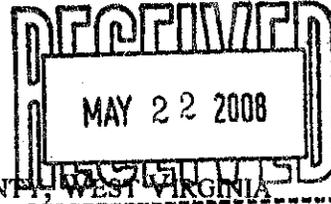


JAV/JNR/PTH



IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA  
DIVISION No. 1

DORIS E. JENNINGS,

Plaintiff,

v.

CIVIL ACTION No. 02-C-373

FARMERS MUTUAL INSURANCE COMPANY,  
and KEVIN FIKE, individually and in his capacity as  
an agent of Farmers Mutual Insurance Company,

Defendants,

and

FARMERS MUTUAL INSURANCE COMPANY,

Third-Party Plaintiff,

v.

UTICA MUTUAL INSURANCE COMPANY,

Third- Party Defendant.

**ORDER**

The Court has pending before it Defendant Kevin Fike's Motion for Summary Judgment on Cross-claim of Farmers Mutual Insurance Company and Motion for Summary Judgment on the Claims Assigned by Doris Jennings to Farmers Mutual. Said motions have been fully briefed and argued by counsel for the respective parties on March 21, 2005. Moreover, by Order entered April 6, 2007, the parties were permitted to submit additional materials in support of their positions by April 12, 2007. Based upon the written briefs, the arguments of counsel, and the material presented, the Court makes the following findings of fact and conclusions of law:

### FINDINGS OF FACT

1. The complaint in this matter arises out of a fire loss which occurred at the business known as Repo Depot on August 15, 2001, owned by the Plaintiff, Doris Jennings (hereinafter "Jennings"), the procurement of the insurance policy in effect at the time of the fire, and the subsequent investigation by the insurance company after the fire.
2. At the time of the fire, Repo Depot was insured by Farmers Mutual Insurance Company (hereinafter "Farmers"). Kevin Fike (hereinafter "Fike"), an agent of Hartley Insurance (hereinafter "Hartley"), was the insurance agent for Jennings who assisted in the procurement of the above referenced insurance policy. Assistance in the procurement of the insurance policy included Fike completing the application for insurance and submitting the application to Farmers in May, 2001.
3. Fike did not provide to Farmers a page of the application which contained information on prior property damage claims.
4. Despite not having this information, the underwriter for Farmers agreed to insure the premises.
5. Farmers did not obtain the missing page of the application, which indicated that Jennings had no prior claims, until after a fire on August 15, 2001, destroyed the insured premises.
6. Farmers admitted in its Answer that at the time of the fire the insurance policy was in "full force and effect."
7. After the fire, Farmers became aware that Jennings had several prior property damage claims. Fike maintains that Jennings denied any prior claims during the application process and Jennings claims that Fike never asked her about prior

claims. However, no one claims that Fike had any knowledge of the prior claims when he submitted the application.

8. Had Farmers known about the prior claims, it would not have insured the premises.
9. The Agency Agreement between Farmers and Fike's employer, Hartley, states that "[t]he duty of investigation, adjusting and litigating claims and losses shall rest exclusively with the Company unless the Agent is requested by the Company to assist in such matters."
10. Fike did not participate in or in any way direct the investigation or settlement of the claim on behalf of Farmers.
11. Jennings was paid Two Hundred and Forty-Five Thousand Dollars (\$245,000.00) by Farmers from the time of the fire until the settlement of the fire claim in November, 2001.
12. On or about May 29, 2002, Jennings's filed the Complaint in this pending matter. Said Complaint contained a claim for *Hayseeds* damages against Farmers; a claim of negligence against Fike; a breach of contract claim against Farmers; a claim arising from the Unfair Trade Practices Act against Farmers; a common law bad faith claim against Farmers; and a claim against both Farmers and Fike for intentional and negligent infliction of emotional distress.
13. On or about December 2, 2002, Farmers filed a cross claim against Fike alleging negligent misrepresentation and requesting contribution and indemnification. Farmers also filed a Third-Party Complaint alleging bad faith against Utica Mutual Insurance Company (hereinafter "Utica"), which insured Hartley and Fike, based upon Utica's handling of the cross claim asserted by Farmers against Fike.
14. In June 2004, Jennings settled her claims with Farmers outlined in the Complaint. As part of the settlement agreement, Jennings assigned to Farmers all claims being

pursued against Fike by Jennings. The assignment included the negligence claim filed against Fike and the negligence and intentional infliction of emotional distress contained within the complaint. This settlement did not affect the cross claim of Farmers against Fike.

15. Fike has filed two pending motions for summary judgment, "Motion for Summary Judgment on Cross claim of Farmers Mutual Insurance Company" and "Motion for Summary Judgment on the Claims Assigned by Doris Jennings to Farmers Mutual".
16. Both motions have been fully briefed on the issues and a hearing on both motions was held before this Court on March 21, 2005. Yolanda Lambert appeared for Fike, Tiffany Durst and Stacy Monday appeared for Farmers, and Sandra Chapman appeared telephonically for Utica.
17. The Court subsequently conducted a status hearing in this case, and permitted the parties to submit additional materials in support of their positions by April 12, 2007.

#### CONCLUSIONS OF LAW

##### **1. Contribution/Indemnity Claims of Farmers Against Fike**

Farmers has not argued that it is entitled to implied indemnity. One of the requisite elements of implied indemnity is that the actions of the proposed indemnitee did not contribute to the injury. *See* Syllabus Point 4, *Harvest Capital v. West Virginia Dept. of Energy*, 211 W.Va. 34, 560 S.E.2d 509 (2002). The real issue is whether Farmers is entitled to contribution from Fike. The Court finds that the claim for contribution must fail. When Farmers settled with Jennings, Farmers settled only the claims Jennings made against the insurance company. Farmers was under no obligation to pay Jennings for any damages she incurred with regard to Fike's conduct. Jennings was able to pursue the claims she had against Fike and the fact that she assigned those claims to Farmers would indicate that she felt that the claims were viable and had not been compromised.

Therefore, it would not appear that, in this context, a claim for contribution by Farmers against Fike existed after Farmers settled with Jennings.

Where there are multiple defendants, and one defendant settles with the plaintiff, it has to be presumed that it has settled the case based upon what it believes is its *pro tanto* share of fault. It is clear that a good faith settlement relieves the settling party from any liability for contribution. Syl. Pt 6, *Board of Education v. Zando, Martin, et al*, 182 W.Va. 597, 390 S.E. 2d 796 (1990). As long as the plaintiff maintains her cause of action against the non-settling defendant, there is no reason to believe that the settling defendant has paid more than its *pro tanto* share and therefore the settling defendant's right to contribution from non-settling parties should also be extinguished. Further, it would be unfair to permit the settling defendant to pursue a claim of contribution against the non-settling defendant, while precluding the non-settling defendant from doing the same.

It appears that if a defendant wants to preserve its right to contribution, a joint judgment must be returned and an allocation of fault must be made. *Reager v. Anderson*, 179 W.Va. 691, 371 S.E. 2d 619 (1988). Jennings has dismissed her causes of action against Farmers, and therefore a joint judgment cannot be returned, nor can fault be allocated between Farmers and Fike. See also *Charleston Area Medical Center v. Parke-Davis*, 217 W.Va. 15, 614 S.E.2d 15 (2005) and *Lombard Canada, Ltd v. Johnson*, 217 W.Va. 437, 618 S.E.2d 446 (2005).

Therefore, given that Farmers settled on its own behalf and not Fike's, there is no claim of contribution. In this case, the claims of contribution between the joint tortfeasors were extinguished by Farmers good faith settlement with the plaintiff.

## **2. Claim for Negligent Misrepresentation**

It is the law in West Virginia that Fike was the agent of the insurer. See WV Code §33-12-2; *Gates v. Justice*, 107 W.Va. 331, 148 S.E.2d 197 (1929). If Fike was negligent in the

application process, then Farmers' recourse was to promptly pay the Jennings claim and seek compensation from Fike for damages caused by his negligent misrepresentation.

Farmers claims that Fike did not ask Jennings about prior claims and therefore incorrectly completed the application by indicating that she had no prior claims. Farmers asserts that had it known of the prior claims, it would not have issued the policy. Farmers claims that it "reasonably relied upon the information provided to it by the application for insurance provided by Kevin Fike" (¶ 14 of the Crossclaim) and that Fike "negligently induced Farmers Mutual Insurance Company to assume the insurance coverage of Repo Depo." (Id. at ¶15)

The parties do not dispute that Fike did not initially fax the relevant information to Farmers and that despite this, Farmers insured the premises. Farmers' underwriter stated in a memo of September 10, 2001, that "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 only relates to sexual abuse or other allegations. Actual loss history is on the reverse side of the Acord commercial insurance application section. The binding letter was faxed on 6/11. Agents check dated 6/12." (Emphasis added).

The issue is then whether Farmers can claim detrimental reliance on a piece of information which, though incorrect, was never provided to Farmers. It is clear that Farmers did not "reasonably rely" on this information and without this reliance it cannot maintain this cause of action against Fike. *Cordial v. Ernst & Young*, 199 W.Va.119, 483 S.E.2d 248 (1996).

In West Virginia, in order to prevail on a claim for negligent misrepresentation, the complainant must at least establish that "the representations 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). To show constructive fraud, Farmers must show: (1) the act claimed to be fraudulent is the act of the defendant or induced by him; (2) that the act is material and false; (3) the plaintiff relied on it and was justified under the circumstances in relying upon it; and (4) that

the plaintiff was damaged because he relied on it. Syl. Pt. 5, Kidd v. Mull, 215 W.Va. 151, 595 S.E. 2d 308 (2004) ( Emphasis added).

Farmers claims that “Mr. Fike fails to mention the fiduciary duty that he and Farmers undisputably had at the time he made the misrepresentations to Farmers.” (Farmers’ Response In Opposition to Kevin Fike’s Motion for Summary Judgment on Crossclaim and Incorporated Memorandum of Law, pg. 5, emphasis added). However, there was no evidence presented that Fike supplied any information to Farmers concerning Jennings’s prior claims experience.

As no information was supplied by Fike to Farmers concerning the prior claims experience of Jennings, Farmers could not have relied upon this information and therefore Farmers cannot establish a claim for negligent misrepresentation. Since it has been determined that Farmers cannot proceed with the claim of negligent misrepresentation, there is no need to determine what damages might have been recoverable through this cause of action.

### 3. Validity of Assignment of Jennings’s Claims to Farmers

The Court would first note that it is inconsistent for Farmers to claim both a right to contribution and an assignment of the plaintiff’s causes of action against Fike. Farmers cannot claim a right of contribution for sums it paid in excess of its share of culpability while also claiming, through the assignment, that Jennings has not been compensated for the conduct of Fike. As the Court has found, that the right to contribution is extinguished by the settlement, it is not necessary to consider this inconsistency further.

The issue of Jennings’s assignment of her causes of action is controlled by *Hereford v. Meek*, 132 W.Va. 373, (1949). It is the law in West Virginia that

(N)othing is assignable either at law or in equity which does not directly or indirectly involve a property right and that the statute providing for the survival of an action for personal injuries was not intended to transform that right of action into a property right, and also under the view that the assignment of a cause of action for personal injuries is contrary to public policy.

*Id.* at 392-393.

Farmers has admitted in its brief that Jennings did not allege any "bad faith" claims against Fike. Her claims were for professional negligence and intentional and negligent infliction of emotional distress. The damages claimed as a result of the professional negligence are difficult to articulate. This is not a "failure to procure" insurance case. According to the plaintiff's theory of the case, it appears that the plaintiff actually obtained insurance due to the alleged negligence of Fike. It is undisputed that "but for" Farmers' failure to ensure that Jennings had no prior claims, she would not have obtained insurance because she had, in fact, recovered several claims over the preceding years. It is difficult to understand how Jennings was then damaged by this alleged misrepresentation or could have suffered from intentional or negligent infliction of emotional distress based on Fike's conduct in obtaining insurance to which Jennings was arguably not entitled.

The Complaint suggests, as did Farmers' brief on this issue, that Jennings's damages included damage to her business and personal reputation, annoyance, inconvenience, emotional distress and embarrassment. (Farmers Mutual Insurance Company's Response in Opposition to Motion for Summary Judgment on the Claims Assigned by Doris Jennings to Farmers Mutual, pg 6). It is not necessary to determine whether or to what extent the claim for professional negligence is assignable because in the context of this case, it is clear that Jennings's claims for damages arising from Fike's alleged conduct are personal in nature, do not involve any property right and are not assignable. *See Hereford, supra*. Similarly, the claims for intentional and negligent infliction of emotional distress, to the extent that there even exists a basis for such claims, are not assignable because they also involve "personal" damages.

This assignment is also barred on the basis of public policy. It was nothing more than the sale of a cause of action for unliquidated personal injuries. Jennings was not relieved of any debt or obligation by the assignment. There is no public policy which would be served by permitting such an assignment. The injured party's damages are capped by her settlement with Farmers, but there is nothing which caps Farmers' potential recovery from Fike. There is the

potential for Farmers to actually obtain a "profit" through the assignment. Pursuant to *Hereford, supra*, the assignment of a cause of action for personal injuries is contrary to public policy. This is especially true where a joint tortfeasor attempts to obtain compensation for those injuries to which it contributed.

It is therefore ORDERED:

1. Farmers' cross claim against Fike for contribution was extinguished by its good faith settlement with Jennings. Fike's Motion for Summary Judgment as to this claim is GRANTED;
2. Farmers did not rely on any information provided by Fike in deciding to insure the Repo Depo. Fike's Motion for Summary Judgment as to Farmer's cross claim of negligent misrepresentation is GRANTED.
3. Jennings claims against Fike were for unliquidated, personal causes of action and are thus not assignable to Farmers. Fike's Motion for Summary Judgment as to the assignment is GRANTED.

It is FURTHER ORDERED that the Clerk of this Court shall provide a copy of this Order to all counsel of record.

ENTER

*May 20, 2008*  
*Robert B. Abner*  
JUDGE

STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and Family Court of Monongalia County State aforesaid do hereby certify that the attached Order is a true copy of the original Order made and entered by said Court.

*Jean Friend*  
Circuit Clerk

**CERTIFICATE OF SERVICE**

This is to certify that on the 19th day of September, 2008, I served the foregoing  
“*Supreme Court of Appeals of West Virginia - Docketing Statement*” upon all counsel of record  
by depositing true copies in the United States Mail, postage prepaid, in envelopes addressed as  
follows:

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