of the circuit court of Hampshire County dismissing Petitioner’s Complaint must be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issue before the Court in this appeal presents a case of first impression. Specifically, may a tortfeasor negotiate a pre-suit settlement with an injured party and then seek implied indemnity from third parties who had no knowledge of the potential claim and were not permitted an opportunity to participate in the settlement negotiations?

Although the issue in this appeal presents a case of first impression, the issue is very narrow. Additionally, as discussed herein, there are prior decisions of this Court which address a closely related issue. Therefore, oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure is appropriate.

ARGUMENT

The Circuit Court Did Not Apply an Improper “Notice Requirement” When Dismissing State Auto’s Claim for Implied Indemnity.

The Petitioner relies on this Court’s decision in Hill v. Ryerson & Son, 165 W.Va. 22, 268 S.E.2d 296 (1980) to support its argument that it is entitled to implied indemnity from the Respondents. As the circuit court pointed out in its Order dismissing State Auto’s Complaint, Hill v. Ryerson is distinguishable from the case at bar because the Indemnitee in Hill filed a Third-Party

Complaint against the Indemnitor thereby providing notice to the Indemnitor and an opportunity to participate in the underlying claim of the injured party. (App at p. 70) In the case at bar, State Auto elected to settle the claim of the injured party without providing notice to Al-Ko or Kaufman Trailers, thereby foreclosing any opportunity for Al-Ko and Kaufman Trailers to participate and defend against the claim of the injured party.

Hill v. Ryerson acknowledges a cause of action for implied indemnity in the field of product liability.¹ However, it does not address the procedure for making such a claim taking into account concerns of judicial economy, piecemeal litigation and the potential for disparate and inconsistent verdicts.

As the circuit court stated in paragraph 13 of its Order dismissing State Auto's Complaint: "To address this matter now, undermines judicial economy, and places Mr. Coleman [the injured party] in an awkward position which would require his participation in a trial. Moreover, the dynamics of the process may have changed since the settlement with Mr. Coleman, and as such, may alter or skew the manner in which the evidence is presented to the trier of fact." (App at p.70)

Al-Ko submits that the state of the law has evolved and clarified since this Court's decision in Hill v. Ryerson with regard to providing notice and opportunity to participate to prospective Third-Party defendants such as Al-Ko and Kaufman Trailers.

¹ There is a secondary consideration as to whether a cause of action even exists under Hill v. Ryerson which allows a purchaser of a product to make a products liability implied indemnity claim. Hill v. Ryerson permits a seller of a product, in a products liability case, to make a claim against an upstream distributor and/or manufacturer. It does not create a cause of action for implied indemnity in favor of a purchaser such as Randy's Contracting in this case.

Decisions from this Court in cases subsequent to Hill v. Ryerson specifically address the failure of a party to provide notice to a third-party against whom that party believes owes a duty of reimbursement in the context of inchoate contribution.

Although those subsequent decisions arise out of contribution claims, the rationale behind those decisions are equally applicable and necessary in the context of implied indemnity claims.² As correctly stated by the circuit court in its dismissal Order, “the semantic distinction between contribution and indemnity are limited and the issue is more procedural than substantive.” (App at p. 70)

The common law with regard to notice and procedural requirements placed upon parties seeking inchoate contribution has been developed and clarified by this Court. In light of the similarities between inchoate contribution and implied indemnity, Al-Ko respectfully submits that the notice and procedural requirements relating to claims for inchoate contribution must also be

2. "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." Syllabus Point 2, Hill v. Joseph T. Ryerson & Son, Inc., 165 W.Va. 22, 268 S.E.2d 296 (1980).

“Implied indemnity is based upon principles of equity and restitution and one must be without fault to obtain implied indemnity.” Syllabus Point 2 Sydenstricker v. Unipunch Products, in et al., 169 W.Va. 440, 288 S.E.2d 511, (1982)

“The doctrine of contribution has its roots in equitable principles. The right to contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his pro tanto share of the obligation. One of the essential differences between indemnity and contribution is that contribution does not permit a full recovery of all damages paid by the party seeking contribution. Recovery can only be obtained for the excess that such party has paid over his own share.” Syllabus Point 4 Sydenstricker v. Unipunch Products, in et al., 169 W.Va. 440, 288 S.E.2d 511 (1982)

applied to claims for implied indemnity. Especially when the purported Indemnitor has no notice of the claim and is not afforded an opportunity to participate in its investigation, defense or settlement.

In Board of Education of McDowell County v. Zando Martin & Milstead, Inc, 182 W.Va. 597, 603, 390 S.E.2d 796, 802-3 (W.Va. 1990) this Court has explained, in the context of inchoate contribution, as follows:

The fundamental purpose of inchoate contribution is to enable all parties who have contributed to the plaintiff's injuries to be brought into one suit. Not only is judicial economy served, but such a procedure also furthers one of the primary goals of any system of justice--to avoid piecemeal litigation which cultivates a multiplicity of suits and often results in disparate and unjust verdicts. See Bowman v. Barnes, 168 W.Va. 111, 282 S.E.2d 613 (1981). Moreover, as we have already indicated, joinder of contribution claims serves to ensure that those who have contributed to the plaintiff's damages share in that responsibility. We have also provided a method of apportioning the damages among the defendants according to fault in negligence cases. Finally, while the right of contribution is designed to promote equality among defendants, it is not automatic [182 W.Va. 604] and must be properly invoked to be preserved. See Sitzes v. Anchor Motor Freight, Inc., 169 W.Va. at 713, 289 S.E.2d at 688.

Likewise, in implied indemnity cases, all parties who may have contributed to a person's injuries must be brought into one suit or claim. This will serve the goal of judicial economy as well as avoid piecemeal litigation and/or disparate and unjust verdicts.

In the 1999 case of Howell v. Luckey, 205 W.Va. 445, 318 S.E.2d 873, 877 (1999), this Court held that "a defendant may not pursue a separate cause of action against a joint tortfeasor for contribution after judgment has been rendered in the underlying case, when that joint tortfeasor was not a party in 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." In 2005 this rule was expanded to include causes of action for contribution arising out of pre-suit settlements.

In Charleston Area Medical Center, Inc v. Parke Davis, 217 W.Va. 15, 614 S.E.2d 15 (2005), this Court specifically addressed the issue of whether a party who enters into a pre-suit settlement

with a Plaintiff is entitled to seek contribution from entities who were not parties to the settlement negotiations and against whom the Plaintiff had made no direct claims.

In that case, Charleston Area Medical Center negotiated a settlement with the estate of a deceased infant. Charleston Area Medical Center then filed a lawsuit against a prescription drug manufacturer and its parent company seeking contribution toward monies paid by it in the pre-suit settlement. The case was tried in the United States District Court for the Northern District of West Virginia which resulted in Jury verdict in favor of Charleston Area Medical Center. The drug manufacturer and its parent company appealed. The United States Court of Appeals for the Fourth Circuit certified the following question to the West Virginia Supreme Court:

Does the law of West Virginia allow a tortfeasor to negotiate and consummate a settlement with the injured party on behalf of itself, before any lawsuit is filed, which would benefit also another party claimed to be a second joint tortfeasor, and thereafter obtain a judgment against the second joint tortfeasor in an action for contribution, although the second joint tortfeasor was not a party to, not aware of, and had no notice of the settlement.

Id. at 18.

This Court ultimately decided that Charleston Area Medical Center could not pursue its contribution claim. In so deciding, this Court stated: “The doctrine of contribution has its roots in equitable principles. The right to contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his *pro tanto* share of the obligation.” Syllabus Point 4 of Charleston Area Medical Center, Inc v. Parke Davis, *citing* Syl. Pt. 4 of Sydenstricker v. Unipunch Products, in et al., 169 W.Va. 440, 288 S.E.2d 511, 516 (1982).

This Court, in Charleston Area Medical Center, further explained as follows:

The cynosure of contribution rights – a common obligation owed to an injured party – is missing from the underlying action given the absence of a cause of

action brought by the child's estate. Without such suit, there was no resulting common obligation owed to the injured party under the law. As we explained in *Sydenstricker*, "it is this common or joint liability to the plaintiff on the part of joint tortfeasors that gives rise to a cause of action for contribution." *Id.* at 448, 288 S.E.2d at 516; *see also GAF Corp. v. Tolar Const. Co.*, 246 GA. 411, 271 S.E.2d 811, 812 (Ga. 1980) (holding that settling party cannot seek contribution from other tortfeasor on the rationale that no debt can be implied from voluntary payment.) ...

Moreover, the underlying basis for the contribution claims asserted by CAMC against Defendants arose out of the *voluntary* payment by CAMC of an amount reached by means of a settlement agreement. In characterizing CAMC's payment as voluntary, as opposed to compulsory, we do not suggest that CAMC was wrong to settle with the child's estate. We choose this designation based on our need to determine whether inchoate rights of contribution can be invoked under the facts presented by the underlying case. *But see Merchants Bank of New York v. Credit Suisse Bank*, 585 F.Supp. 304, 309-10 (S.D.N.Y.1984) (holding that settling party cannot seek contribution from other tortfeasor on rationale that no debt can be implied from voluntary payment). (footnote omitted) (emphasis in original)

Id. at 23. Relying upon the bedrock principles of common obligation and compulsory payment that underpin the right to inchoate contribution, the Charleston Area Medical Center Court ultimately held that, "[g]iven that CAMC acted of its own salutary accord in deciding to settle the claims raised by the child's estate, it cannot claim to have been 'forced to pay more than [its] *pro tanto* share.'" (internal citation omitted).

In examining the principle of fairness, equity and judicial economy, this Court in Charleston Area Medical Center at 25 recognized that:

there is no assurance that principles of fairness and equity will be advanced if one settling party can affect the amount of settlement independent of other tortfeasors and then seek to make those non-involved tortfeasors contribute to the settlement that it voluntarily undertook to pay. When the non-involved tortfeasor is totally removed from the settlement negotiations, there is little, if any, assurance that such settlement is in accord with such tortfeasor's interests. Rather than contributing to the laudable objective of judicial economy, such separate actions seem by design to encourage, as in this case, the possibility of protracted proceedings. Consequently, the benefits typically realized by the court system from a settlement are significantly vitiated when piecemeal litigation is necessitated to resolve issues arising from the post hoc

assertion of inchoate rights of contribution.

Accordingly, in Syllabus Point 6 of Charleston Area Medical Center, the West Virginia Supreme Court held:

The inchoate right of contribution recognized by this state can only be asserted by means of a third-party impleader in an action brought by the injured party against a tortfeasor. Consequently, 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.

The facts of the case at bar are very similar to those in the Charleston Area Medical Center case. In the case at bar, State Auto Property and Casualty Insurance Company, on behalf of Randall Buckley d/b/a Randy's Contracting Service settled the claims made by James Coleman without any prior notice to Al-Ko or Kaufman Trailers. After settling Mr. Coleman's claim, State Auto Property and Casualty Insurance Company filed the suit against Al-Ko and Kaufman Trailers seeking reimbursement (contribution) for monies it paid in that settlement.

The principles set forth by this Court in Board of Education of McDowell County v. Zando Martin & Milstead, Inc., Howell v. Luckey and Charleston Area Medical Center, Inc v. Parke Davis are equally applicable to claims for implied indemnity. As the circuit court noted in its Order dismissing Petitioner's complaint, "[t]here are equitable considerations here, but the semantic distinction between contribution and indemnity are limited and the issue is more procedural than substantive." (App. at p. 70)

As it is with contribution, the bright line rule with regard to implied indemnity claims must be that a party who negotiates and consummates a pre-suit settlement with an injured party on behalf of itself cannot subsequently bring an action seeking implied indemnity from a third party who was

not apprised of and not permitted to participate in the investigation, defense and settlement of the claim.

As such, pursuant to this Court's holding in Board of Education of McDowell County v. Zando Martin & Milstead, Inc., Howell v. Luckey and Charleston Area Medical Center, Inc v. Parke Davis, State Auto Property and Casualty Insurance Company should be precluded from pursuing a claim for implied indemnity against Al-Ko and Kaufman Trailers in this action. Therefore, the circuit court was correct in dismissing the lawsuit filed by State Auto against Al-Ko and Kaufman Trailers.

CONCLUSION

"[T]he singular purpose of a Rule 12(b)(6) motion is to seek a determination whether the plaintiff is entitled to offer evidence to support the claims made in the complaint." Dimon v. Mansy, 198 W.Va. 40, 48 479 S.E.2d 339, 347 (1996). Dismissal of a civil action pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is proper where "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Harrison v. Davis, 478 S.E.2d 104, 109 (W.Va.1996).

In this case, State Auto Property and Casualty Insurance Company can prove no set of facts in support of its claim for implied indemnification against Al-Ko or Kaufman Trailers. Therefore, the circuit court was correct in dismissing State Auto's complaint.

WHEREFORE, based upon the foregoing, Al-Ko Kober respectfully prays that the Supreme Court of Appeals of West Virginia enter an order affirming the Order of the Circuit Court of Hampshire County, West Virginia which dismissed Petitioner's Complaint.

RESPECTFULLY SUBMITTED

AL-KO KOBER

By Counsel,

A handwritten signature in black ink, appearing to read 'S. Summers', written over a horizontal line.

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AL-KO KOBER and
KAUFMAN TRAILER,

Respondents.

CERTIFICATE OF SERVICE

I, Scott L. Summers, Esquire, counsel for Respondent, Al-Ko Kober, certify that I have served the foregoing, **"RESPONSE OF AL-KO KOBER TO PETITIONER'S BRIEF ON APPEAL"** on the following by depositing same into the United States Mail, First Class, postage pre-paid this 17th day of **October, 2014**, addressed to the following:

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