

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
APPEAL NO. 34743

FARMERS MUTUAL
INSURANCE COMPANY

Appellant

v.

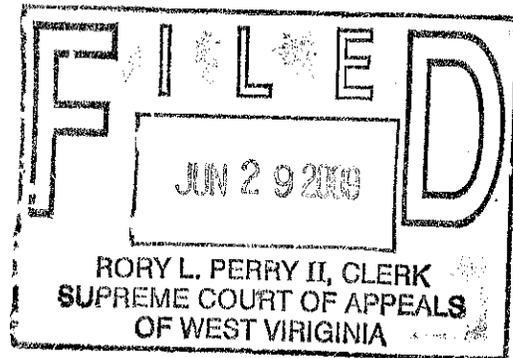
Civil Action No. 02-C-373

KEVIN FIKE, individually and in his
capacity as agent of Farmers Mutual
Insurance Company

Appellee

**RESPONSE BRIEF ON BEHALF OF THE APPELLEE, KEVIN FIKE,
IN OPPOSITION TO FARMERS MUTUAL INSURANCE COMPANY'S
BRIEF IN SUPPORT OF ITS PETITION FOR APPEAL**

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MEMORANDUM OF PARTIES

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**STATEMENT OF THE KIND OF PROCEEDINGS
AND NATURE OF THE RULING BELOW**

The Appellee, Kevin Fike, finds no material error in the Statement of the Kind of Proceedings and the Nature of the Ruling Below, set forth by the Appellant, Farmers Mutual Insurance Company.

STATEMENT OF THE FACTS

Importantly, Farmers does not point to any specific errors in the "Findings of Fact" contained in the lower court's Order of May 22, 2008 (Record at 92) and therefore they are undisputed. These undisputed facts are the core of the lower court's decision. Instead of providing this Court with an analysis of mistakes in the lower court's "Findings of Fact" based upon the record developed during discovery, Farmers has, in a wholly conclusory fashion, based its argument on the unsupported assertion that "Jennings' claims against Farmers arose entirely as a result of the conduct of Fike. (Appellant's Brief at 19-20). Farmers' claim that it had **no** responsibility for the fiasco that was the claims investigation of the Jennings' fire claim is new and it is not based upon the record. Further Farmers continues to confuse Fike's role in the underlying property damage claim and consequently the damages that can be attributable to his alleged misconduct. Fike's liability, if at all, stems from the alleged errors on the application, not the claims investigation process.

On May 18, 2001, Fike, an employee of Hartley Insurance ("Hartley") in Kingwood, West Virginia, submitted an application for insurance to Farmers on the "Repo Depo," a business operated by Doris Etta Jennings. (Attached as Ex. 7 to Memorandum in Support of Fike's Motion for

Summary Judgment on Crossclaim of Farmers Mutual, Record at 37).¹ A fire destroyed the Repo Depo on August 15, 2001. Farmers admitted in its Answer that at the time of the fire, the policy was in “full force and effect.” (Farmers’ Answer at ¶ 16). However, from the date of the fire until the claim was paid, Farmers investigated both the cause of the fire and the damages claimed by Mrs. Jennings. (Jennings Depo. at 68,146) Farmers paid Jennings’ fire damage claim in early November 2001, (See “Check” attached as Ex. 5 to Memorandum in Support of Fike’s Motion for Summary Judgment on Crossclaim of Farmers Mutual, Record at 37), but Farmers did not pay any Hayseeds damages. (Addendum 1, Deposition of Douglas Pence, Vol.1, at 74,75).

Jennings then filed a lawsuit against Farmers and Fike. Against Farmers, Jennings claimed *Hayseeds* damages, breach of contract, violations of the Unfair Trade Practices Act, and common law bad faith. She alleged a negligence claim against Fike and intentional and negligent infliction of emotional distress against both Fike and Farmers. Farmers filed a crossclaim against Fike, asserting that the application for insurance completed by Fike, contained inaccurate and incomplete information and that Farmers reasonably relied on this information in providing insurance coverage to Jennings (Crossclaim ¶¶ 13,14,15). In addition, Farmers claimed that it was entitled to contribution and indemnity.

On April 23, 2004, Fike moved for summary judgment on Farmers’ claims of negligent misrepresentation and contribution. Fike argued that Farmers could not have detrimentally relied on any mistakes regarding Jennings’ prior loss history because that information was not sent to

¹ It must be noted that the Insurance Application relied upon by the Appellant in its Petition includes critical pages, CL00497 and CL00505, which were not received by Farmers until August 22, 2001, after the fire. (See Deposition of Lyndon Auvil at 37,39).

Farmers until after the fire. (Auvil Depo. at 42) (Question: “Was August 22, 2001 the first time that you had this prior carrier information?” Answer: “Yes.”); (*Id.* at 44) (Question: “Just so we’re clear, August 22, 2001 was the first time you had either of those missing pages; is that correct?” Answer: “Yes.”).

In June of 2004, Farmers and Jennings reached a settlement that included an assignment by Jennings to Farmers of her claims against Fike. (Partial Dismissal Order of June 17, 2004, Record at 69) (“This Dismissal Order in no way affects the issues of controversy pending between Farmers Mutual Insurance Company and Kevin Fike, its agent, or any causes of action between the plaintiff and Fike, *which by agreement have been assigned to Farmers Mutual Insurance Company*, said causes of action being preserved.”) (Emphasis added).

Farmers then assumed a dual role in this litigation by asserting those claims made by Jennings against Fike, and, on its on behalf, Farmers continued to assert claims of negligent misrepresentation and indemnity/contribution against Fike. After the settlement of the case between Jennings and Farmers, Fike expanded his motion for summary judgment asserting that the claim for contribution was extinguished by the good faith settlement between Farmers and Jennings and that the claims and/or the damages sought by Jennings against Fike were not assignable.

The “assigned” claims against Fike were for professional negligence and intentional and negligent infliction of emotional distress. It is difficult to understand Jennings’ negligence claim and even more difficult to understand how Farmers will assert the claims at trial. Jennings alleged that, in completing the insurance application, Fike was “obligated to provide true and accurate information to Farmers, and was further obligated to make reasonable inquiry that would permit him to provide accurate information to Farmers.” (Compl. ¶ 48). Factually, the problem with the

assignment of her claim is that if Farmers had had accurate information regarding her prior losses, it would not have insured the property. (Appellant's Brief at 18) Arguably, it was only through Fike's alleged negligence that the Jennings' property was insured. If Jennings sustained no damage as a result of Fike's alleged negligence in completing the application – since she arguably obtained insurance to which she was not entitled – then she had no “loss” to assign to Farmers. Legally, the problem with the assignment is that it amounts to no more than a sale of a cause of action.

REBUTTAL TO ASSIGNMENTS OF ERROR

- I. The Circuit Court of Monongalia County Correctly Concluded that Farmers' Cross-Claim Against Fike for Contribution was Extinguished by Farmers' Good Faith Settlement with Jennings.
- II. The Circuit Court of Monongalia County Correctly Concluded that Farmers Did Not Rely upon the Information Provided by Fike in Deciding to Insure Repo Depo, Thereby Defeating Farmers' Claim for Negligent Misrepresentation.
- III. The Circuit Court of Monongalia County Correctly Concluded that Jennings' Claims against Fike Were Not Assignable.

STANDARD OF REVIEW

Fike finds no error in the Standard of Review set forth by the Appellant.

POINTS AND AUTHORITIES RELIED UPON

- I. **The Circuit Court of Monongalia County Correctly Concluded that Farmers' Cross-Claim Against Fike for Contribution was Extinguished by Farmers' Good Faith Settlement with Jennings.**

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<i>Beech Aircraft Corp. v. Jenkins</i> , 739 S.W.2d 19, 22 (Tex.1987).....	11
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<i>Cordial v. Ernst & Young</i> , 199 W. Va. 119, 132; 483 S.E.2d 248 (1996).....	17
<i>Kidd v. Mull</i> , 215 W. Va. 151, 595 S.E.2d 308 (2004).....	17

III. The Circuit Court of Monongalia County Correctly Concluded that Jennings' Claims against Fike Were Not Assignable to Farmers.

<i>Aluise v. Nationwide Mut. Fire Ins. Co.</i> , 218 W. Va. 498; 625 S.E.2d 260 (2005).....	25, 26
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<i>Barkers Creek Coal Co. v. Alpha-Pocahontas Coal Co.</i> , 96 W. Va. 700; 123 S.E.2d 803 (1924).....	22
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<i>Black's Law Dictionary</i> 826, 1064 (8 th ed. 2004).....	23
<i>Davis v. Settle</i> , 26 S.E. 557, 560 (W. Va. 1896).....	21
<i>Del. CWC Liquidation Corp. v. Martin</i> , 213 W. Va. 617; 584 S.E.2d 473 (2003).....	25, 27
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<i>Hubbard v. State Farm Indem. Co.</i> , 213 W. Va. 542; 584 S.E.2d 176 (2003).....	25, 26
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<i>Kobbeman v. Oleson</i> , 574 N.W.2d 633, 635-36 (S.D. 1998).....	26
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DISCUSSION

I. The Circuit Court of Monongalia County Correctly Concluded that Farmers' Cross-Claim Against Fike for Contribution was Extinguished by Farmers' Good Faith Settlement with Jennings.

Farmers claims it became obligated to pay the contractual damages to Jennings on her property damage claim because of Fike's mistake on the policy application - this is separate and apart from any damages sustained by Jennings from the claims investigation process which was the basis of her lawsuit against Farmers. The contractual damages paid to Jennings would be recoverable by Farmers through its "detrimental reliance" claim against Fike, but they are not recoverable as part of the contribution claim which Farmers asserts as a result of its settlement with Jennings. Therefore, the Appellant's claim for reimbursement of this sum rises or falls upon the strength of the detrimental reliance claim. The extra contractual damages paid in settlement to Jennings are not recoverable against Fike because they stem from the claims investigation process in which Fike had no role. But, even if Fike were a joint tortfeasor, Farmers' claim for contribution was extinguished by its settlement with the plaintiff. Farmers' claim for contribution fails because it is completely contrary to West Virginia law. Further, Farmers has cited no document in which Farmers and Jennings purported to allocate the amount paid on behalf of Farmers and on behalf of Fike nor was Fike released from any liability as a consequence of the settlement.

The Circuit Court was correct in holding that Farmers' claim for contribution and/or indemnity was extinguished by Farmers' good faith settlement with Jennings and the concomitant dismissal of Jennings' claims against Farmers. The Circuit Court was correct because: (A) contribution in this case is a factual impossibility as it relates to the claims brought by Jennings against Fike that Jennings "assigned" to Farmers; (B) contribution is contrary to law in that Fike and

Farmers are not defendants “in judgment,” which is a required prerequisite for establishing a contribution right; and (C) no basis exists to depart from existing statutory and case law to carve out new contribution rights in favor of Farmers.

A. Contribution is a Factual Impossibility.

The position of Farmers is absolutely clear in the record that it never executed a settlement agreement with Jennings on behalf of Fike:

Farmers . . . did not negotiate for a global settlement on behalf of both Farmers and Fike. Thus, without question, Jennings’ direct claims against Fike (i.e., claims for intentional and negligent infliction of emotional distress and for professional negligence) were and still are viable notwithstanding Jennings’ settlement with and release of Farmers.

(Appellant’s Brief at 19).

Despite never settling any part of Jennings’ case against Fike,² Farmers nevertheless asserts that it is entitled to contribution. This is a factual impossibility because this position is wholly contrary to the very definition of contribution:

contribution. 1. The right that gives one of several persons who are liable on a common debt the ability to recover ratably from each of the others when that *one person discharges the debt for the benefit of all*; the right to demand that another who is jointly responsible for a third party’s injury supply part of what is required to compensate the third party **2.** A tortfeasor’s right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault. . . .

Black’s Law Dictionary, 352-53 (8th ed. 2004) (emphasis added).

Because Farmers has taken the position that it never settled Jennings’ claims against Fike on

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It appears from the record in this case that Farmers is only claiming contribution arising from the intentional and negligent infliction of emotional distress causes of action asserted against both Farmers and Fike by Jennings. It does not appear as if Farmers is claiming contribution for the claims asserted against it individually by Jennings under the Unfair Trade Practices Act, *Hayseeds*, breach of contract, and/or bad faith common law. Farmers’ cross-claim against Fike does not include these causes of action.

her intentional and negligent infliction of emotional distress claims, it never discharged those obligations for the benefit of Fike, and it therefore cannot seek contribution.

B. As a Matter of Law, Farmers' Contribution Claim Must be Denied.

In West Virginia, two methods exist for claiming a right to contribution. The first is statutory, which requires that a joint judgment be rendered against tortfeasors before contribution rights may arise.³ Farmers has made no claim against Fike under the statutory right of contribution because it cannot: no joint judgment has ever been obtained.

In addition to this statutory right of contribution, the law permits a joint tortfeasor to recover contribution through means of third-party impleader in the course of a lawsuit that is initiated by the injured party. This is an "inchoate" contribution claim, which may be brought in advance of judgment, but the right to recover on the claim of contribution requires that the defendants be "in judgment" together. *Charleston Area Med. Ctr., Inc. v. Parke-Davis*, 217 W. Va. 15, 24; 614 S.E.2d 15, 24 (2005).

While this Court has made exceptions to the joint judgment rule in instances where a joint judgment was impossible due to a trial court error, *Haynes v. City of Nitro*, 161 W. Va. 230, 240; 240 S.E.2d 544, 550 (1977); or when the parties implicitly agreed to be treated as if they had incurred a joint judgment even though one party entered a "Mary Carter" type settlement in advance of judgment, *Makey v. Irisari*, 191 W. Va. 355, 361, 62; 445 S.E.2d 742, 748, 49 (1994),⁴ it has

³ The statute provides:

Where a judgment is rendered in an action *ex delicto* against several persons jointly, and satisfaction of such judgment is made by any one or more of such persons, the others shall be liable to contribution to the same extent as if the judgment were upon an action *ex contractu*.

W. Va. Code § 55-7-13.

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See also Reager v. Anderson, 179 W. Va. 691; 371 S.E.2d 619 (1988) (recognizing a right

clearly stated:

While *Haynes* and its progeny permit contribution to be sought by joint tortfeasors in advance of judgment and separate from the protections of West Virginia Code § 55-7-13, the procedural requirements for asserting contribution in advance of a joint judgment are clear. To permit the inchoate right of contribution to be successfully asserted, the injured party must bring a cause of action against an alleged tortfeasor who then joins additional non-named tortfeasors by means of third-party joinder, *following which a judgment is rendered that establishes a common obligation owed by the joint tortfeasors to the injured party*. Absent compliance with this procedural mechanism for asserting contribution *in advance of the rendering of a joint judgment*, there is no right of contribution outside the statutory rights provided by West Virginia Code § 55-7-13.

Charleston Area Med. Ctr., Inc. v. Parke-Davis, 217 W. Va. 15, 24; 614 S.E.2d 15, 24 (2005)

(emphasis added).

Importantly, in *Parke-Davis*, as here, the tortfeasor settled with the injured party and obtained a release of its liability. Thereafter, the tortfeasor sought to obtain contribution from others that it thought might be jointly liable on the obligation. The only difference between *Parke-Davis* and this case is that the alleged joint-tortfeasor in *Parke-Davis* was not privy to the settlement, and, in fact, the injured party never even filed a lawsuit. These factual distinctions are immaterial, however, considering this Court's reasoning: "Given 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.'" *Id.* at 23. Likewise, by settling its liability in this case, Farmers cannot meet the requirement that it be "in judgment" and should be deemed to have settled no more than its *pro tanto* share of its alleged liability to Jennings. *Haynes*, 161 W. Va. at 234, 240 S.E.2d at 547; *See also Lombard Can., Ltd. v. Johnson*, 217 W. Va. 437, 441; 618 S.E.2d 446, 450 (2005) ("Critically, the substantive grounds for invoking the inchoate right of contribution were determined not to be

in a non-settling defendant to recover contribution from a settling defendant under a "Mary Carter" agreement when the settling defendant remained in the case and was subject to the jury's joint judgment).

present in *Parke-Davis* based upon the voluntary payment by one tortfeasor of a settlement amount as opposed to being compelled legally to make such payment due to the rendering of a judgment.”).

Indeed, good reasons exist to prohibit a pre-judgment settling defendant from seeking contribution for the amount of its settlement against a party alleged to be liable for contribution. As articulated by the Court of Appeals for the Fifth Circuit, in discussing Texas law, in *Jackson v. Freightliner Corp.*, 938 F.2d 40, 42 (5th Cir. 1991), the requirement that contribution parties be in judgment (and thereby prohibiting a tortfeasor from settling more than his proportionate share of common liability before judgment) is based on the rationale that such settlements would not result in any significant savings of time or resources. Should the settling defendant be allowed to seek contribution from other alleged joint-tortfeasors, then ‘the settling defendant's unusual posture as ‘surrogate plaintiff’ would lead to additional litigation, jury confusion, and possible prejudice to the remaining tortfeasors.” *Id.*; see also *Beech Aircraft Corp. v. Jinkins*, 739 S.W.2d 19, 22 (Tex.1987) (same).

Let the status of the law in this State be clear: this Court has never – never – allowed a settling tortfeasor to seek contribution for the amount of the settlement from an alleged joint-tortfeasor that is not in judgment with the settling tortfeasor, and who denies liability. To allow such a contribution claim would be directly contrary to the Legislature’s express statute, and would contravene public policy.

C. Farmers’ Arguments are Unpersuasive & Contrary to Existing Law.

Farmers makes a four-part argument regarding its contention that it is entitled to contribution from Fike for the amount of its settlement with Jennings. First, Farmers asserts that, had Jennings’ case against it and Fike gone to judgment, Farmers may have been liable for the acts of its agent, Fike, under the laws of agency. Second, as a matter of policy – not law – Farmers asserts that this

Court should allow it contribution rights against Fike on the basis that: (a) defendants would not settle if they had to give up their contribution rights for the amount of the settlement against potential joint-tortfeasors; and (b) recalcitrant defendants that refuse to settle are rewarded in that they receive the value of the settlement while those that acknowledge their responsibility are punished by not being able to recover settlement proceeds paid in excess of their fair share. Third, without any support for its proposition, Farmers contends that a joint judgment is not required to preserve the inchoate right of contribution. Fourth, Farmers asserts that it paid more than its *pro tanto* share of liability to Jennings.

Fike was acting as the agent of Farmers in his procurement of the insurance, but it does not follow that he became Farmers' agent for all purposes, including the investigation and payment of the claim. The "Non-Exclusive Agent's Contract with Farmers Mutual Insurance Company" provides that, "[t]he duty of investigating, adjusting and litigating claims and losses shall rest exclusively with the Company unless the Agent is requested by the Company to assist in any such matters." ("Non-Exclusive Agent's Contract with Farmers Mutual Insurance Company, ¶ 5, attached as Ex. 11 to Memorandum in Support of Motion for Summary Judgment on Crossclaim of Farmers Mutual Insurance Company, Record at page 37). Doug Pence, who was claims manager of Farmers Mutual at the time of the Jennings property damage claim, (Addendum No.1, Pence Depo, Vol. 1, pg 5-6) testified that he did not "look to him [Fike] to engage in any investigation of the claim (Addendum No. 2 Pence Depo., Vol 2, 125-126). He agreed that Fike did not play any role in the "actual investigation of this matter" nor did he "make any representations with regards to whether" the claim should or should not be paid. (*Id.* at 126-127). Nor did Fike delay the investigation since Pence agreed that Fike provided his statement in a timely manner (*Id.* at 127,128). Pence further agreed that it was Farmers' responsibility to see that the claim was investigated "fairly, reasonable

and promptly”. (*Id.* at 21) Interestingly, when the property damage claim was settled, the claims manager, Pence, did not feel that Jennings had “substantially prevailed” with regard to her property damage claim (*Id.* at 131) and Farmers declined an attempt by Jennings’ counsel to settle the *Hayseeds* damages. (Addendum No. 1 at 74-75).

Incredibly, Farmers now asserts that its liability to Jennings derived exclusively from Fike's conduct. (Appellant's Brief at 19,20) (“Jennings’ claims against Farmers arose entirely as a result of the conduct of Fike.”) It is important, given Farmers claim that it bore no responsibility for the damages paid in settlement of Jennings' claim, that this Court have some understanding of Jennings' claims against Farmers. Contrary to Farmers' assertions, Mrs. Jennings’ complaints regarding the attacks on her integrity centered on Farmers' conduct.

Mrs. Jennings was not represented by counsel on the property damage claim until Farmers conducted a “statement under oath” taken by its attorney, David Sims, during which, she claimed she was accused of lying and arson by a Farmers agent, Doug Pence, and its' attorney. (Deposition of Doris Jennings, Vol. I at 58) (“And I said, 'What do you mean?' He said, 'Well, you lied on the application,' he said, 'and we think you burnt it.'”) Farmers Mutual hired a private investigator to investigate Mrs. Jennings’ claim. (Addendum No. 2, Pence Depo. Vol. 2 at 81). According to Mr. Pence, the investigation indicated that although the official cause of the fire was undetermined there were “certain characteristics that would be consistent with a set fire.” (*Id.* at 91). Mrs. Jennings testified that the investigator for Farmers “was going around to the people in the community and my father and my workers and saying that there was something very strange, very weird going on.” (Jennings Depo., Vol. 1 at 86) and that the investigator was asking “nosy questions all around the community” (*Id.* at 114). Mrs Jennings claimed that Farmers “... treated me like a friggin’ criminal. I mean, if they were going to investigate me, my feeling is they should have told me they was having

this guy going around asking people questions and investigate me.” (*Id.* at 143,145) The “Examination under Oath” of Mrs. Jennings taken by Farmers on September 26, 2001, during which she was not represented by counsel, lasted from 10:04 a.m. until 4:53 p.m. (See Addendum 3, Excerpts from “Examination Under Oath” pages 1 and 203, indicating the beginning and end times of the examination). Given Farmers’ conduct in the claims investigation process, any assertion on the its part that it settled the case exclusively because of Fike's misconduct, rather than its own, is absurd.

Mrs. Jennings was unable to point to anything Fike did wrong except for the alleged misstatements on the application. (Jennings Depo., Vol 2 at 184). She had no facts to support her claim that Fike “assisted Farmers in its quest to withhold payment from her” (*Id.* at 199-200) or that Fike accused her of fraud (*Id.* at 200-201) or that Fike “negligently caused the proliferation of false statements about [her] honesty and integrity” (*Id.* at 200). The only thing that she connected to Fike was a statement made by the principal of the local high school who told Jennings that he heard she was not going to get paid for the store because they had “burnt it.” The principal did not tell her where he got this information. She only assumes this information came from the Fike. (*Id.* at 202-203).

Farmers claims that Fike’s statements caused unnecessary delay, but in fact, Fike was scrupulously honest in the statement he gave to Farmers after the fire. When he was contacted by Farmers’ adjuster the morning after the fire, he related that someone in his office told him that morning that Mrs. Jennings had a previous fire. Fike stated “she did say that there was a history, she heard, *and I'm repeating this, so this is not something that I know to take to heart.* She said that there was a loss on a previous business at one point and somebody told her that they had burnt a house, *her words.*” (Addendum No. 4, Excerpt from Recorded Statement of Kevin Fike, August

17, 2001, at 6-7) (Emphasis added). Fike clearly qualified his statement - he had no personal knowledge of any bad conduct on Jennings' part.

No one asked Farmers to settle more than its proportional share of liability (assuming that it did), and Farmers had no standing to assert Fike's individual rights and/or liabilities at the negotiating table - Fike had counsel present. A non-settling defendant is not "rewarded" by having a potential joint-tortfeasor settle. In fact, the non-settling defendant loses any claim of contribution, *Board of Educ. v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 605; 390 S.E.2d 796, 804 (1990), and the deduction of the settlement proceeds from any potential judgment is only a recognition that a plaintiff is entitled to but one recovery. *Id.*

Moreover, having settled with Jennings and having attempted to take an assignment of her claims against Fike, a trial on this case would be bizarre, at best. Jennings is no longer a party in interest considering that she has forsaken all her rights in this case. Thus, the real party plaintiff is Farmers. No savings of resources or time would have been served by the settlement. Having a "surrogate" plaintiff would cause additional litigation, jury confusion, and possible prejudice to Fike as the remaining defendant. *Jackson, supra.*

Farmers argues that a joint judgment is not required before a right of contribution may be had in this State. Yet, Farmers never cites a single case or statute in support of that proposition, much less one that would overcome the mandates of W. Va. Code § 55-7-13, *Hayes*, and *Parke-Davis*, all of which require a joint judgment before entitling a party to contribution rights.

Finally, assuming this Court does not find Farmers' liability arose exclusively from Fike's misconduct, Farmers' argues that it "should be able to establish that it paid more than its *pro tanto* share in the settlement with Jennings and recover the same from Fike." (Appellant's Brief, p. 13). Farmers was under no obligation to settle, and it should not be heard to complain now that it is

unhappy with the amount it paid to settle its potential liability on Jennings' lawsuit, especially when it is still asserting those damages against Fike in the guise of the assignment from Jennings.

Farmers makes no attempt to show what amount was paid in excess of its *pro tanto* share of a potential joint judgment. Farmers does not claim to have negotiated a global settlement for it and Fike. It is unclear what Farmers is in fact claiming to have paid on behalf of Fike. It has never attempted to explain to the Court what amount of the settlement proceeds were "for Fike" and in fact, it seems to confuse the settlement of its contractual obligation to pay Jennings' property damage claim with the settlement of the bad faith/*Hayseeds* claim. In its argument regarding contribution, Farmers stated that "...there is no question that Farmers was forced to pay contract damages in the form of policy proceeds, as a direct result of Fike's conduct." (Appellant's Brief at 13). Even if true, this is not a part of a claim for contribution. Once the property damage claim was paid, Jennings had no right to seek these contractual damages as part of the bad faith claim. Damages resulting from payment of the contractual claim to Jennings belongs to Farmers itself – not to Jennings – and would therefore not be included as part of the settlement. The mechanism for Farmers to recover the contractual damages was through the "detrimental reliance" claim it made against Fike. It is apparent that the settlement with Jennings was for payment of the plaintiff's attorney's fees in the fire damage claim, i.e., the "*Hayseeds*" damage, and for Farmers's unscrupulous methods in investigating the fire claim, i.e., the common law and statutory bad faith claims. The settlement was not, as claimed by Farmers, for damages resulting from the fire itself. (Appellant's Brief at 5) If, however, Farmers paid the contractual damages twice to Jennings, it is not Fike's fault.

Farmers was not "compelled" to pay for Fike and it did not obtain a release on Fike's behalf. Based on the above, Fike respectfully requests that his Court find that Farmers' right to contribution/indemnity was extinguished by a good faith settlement with Jennings.

II. The Circuit Court of Monongalia County Correctly Concluded that Farmers Did Not Rely upon the Information Provided by Fike in Deciding to Insure Repo Depo, Thereby Defeating Farmers' Claim for Negligent Misrepresentation.

In Count I of the Crossclaim, Farmers alleges that it reasonably relied upon the information contained in the application for insurance that Fike provided to Farmers, (Crossclaim at ¶ 14), and that “[t]hrough such substantial misrepresentation, supplying of false information, and/or failing to fully disclose and/or assess the risk, Kevin Fike negligently induced Farmers Mutual to assume the insurance coverage of Repo Depo.” (*Id.* at ¶ 15). In West Virginia, to prevail on a claim for negligent misrepresentation, Farmers must at least establish that “the representation contributed to the formation of the conclusion in the [complainant’s] mind.” *Cordial v. Ernst & Young*, 199 W. Va. 119, 132; 483 S.E.2d 248 (1996). These requirements have been more fully explained by this Court in fraud actions: “(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it.” Syllabus Pt. 5, *Kidd v. Mull*, 215 W. Va. 151, 595 S.E.2d 308 (2004). In this case, there was no reliance on the alleged misrepresentation because Farmers did not know about the alleged “misrepresentation” regarding Jennings’ prior loss history when it issued the policy.⁵

Lyndon Auvil, the underwriter for Farmers who approved the application, claims that had he been aware of proper fire losses suffered by Jennings, he probably would not have insured the premises. (Auvil Depo. at 51) (“Loss history is, predominately, one of the most important things to inquire about.”) (“But I know that if the losses that we found out they had, if I would have been

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The issue of what Jennings told Fike is disputed. He claims that she denied prior losses. However, the accuracy of the information is not relevant since it was not provided to Farmers before Farmers decided to insure the premises.

aware. I probably wouldn't have proceeded with the account." *Id.* at 70)

Fike is entitled to judgment as a matter of law on Count I of the Crossclaim since the evidence clearly established that Farmers did not receive the information about prior losses, upon which it claims to have detrimentally relied in issuing the Jennings' insurance policy, until **after** both the issuance of the policy and the occurrence of the fire at Repo Depo. It appears that when the undersigned application was faxed to Farmers, the reverse sides of several pages, including the one containing the information about prior losses, were not included. (Auvil Depo. at 42 and 44).

Mr. Auvil did not receive the page containing information as to actual loss history of the Repo Depo until August 22, 2001, seven days after the fire. This point is made abundantly clear in the September 10, 2001, memorandum from Lyndon Auvil to Doug Pence, Claims Manager at Farmers Mutual, and Gary Skeen, the President of the company:

There are actually two applications in the file. The quote Application dated 5/11 and faxed 5/18 and the binding application still dated 5/11 but faxed 6/12 including the necessary insured's signature . . . we did not receive 2 of the reverse sides of the application until 8/22. In briefing the quote application I quickly reviewed the section showing no losses. However, this in fact relates to sexual abuse and other allegations. Actual loss history is on the reverse side of the Accord commercial application section.

(Memorandum Sept. 10, 2001, to Doug Pence and Gary Skeen, attached as Ex. 9 to Motion For Summary Judgment on Crossclaim of Farmers Mutual, Record at 37.)

For Farmers to have relied on the prior loss information, Farmers had to have this information before issuance of the insurance policy to Jennings. Instead, Farmers decided to insure the premises without the page of the application which contained the prior loss information because Auvil either did not notice it was missing or, he thought the information about "no losses," which actually related to sexual abuse, referred to prior property damage claims.

Farmers claims that regardless of what written information it had -or didn't have - Lyndon

Auvil would have discussed it with Fike because this would have been his “usual practice,” (Auvil Depo at 52) . However, he testified that he had no specific recollection of discussing prior claims with Fike, (*Id.*) (“Can't speak explicitly on what we discussed. I can only tell you what we normally talk about.” (*Id.* at 53). Nor could he remember whether he made any written notation of such a conversation, (*Id.* at 29) even though he made notes of important conversations. (*Id.* at 28-29) (“And I can't say that I was good about it all the time, but if there was a conversation that I felt was worthy, I would make a note and put it in the file.”) Certainly no written notation of such a conversation was ever produced. Finally, there is no reference to such a conversation in his September 10, 2001 memorandum. This memorandum clearly states that the only information regarding prior losses that Mr. Auvil reviewed before issuing the policy related to sexual abuse allegations, not property damage claims. The Appellant cannot base its detrimental reliance claim upon an unremembered, undocumented conversation.

Farmers claims that the “*absence* of material information was justifiably relied upon by Farmers.” (Petition, p. 14) (emphasis added). Such a claim is akin to Farmers arguing that it relied on a belief that a house had no termites, when Farmers had *no* information regarding the presence or absence of termites. Further, the Application submitted with the Petition for Appeal is misleading because it includes pages CL00497 and CL00505, which were clearly not received by Farmers until after the fire. (Auvil Depo. at 42). It appears that these pages were inserted into the application for the missing pages on August 22, 2001, as indicated by the date in the top left corner, when they were faxed to Farmers and put into its “paperless” system.

Farmers lists other alleged misrepresentations found on the application, but Farmers has never claimed that anything other than the prior loss information would have caused it to refuse to insure the premises. The assertion made in the Petition that the “cumulative application

misrepresentations . . . led to the assumption of coverage” (Petition for Appeal at 16), is wrong and is in complete contradiction to the testimony of Farmers’ own underwriter. The fact that the Repo Depo was outside the city limits was not important to his underwriting. (Auvil Depo. at 46) No one else claimed an insurable interest in the building so the ownership of the property on which the building was located was not an issue. (*Id.* at 47). The age of the building, though incorrect, was not a problem. (*Id.* at 47-48). Auvil knew that gas was being sold there and that there would have been exposure to “flammables, explosives or chemicals” and/or “catastrophic exposure” and, if he had been concerned, he would have contacted Fike. (*Id.* at 49-50). The location of the fire hydrant would only have resulted in a different premium (*Id.* at 53-54).

The only issue is whether Farmers had information about Jennings’ prior loss history when it decided to insure the premises. The evidence shows that as a matter of law, Farmers cannot establish the necessary element of reliance in its negligent misrepresentation cross-claim against Fike because prior loss information was not provided in the application faxed to Auvil.

In sum, even when all the evidence is construed in favor of Farmers, Fike is entitled to summary judgment on Farmers’ claim of misrepresentation.

III. The Circuit Court of Monongalia County Correctly Concluded that Jennings’ Claims against Fike Were Not Assignable to Farmers.

The Circuit Court properly concluded that Jennings’ stated causes of action against Fike for intentional and/or negligent infliction of emotional distress and professional negligence are not assignable as a matter of law. Allowing a joint tortfeasor - that is, a party who contributed to the damages which are now assigned to it - to attempt to recover monetary damages for an individual’s alleged emotional injuries is an anathema to the common law and to the law of this State.

A. Maintenance, Champerty, And Assignment of Claims in West Virginia.

As recognized by Farmers, it never settled Jennings’ alleged claims against Fike; it took an

assignment of her tort claims against Fike. At the time of the assignment, Jennings' claims were – and are – disputed, contingent, and unliquidated. It is unknown exactly how much money Farmers paid for its attempt to purchase Jennings' claims⁶ against Fike.

West Virginia does not have a specific statutory prohibition on the anti-assignment of personal injury tort claims and, therefore, resort must be made to common law. *See, e.g.*, W. Va. Code § 55-7-8a(f) (“Nothing contained in this section shall be construed to . . . give the right to assign a claim for a tort not otherwise assignable.”).

At common law, “maintenance” is the “officious intermeddling in a suit that in no way belongs to the meddler, and signifies an unlawful taking in hand, or upholding of quarrels or sides, to the disturbance or hindrance of common right.” *Davis v. Settle*, 26 S.E. 557, 560 (W. Va. 1896). “Champerty” is a species of maintenance, and “is the unlawful maintenance of a suit in consideration of part of the matter in controversy.” *Id.* Traditionally, at common law, maintenance and champerty of personal injury tort claims have been forbidden based on a policy that protected the injured party “so that an unrelated third-party cannot reap a windfall by paying the injured party a pittance for the claim and then prosecute litigation for injuries that the party never suffered.” *In re Brown*, 354 B.R. 100, 105 (Bankr. N.D.W.Va. 2006) (citation omitted). Indeed, before the 17th Century, English courts refused to recognize any type of assignment of a litigious right. *e.g.*, *Sprint Communs. Co., L.P. v. APCC Servs.*, ___ U.S. ___, 128 S. Ct. 2531, 2536 (2008) (“Prior to the 17th century, English law would not have authorized a suit like this one. But that is because, with only limited exceptions, English courts refused to recognize assignments at all.”) (citing *Lampet's Case*, 10 Co. Rep. 46b, 48a, 77 Eng. Rep. 994, 997 (K. B. 1612) (stating that “no possibility, right, title, nor thing in action,

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Should the court allow the purchase of these types of claims, and contravene existing West Virginia policy, then the Court should also require the settlement amount to be apportioned so that a sum certain is designated for the purchase of Jennings' claims.

shall be granted or assigned to strangers”)).

Of course, over the years, strict prohibitions on all forms of maintenance and champerty have been relaxed. For example, courts allowed suits to be brought by those with equitable title to property even though legal title remained in a non-party to the lawsuit. *See, e.g.*, Syllabus Pt. 2, *Barkers Creek Coal Co. v. Alpha-Pocohontas Coal Co.*, 96 W. Va. 700; 123 S.E.2d 803 (1924) (stating that a lessee of real property may sue for a tort done on the real property so long as the lessee maintains the action in the name of the lessor); *see also Sprint Communs.*, 128 S. Ct. at 2541-42 (reciting the development of the common law with regard to the assignment of collection rights). Also, certain tort claims held by an individual at his or her death can be assigned to the decedent’s legal representative. *e.g.*, W. Va. Code § 55-7-8a (actions that survive death).

Additionally, property rights, as opposed to personal rights, became recognized as assignable claims. *e.g.*, *Sprint Communs.*, 128 S. Ct. at 2541-42; *see also Boarman v. Boarman*, 210 W. Va. 155; 556 S.E.2d 800 (2001) (money judgment is a property right that may be assigned). As stated by this Court in *Hereford v. Meek*, 132 W. Va. 373, 391; 52 S.E.2d 740, 749 (1949), the test for whether a cause of action was assignable became whether the cause of action survived the death of the injured person. Nevertheless, as the Court in *Hereford* cautioned, “[a] claim for personal injury . . . can by statute be made to survive the death of the injured person and still be without the quality of assignability.” *Id.* at 391. This is because, notwithstanding the rule that survivable causes of action are assignable, only property rights may be assigned; a statute providing for the survivability of personal injury action is not intended to transform that cause of action into a property right, or to contravene long-standing public policy prohibiting the assignment of personal injury actions. *Id.* at 391,92.

In short, personal injury torts are not, and have never been, assignable in West Virginia.

B. Jennings' Alleged Causes of Action for Intentional and/or Negligent Infliction of Emotional Distress are Personal Injury Torts that are Not Assignable.

Farmers states that the assignment from Jennings “involves a property right (a property damage claim under Jennings’ Businessowners Policy) and is, therefore, assignable.” (Appellant’s Brief at 20). Again, Farmers confuses the contractual damages were paid to Jennings in 2001 with the extra contractual damages sought by Jennings against Farmers in her lawsuit. Further, Farmers claims that an alleged cause of action for intentional and/or negligent infliction of emotional distress is a property right is contrary to law, the dictionary, and common sense:

intentional infliction of emotional distress. The tort of intentionally or recklessly causing another person severe emotional distress through one’s extreme or outrageous acts.

.....
negligent infliction of emotional distress. The tort of causing another severe emotional distress through one’s negligent acts.

Black’s Law Dictionary 826, 1064 (8th ed. 2004); *see also Bias v. Eastern Associated Coal Corp.*, 220 W. Va. 190, 193; 640 S.E.2d 540, 543 (2006) (“[E]motional injury is a personal injury”); *Syllabus Pt. 2, McCammon v. Oldaker*, 205 W. Va. 24; 516 S.E.2d 38 (1999) (“A claim for severe emotional distress arising out of a defendant’s tortious conduct is a personal injury claim”) (citation omitted).

As a matter of law, Jennings’ alleged causes of action for intentional and/or negligent infliction of emotional distress are personal injury claims that cannot be assigned to Farmers.

C. Jennings’ Alleged Cause of Action for Professional Negligence Seeks Unliquidated Personal Injury Damages and Cannot be Assigned.

The merits of Jennings’ professional negligence claim is difficult to understand. She asked Fike for an insurance policy and got exactly what she asked for. Farmers has already paid Jennings \$245,000 in coverages available to her under the Repo Depo policy, (Appellant’s Brief at 4), thus, Jennings has no claim against Fike for coverage under the policy. It stands to reason then, that

Jennings' only other claims against Fike for his alleged professional negligence are for her purported personal injuries - she made no other claims against Fike rooted in any pecuniary loss. As stated in her Complaint, these alleged injuries are for emotional distress, annoyance, inconvenience, embarrassment, and damage to her reputation in the community -- *i.e.*, damages to her person. Even if her claim for professional negligence were assignable, the damages recoverable are not.

Jennings' alleged cause of action for professional negligence cannot be assigned to Farmers because it cannot recover for her personal injuries. For example, in *Sprague v. California Pacific Bankers*, 74 P.3d 12 (Haw. 2003), the court carefully distinguished between a negligence claim arising out of an insurance contract from the general damages sought by the assignor based on that claim. "[I]n determining assignability, the issue is not only whether the claim is assignable, but also whether the damages arising from the claim are purely personal in nature. If so, they are unassignable." *Id.* at 22. With regard to a party's general damage claims, the party is usually seeking compensation for such items as pain and suffering, inconvenience, loss of enjoyment, and other items that cannot be measured in definitive monetary terms. *Id.* at 22,23. These elements of a general damage claim, like damage to one's reputation and commercial credit, are personal in nature. *Id.* at 23. In this case, permitting Jennings to testify to her emotional distress, annoyance, inconvenience, embarrassment, and damage to her reputation, when she is no longer a party to the action and any damages awarded would be obtained by Farmers, shows the folly of allowing an assignment of a disputed, contingent, and unliquidated cause of action where the damages sought are personal in nature. Even if professional negligence claims are assignable, damages which are personal in nature should not be capable of assignment.

The only case in West Virginia considering the assignment of professional negligence claims forbids these types of assignments. *Del. CWC Liquidation Corp. v. Martin*, 213 W. Va. 617; 584

S.E.2d 473 (2003) (attorney malpractice claim is a cause of action that cannot be assigned by the client to a third party). The Court reasoned that an assignment of a claim for legal malpractice is void as against public policy because of its “highly personal nature.” The Court noted that another reason to prohibit such assignments is that it would increase the possibility of collusion between the assignor and the assignee. The instant case illustrates the problems that can occur with assignments of personal causes of action. This is even more egregious than a situation where a stranger to litigation purchases the plaintiff’s cause of action because Farmers is attempting to recover damages sustained by Jennings to which it contributed. This case is qualitatively different from other types of assignments.

D. Farmers Misstates the Law, References Inapposite Cases, and Asks the Court to Make Inappropriate Changes to Existing Law.

Apart from attempting to contort unliquidated and contingent personal injury claims into property rights, Farmers cites a string of cases that are simply not applicable to this case in an attempt to support its argument.

For example, in *Aluise v. Nationwide Mut. Fire Ins. Co.*, 218 W. Va. 498; 625 S.E.2d 260 (2005); *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542; 584 S.E.2d 176 (2003); and *Strahin v. Sullivan*, 220 W. Va. 329; 647 S.E.2d 765 (2007), the Court mentioned that an individual defendant had assigned bad faith claims against the individual defendant’s insurer to the plaintiff as part of a settlement agreement. In *Strahin*, 220 W. Va. at 337, the Court reiterated that these types of causes in action are “clearly assignable.” The reasons why bad faith causes of action are “clearly assignable” is that the action arises out of the insurance contract because the insurer has a contractual obligation to exercise good faith in settling claims. *e.g.*, *McNulty v. Nationwide Mut. Ins. Co.*, 221 So.2d 208, 210 (Fla. Ct. App. 1969) (“[T]he cause of action for an ‘excess,’ where one arises from bad faith, is bottomed on the contract, and that the nature of an action thereon is *ex contractu* rather

than in tort.”). Unlike these cases cited by Farmers, no statutory or common law bad faith insurance type claim has been assigned in this case since these claims were not asserted by Jennings against Fike.⁷

Under the fact patterns of the above cases, the insured defendant stipulated that the full amount of the policy limits was payable to the plaintiff, and what was assigned (or attempted to be assigned) was the insured’s right to recover from the insurer for failure to settle the claim timely. *Aluise*, 218 W. Va. at 502 (insured allowed judgment to be entered for \$34,000 and assigned first party bad faith claim to plaintiff); *Hubbard*, 213 W. Va. at 545 (default judgment against the insured entered for \$300,000, and the insured assigned the insured rights against the insurer to the plaintiff); *Strahin*, 220 W. Va. at 334, (assignment of claims to the plaintiff by the insured against the insurer failed because, under the settlement agreement with the insured, the insured had no liability beyond the policy’s limits). To meet the fact pattern of the cases cited by Farmers, the plaintiff, Jennings, would have to be the recipient of the assignment from the defendant. The type of assignments referenced in the cases cited by Farmers protect a party from further exposure and/or reimburse the assignee for what may be owed to them by the assignor. Here, Farmers was not owed anything by Jennings. It simply purchased a cause of action. This Court in *Del. CWC Liquidation Corp. v. Martin*, 213 W. Va. 617; 584 S.E.2d 473 (2003), noted the problem with “merchandising” an assigned claim and, as shown in this case, the “endless complications and litigious intricacies arising

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Farmers cites three foreign cases to support its argument that claims for intentional/negligent infliction of emotional distress and professional negligence may be assigned. None of the cases cited, however, support that proposition. *Kobheman v. Oleson*, 574 N.W.2d 633, 635-36 (S.D. 1998) (“[A] thing in action arising out of a right of property or out of an obligation may be transferred by the owner.”) (citation omitted); *Wangler v. Lerol*, 670 N.W.2d 830, 832 (N.D. 2003) (assigning the contract right “to pursue insurance coverage from Farmers Union . . . for the judgment” and, in addition, a tort claim against the insurance agent for allegedly failing to procure the right policy); *McLellan v. Atchison Ins. Agency*, 912 P.2d 559 (Haw. Ct. App. 1996) (insured reduced claim against him to judgment, and assigned rights against the insurer to the plaintiff).

from such commercial activity.”

It is interesting that Farmers has chosen to cite *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So.2d 557 (1997), in support of its argument that this Court should permit the assignment of the professional negligence claim. Although the court permitted the assignment of a claim against an insurance agent for failure to procure insurance coverage, it reiterated that purely personal causes of action are not assignable. The insureds, owners of an automobile, had a gap in coverage. They were sued by Forgione for injuries he received as a result of an automobile accident in which they were involved. The Judgment could not be satisfied and so the insureds assigned their rights against the insurance companies and agents to Forgione.

Although the Florida court allowed the assignment of the claim against the insurance agent which derived from contract, the court would not permit the assignment of a medical negligence claim, or as in this case, claims for intentional or negligent infliction of emotional distress because these are “personal” torts. *Id.* at 559. In her Complaint, Jennings specifically designated Count II as “Negligence Claims against Kevin Fike.” The acts she complained of were: Fike did not provide accurate information to Farmers (§ 50); Fike “negligently and carelessly assisted Farmers in its quest to contrive any reason to withhold payment of policy proceeds” (§ 51); Fike accused plaintiff of fraud to “take the focus off himself regarding his own negligence in the application process” (§ 52); Fike negligently caused the proliferation of false statement regarding plaintiff’s honesty and integrity, which, in turn, adversely affected plaintiff’s ability to recover from her policy (§ 53) and as a result “of Fike’s negligence plaintiff suffered damages.” (§ 54). There is no mention of a breach of contract against Fike.

Importantly, in *Forgione*, the assignee was a creditor of the assignors. The assignors obtained a real benefit from the assignment – a release of their financial obligation to Forgione.

Although Jennings received an economic benefit from the assignment in this case, it is the same benefit that any seller receives – cash. It was not, as in *Forgione*, relief from the payment of a debt. The assignment to Farmers was clearly the purchase of a cause of action.

CONCLUSION

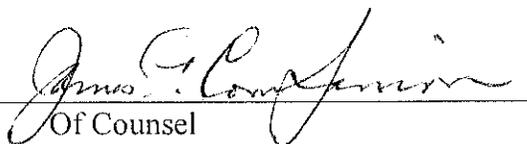
The Circuit Court correctly held that Farmers’ claim for contribution and/or indemnity was extinguished by Farmers’ good faith settlement with Jennings and the concomitant dismissal of Jennings’ claims against Farmers. The Circuit Court was correct because: (A) contribution in this case is a factual impossibility as it relates to the claims brought by Jennings against Fike that Jennings “assigned” to Farmers; (B) contribution is contrary to law in that Fike and Farmers are not defendants “in judgment,” which is a required prerequisite for establishing a contribution right; and (C) no basis exists to depart from existing statutory and case law to carve out new contribution rights in favor of Farmers.

The Circuit Court correctly concluded that Farmers did not rely upon the information provided by Fike in deciding to insure Repo Depo since the evidence clearly established that Farmers did not receive the information about prior losses, upon which it claims to have detrimentally relied, in issuing the Jennings insurance policy, until **after** both the issuance of the policy and the occurrence of the fire at Repo Depo. Thus, the lower court correctly denied Farmers’ cross-claim for negligent misrepresentation.

The Circuit Court correctly concluded that Jennings’ stated causes of action against Fike for intentional and/or negligent infliction of emotional distress and professional negligence are not assignable as a matter of law because these damages are personal injuries. Personal injury torts are not, and have never been, assignable in West Virginia.

Wherefore, Fike respectfully requests this Court to **affirm** all of the lower court’s rulings.

KEVIN FIKE, Appellee

By 
Of Counsel

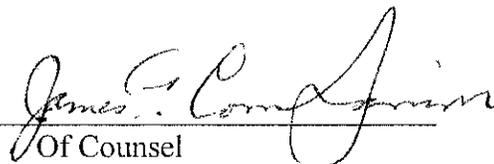
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CERTIFICATE OF SERVICE

Service of the foregoing **RESPONSE BRIEF ON BEHALF OF THE APPELLEE, KEVIN FIKE, IN OPPOSITION TO FARMERS MUTUAL INSURANCE COMPANY'S BRIEF IN SUPPORT OF ITS PETITION FOR APPEAL** was made upon the Petitioner, Farmers Mutual Insurance Company by serving a true copy thereof by U.S. mail, postage prepaid to the following below-named counsel this 16th day of June, 2009:

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KEVIN FIKE, Appellee

By 
Of Counsel

EXHIBITS

ON

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CLERK'S OFFICE