

NO. 34743

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON

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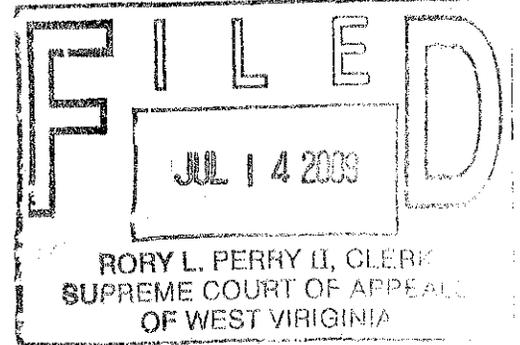
FARMERS MUTUAL  
INSURANCE COMPANY,

Appellant,

v.

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

Appellee.



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**REPLY BRIEF ON BEHALF OF THE APPELLANT, FARMERS MUTUAL  
INSURANCE COMPANY, IN SUPPORT OF ITS PETITION FOR APPEAL**

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF  
WEST VIRGINIA

**CLARIFICATION OF STATEMENT OF FACTS**

In his Response Brief, Kevin Fike ("Fike") asserts that Farmers Mutual Insurance Company's ("Farmers") claim that it had no responsibility for the investigation of Dorris Jennings' ("Jennings") fire claim is new and not based upon the record. Likewise, also in his Response Brief, Fike further insists that his liability, if any, stems from alleged application errors and not the claims investigation process.

Importantly, however, despite Fike's assertions to the contrary, Farmers has consistently maintained that it was without fault relative to the actions complained of in Jennings' Complaint. (Farmers' Cross-Claim Against Kevin Fike at ¶20.) Indeed, beginning with the institution of its Cross-Claim against Fike in December 2002, Farmers has insisted that it is entitled to indemnification and/or contribution from Fike.

Furthermore, as argued in Farmers' Appeal Brief, Fike's negligence in the form of cumulative application misrepresentations, along with his misrepresentations post fire loss regarding Jennings' honesty and integrity, unquestionably affected Jennings' policy recovery. Fike's accusations of fraud by Jennings, with respect to the information contained in Jennings' application, post fire loss inevitably affected Jennings' recovery under her policy.

Also in his Response Brief, Fike argues that Jennings had no loss to assign to Farmers, but, rather, obtained insurance to which she was not entitled. Jennings, however, did have losses to assign to Farmers (in the form of professional negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress claims). In fact, as discussed in the preceding paragraph, and as alleged by Jennings in her Complaint, Fike accused Jennings of fraud in the procurement of her application and caused the proliferation of false statements regarding Jennings' honesty and integrity which, in turn, affected Jennings' ability to recover under her Businessowners

Policy. (Jennings' Complaint at ¶52 and ¶53.) As a result of Fike's actions, although Jennings ultimately obtained coverage, recovery under her policy was affected by Fike's misrepresentations (with respect both Jennings' application and Jennings' honesty and integrity relative to disclosure of her prior loss history). Thus, although Jennings successfully obtained coverage, Jennings still possessed assignable claims against Fike as a result of his misrepresentations. Moreover, as a result of Fike's actions Farmers was responsible for payments to Jennings for which it otherwise would not have been.

### DISCUSSION

#### **I. The Circuit Court of Monongalia County, West Virginia Erroneously Concluded That Farmers' Cross-Claim Against Fike for Contribution was Extinguished by Farmers' Good Faith Settlement With Jennings.**

In his Response Brief, Fike concludes that the extra-contractual damages paid by Farmers in settlement with Jennings are not recoverable against Fike because they stem from the claims investigation process in which Fike had no role. Notwithstanding, as highlighted above, the viability of Farmers' claims for indemnification and/or contribution are not contingent upon Fike's actual involvement in the investigation of Jennings' claim, but, rather, upon Fike's failure to cease the proliferation of false statements regarding Jennings' honesty and integrity relative to the investigation process. These acts by Fike, clearly impacted the nature and scope of the claims investigation process. Irrespective of Fike's insistence that Jennings' complaint allegations regarding her integrity centered around Farmers' conduct, a brief review of Jennings' complaint reveals the opposite. Moreover, also upon review of Jennings' complaint, it is apparent that the actions of Farmers of which Jennings complains, were the direct result of Fike's application misrepresentations and proliferation of false statements during the investigation process.

In addition, although Fike insists that contribution is a factual impossibility because Farmers did not settle Jennings' claims against Fike, West Virginia case law holds to the contrary.<sup>1</sup> Indeed, "[o]nce comparative fault in regard to contribution is recognized, recovery can be had by one joint tortfeasor against another joint tortfeasor *inter se* regardless of their respective degree[s] of fault so long as the one has paid more than his *pro tanto* share to the plaintiff." Reager v. Anderson, 179 W. Va. 691, 703, 371 S.E.2d 619, 631 (1988). Moreover, as recognized in Sitzes v. Anchor Motor Freight, 169 W. Va. 698, 713, 289 S.E.2d 679, 688 (1982), "as between joint tortfeasors a right of comparative contribution exists *inter se* based upon their relative degrees of primary fault or negligence." Practically, the "method for invoking the right of comparative contribution is by requesting that special interrogatories pursuant to Rule 49(b) of the West Virginia Rules of Civil Procedure be given to the jury requiring it to allocate the various joint tortfeasors' degree of primary fault." Id. at 713, 688.

Despite Fike's conclusion that there is no right to contribution from a tortfeasor (who denies liability) that is not in judgment with a settling joint tortfeasor, as discussed in Charleston Area Med. Ctr., Inc. v. Parke-Davis, 217 W. Va. 15, 614 S.E.2d 15 (2005):

Asked to determine whether an inchoate right of contribution existed independent of the statutory rights established in West Virginia Code §55-7-13, the Court in Haynes looked to the general right to contribution that existed before the enactment of West Virginia Code §55-7-13. Citing this Court's decision in Hutcherson v. Slate, 105 W. Va. 184, 142 S.E. 444 (1928), we concluded in Haynes that the "forerunner of Code, 55-7-13, . . . did not limit the general right to contribution." 161 W. Va. at 238, 240 S.E.2d at 549. Expounding on the law governing contribution rights in existence prior to the statutory enactment, we stated that "the general law provides that one joint tort-feasor may ordinarily require contribution from another, except in cases where the wrong was *malum in se* . . ." Id. at 239, 240 S.E.2d at 549 (quoting Hutcherson, 105 W. Va. at 190, 142 S.E. at 447) (emphasis omitted). Acknowledging

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<sup>1</sup> Although Fike maintains that Farmers appears to only be claiming contribution for the intentional and negligent infliction of emotional distress causes of action, Farmers disagrees with Fike's position and does not know what basis Fike would have for making such an assumption.

this longstanding precept, we held in syllabus point three of *Haynes* that "in West Virginia one joint tort-feasor is entitled to contribution from another joint tort-feasor, except where the act is *malum in se*." 161 W. Va. at 230, 240 S.E.2d at 545.

Following an examination of the historical underpinnings of contribution in *Haynes*, we proceeded to determine that an inchoate right of contribution exists as between joint tortfeasors. Based on that inchoate right, we allowed a co-defendant to seek contribution against a dismissed defendant where "trial court error" prevented the entry of a joint judgment. *Id.* at 240, 240 S.E.2d at 550. The significance of the *Haynes* decision is our recognition that the statutory right of contribution, which arises pursuant to West Virginia Code §55-7-13 upon the entry of a joint judgment, did not extinguish the general right of contribution among joint tortfeasors that preexisted the statutory enactment. *See Haynes*, 161 W. Va. at 238-39, 240 S.E.2d at 549 (discussing *Hutcherson v. Slate* and general law of contribution pre-statutory enactment).

Expounding on the right of a joint tortfeasor to seek contribution either in advance of judgment during the pleading stage or post judgment, we explained:

In *Haynes* . . . we traced our prior cases in this area and concluded that a defendant in a negligence action has a right in advance of judgment to join a joint tortfeasor based on a cause of action for contribution. We termed this an "inchoate right to contribution" in order to distinguish it from the statutory right of contribution after a joint judgment conferred by W.Va. Code, 55-7-13 (1923).

*Board of Educ. v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 602, 390 S.E.2d 796, 801 (1990) (citation and footnote omitted). As we articulated in *Zando*, while there is a clear statutory right to seek contribution upon the rendering of a joint judgment, there is also an inchoate right of contribution that exists independent of that statutory right. *See id.*

As argued previously by Farmers in its Appeal Brief, the case law relied upon by Fike does not stand for the proposition that the right to contribution and an allocation of fault are extinguished by a plaintiff's settlement with a joint tortfeasor, rather, said joint tortfeasor is simply limited to pursuit of contribution among joint tortfeasors in the same action rather than a separate cause of action after judgment has been rendered in the underlying case. Furthermore, also as asserted previously, Farmers' right to contribution from Fike is not dependent upon a joint judgment. Indeed, despite Fike's reliance upon *Parke Davis, supra*, unlike the Parke-Davis and Pfizer defendants, whose joint legal obligation had not been established, 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.

Moreover, as a result of Fike's post-fire actions relative to his misrepresentations regarding Jennings' honesty and integrity, Farmers was required to pay extra contractual damages to Jennings. Due to Fike's improper conduct, alone, during the application process, Farmers was forced to pay Jennings the coverages available under her Repo Depo policy, totaling two hundred forty-five thousand dollars (\$245,000.00). Moreover, unlike the defendants in Parke Davis, *supra*, Fike defended the suit instituted against him, was involved in the mediation process, and was aware of the settlement reached at mediation. Thus, Fike's reliance upon Parke Davis, *supra*, is misplaced. In addition, the circuit court's reliance upon Reager, *supra*, is also misplaced in that such a ruling relates solely to a statutory right of contribution. In this instance, however, Farmers' right to contribution from Fike is the well-established, inchoate right of contribution. Thus, Farmers 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. Again, Fike, the wrongdoer, should not be permitted to escape responsibility based upon Farmers' foresight to resolve a difficult case.

Again, any decision by this Court but to permit Farmers' contribution claim would deter, rather than encourage, settlements in cases where there are multiple defendants. In such cases with multiple defendants, if said defendants were forced to give up their rights to contribution upon settlement, said defendants simply would not settle, thus negating the public policy in favor of settlement. This Court should not permit recalcitrant defendants who pay nothing towards settlement are rewarded while those who acknowledge their responsibilities are punished.

Accordingly, the circuit court's holding that Farmers' Cross-Claim against Fike for contribution was extinguished by Farmers' good faith settlement with Jennings should be reversed so as to permit the case to proceed to trial.

**II. The Circuit Court of Monongalia County, West Virginia Erroneously Concluded That Farmers Did Not Rely upon the Information Provided by Fike in Deciding to Insure Repo Depo, Thereby Defeating Farmers' Cross-Claim for Negligent Misrepresentation.**

In his Response Brief, Fike maintains that Farmers did not rely on any of Fike's misrepresentations regarding Jennings' prior loss history because Farmers did not know about Fike's misrepresentations when it issued Jennings' policy. Fike, however, misses the mark, as the absence of important, material, application information was justifiably relied upon by Farmers resulting, ultimately, in damages to Farmers because it relied upon Fike's misrepresentations.

As argued previously, Farmers would have been justified in concluding that there were no prior losses to report if none were reported by Fike. In fact, during his deposition, Lyndon Auvil, the underwriter for Farmers, testified that he would have spoken to Fike about the application telephonically prior to binding the coverage. *See Deposition Transcript of Lyndon Auvil, at p. 51.* Moreover, according to Auvil, he would have expected Fike to advise of prior losses at that time. *See Deposition Transcript of Lyndon Auvil, at p. 51.* In fact, when the completed form was forwarded to Farmers it did erroneously indicate that Jennings had no prior loss history. *See Insurance Application, Exhibit 5, at p. 2.*

Although Fike insists that Farmers has not claimed that anything other than prior loss information would have caused it to refuse to insure Repo Depo, nowhere in Farmers' Cross-Claim against Fike are the allegations limited merely to Fike's failure to report Jennings' loss history. In fact a cursory review of Farmers' Cross-Claim reveals that Farmers' general negligence and negligent misrepresentation claims were founded upon Fike's "substantial misrepresentations, supply of false information, and/or failing to fully disclose and/or assess the risk." (Farmers' Cross-Claim Against Kevin Fike at ¶15.)

Accordingly, with respect to Farmers' negligent misrepresentation claims, the circuit court's ruling that Farmers did not rely upon the information provided by Fike in deciding to insure Repo Depo should be reversed so as to permit the case to proceed to trial.

**III. The Circuit Court of Monongalia County, West Virginia Erroneously Concluded That Jennings' Claims against Fike Were Not Assignable to Farmers.**

In his Response Brief, Fike argues that Jennings' intentional and negligent infliction of emotional distress claims are personal injury claims that cannot be assigned to Farmers. However, as argued by Farmers in its Appeal Brief, because the claims assigned by Jennings to Farmers involve a property right (a property damage claim under Jennings' Businessowners Policy), said claims are assignable. Moreover, as highlighted in Farmers' Appeal Brief, the broadly recognized rule in the State of West Virginia is that if a cause of action survives death, it is assignable. Barkers Creek Coal Co. v. Alpha-Pocahontas Coal Co., 96 W. Va. 700, 123 S.E. 803 (1924). Thus, in conformance with Barkers, because Jennings' "personal injury" emotional distress claims survive death, they too must be assignable.

In addition, in his Brief, Fike also asserts that Jennings' professional negligence action seeks unliquidated personal damages and, therefore, cannot be assigned. Again, however, because Jennings' professional negligence action involves a property right, said cause of action is assignable.

Finally, as argued in Farmers' Appeal Brief, this Court has acknowledged the assignability of insurance claims, in the form of insured claims against both insurers and agents. *See generally*, Strahin v. Sullivan, 220 W. Va. 329, 647 S.E.2d 765 (2007), et al. Moreover, despite Fike's assertions to the contrary, Jennings' claims against Fike derive from contract, the insurance contract between Jennings and Farmers.

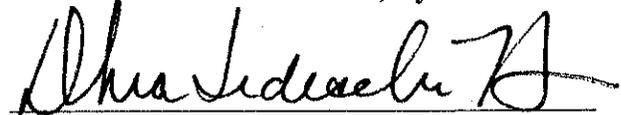
Accordingly, because Jennings' cause of action against Fike exists only because Jennings suffered property damage and filed a claim with Fike and Farmers and because Jennings' claims against Fike were clearly assignable, the circuit court's ruling on assignability should be reversed so as to permit the case to proceed to trial.

**CONCLUSION**

WHEREFORE, based upon the foregoing and for all the reasons previously set forth in Farmers' Appeal Brief, Farmers Mutual Insurance Company, respectfully requests this Honorable Court enter an Order reversing the Circuit Court of Monongalia County, West Virginia's May 20, 2008 Order Granting Kevin Fike's Motions for Summary Judgment on the Cross-claim of Farmers Mutual Insurance Company and on the Claims Assigned by Doris Jennings to Farmers Mutual and remanding the same with instructions.

Respectfully submitted this the 14th day of July, 2009.

**Appellant, FARMERS MUTUAL  
INSURANCE COMPANY, By Counsel:**



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**CERTIFICATE OF SERVICE**

This is to certify that on the 14th day of July, 2009, I served the foregoing "**REPLY BRIEF ON BEHALF OF THE APPELLANT, FARMERS MUTUAL INSURANCE COMPANY, IN SUPPORT OF ITS PETITION FOR APPEAL**" upon counsel for the appellee by depositing a true copy in the United States Mail, postage prepaid, in an envelope addressed as follows:

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