No. 121943

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

ANGELA ANTONICELLI, Plaintiff-Respondent, v. DANIEL JUAN RODRIGUEZ, Defendant-Respondent, ARTEMIO RAMOS Defendant-Respondent, KARL BROWDER, CHICAGO TUBE AND IRON COMPANY, a Foreign Corporation, and TRILLIUM STAFFING d/b/a TRILLIUM DRIVERS SOLUTIONS, a Foreign Corporation, Defendants-Petitioners,	)	Appellants' Reply Brief No. 1-15-3532 There heard on Appeal from the Circuit Court of Cook County Illinois Honorable Moira S. Johnson, *Judge Presiding*. Order of Appellate Court January 17, 2017

(CAPTION CONTINUED ON INSIDE COVER)

APPELLANTS' REPLY BRIEF

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ORAL ARGUMENT REQUESTED

KARL BROWDER, CHICAGO TUBE AND IRON COMPANY, a Foreign Corporation, and TRILLIUM STAFFING d/b/a TRILLIUM DRIVERS SOLUTIONS, a Foreign Corporation,

Counter-Plaintiffs-Petitioners,

v.

DANIEL JUAN RODRIGUEZ,

Counter-Defendant-Respondent.

Argument

I. An intentional tortfeasor cannot seek protection from the Contribution Act.

The Appellee, Mr. Rodriguez, has conceded that contribution is not authorized where a defendant's acts amount to intentional behavior. However, he goes on to argue that this fundamental proposition does not apply to his settlement with the plaintiff. First, he argues that he cannot be characterized as an intentional tortfeasor because the allegations of the Plaintiff's Complaint are framed in terms of negligence. Second, he argues that if he is properly characterized as an intentional tortfeasor, there is a qualitative distinction between negligent and intentional conduct that prevents the Browder Defendants from making a contribution claim against him. Third, he argues that if the Browder Defendants can make a contribution claim against him, he is entitled to the protection of a good faith finding under the Contribution Act. Each of his arguments disregards the basis upon which the legislature codified the right of contribution created by this court in *Skinner v. Reed-Prentice Div. Package Machinery Company Co,* 70 Ill. 2d, 1 (1977) 740 ILCS 100/2, et seq.

The *Skinner* court created the right of contribution to address the obvious lack of sense and justice in a rule that permitted the entire burden of loss to rest on the shoulders of one negligent defendant under facts demonstrating that more than one defendant is responsible for damages suffered by the plaintiff. The *Skinner* court therefore fashioned an equitable remedy to apportion damages based upon the relative degrees of fault of co-defendants.

The undisputed evidence presented in the trial court established that Mr. Rodriguez was an intentional tortfeasor. He intentionally attempted to make a U-turn

through an expressway median while under the influence of cocaine. As a result of his intentional wrongdoing, he remains incarcerated in the Illinois Correctional Facility in Vienna, Illinois. Because contribution is an equitable remedy, the right of contribution falls under the centuries old legal maxim that the law does not aid those who have committed an illegal act. *Holman v. Johnson*, 1 Cowp. 341 (1775). Similarly, Rodriguez cannot argue that it is inequitable to allow the Browder Defendants to seek contribution against him when he is prohibited from seeking contribution against them. A party seeking equitable relief cannot take advantage of its own intentional misconduct. *State Bank of Geneva v. Sorenson*, 167 Ill. App. 3rd 674 (2nd Dist. 1988).

The argument that Mr. Rodriguez can benefit from the Plaintiff's characterization of his conduct as "negligent" disregards the equitable principles creating the right of contribution. Although the Appellate Court accepted Appellee's argument that the contribution analysis is controlled by the allegations of the Plaintiff's Complaint, there are no cases to support that conclusion. The argument that the counterclaim against Rodriguez is a separate cause of action is incorrect. The counterclaim filed by the Browder Defendants arises out of the same set of operative facts as the underlying case brought by the plaintiff, and as such, it must be filed in the underlying action brought by the plaintiff. *Laue v. Leifheit*, 105 Ill. 2nd 191, 196 (1984). It simply seeks a comparison of the relative degrees of fault of the two defendants. Furthermore, a court's ruling on a motion for good faith finding under the Contribution Act must be based on the totality of circumstances, which in an appropriate case, can include extrinsic evidence. *Muro v. Able Freight Lines*, 283 Ill. App. 3rd 416, 419 (1st Dist. 2005). In this case, the extrinsic evidence of Rodriguez's culpability was uncontroverted. Based upon that evidence, he is

properly characterized as an intentional tortfeasor. Any determination otherwise would be an abuse of discretion.

Appellee's argument that a qualitative distinction between intentional conduct and negligent conduct prevents a contribution claim against Rodriguez is similarly misplaced. Appellees rely on *Ziarko v. Soo Line R.R.*, 161 IL 2nd 267 (1994), to support their contention in this regard. *Ziarko*, however, addressed the questions of whether an intentional tortfeasor sued for punitive damages can raise the defense of comparative negligence, and whether an intentional tortfeasor can seek contribution from a negligent co-defendant. The court held that an intentional tortfeasor is not entitled to relief in either case. Ziarko, 161 Ill. 2nd 276, 280. The *Ziarko* court did not address the question of whether a negligent tortfeasor can seek contribution from an intentional wrongdoer. To the contrary, the court in *Long Beach Mortgage Company v. White*, 918 F. Supp. 252, 254 (ND. Ill. 1996), commented that it would be totally bizarre to preclude a tortfeasor who is even less at fault (negligent, rather than willful and wanton) from obtaining contribution from a tortfeasor who is even more at fault (an intentional rather than merely negligent wrongdoer). *Long Beach*, 918 F. Supp. 252, 254.

Appellee finally argues that if a negligent tortfeasor can seek contribution from an intentional tortfeasor, the Contribution Act necessarily becomes implicated and, as a result, the intentional tortfeasor can enter into a good faith settlement under the Contribution Act. There are no cases to support this proposition. However, if this were true, the intentional tortfeasor would be receiving the protection of the Contribution Act, a result that is inconsistent with the equitable principles upon which the right of

contribution was created. Again, the law does not come to the aid of someone like Mr. Rodriguez, who commits an intentional act.

In summary, a statutory construction that on the one hand prohibits an intentional tortfeasor from asserting a contribution claim while on the other hand provides him with the statutory protections of the Act makes little sense. In order to apply the Act consistently, the intentional tortfeasor should not derive any benefit, either as a remedy or a defense. Accordingly, Mr. Rodriguez's attempt to seek protection by means of a good faith finding under the Contribution Act has no support in law or in fact.

II. Assuming Mr. Rodriguez's conduct can be characterized as willful and wanton, but not intentional, the Appellate Court and the trial court erroneously failed to consider the rights of minimally culpable defendants under Section 2-1117 in arriving at a finding that Rodriguez's settlement with the Plaintiff was in good faith.

Appellee relies primarily upon this Court's decision in *Ready v. United v. Goedecke Services, Inc.*, 232 Ill. 2nd 369 (2008) to argue that a Section 2-1117 analysis of the rights of minimally culpable defendants is irrelevant to the court's ruling on a motion for good faith finding. The reliance on *Ready* is misplaced. In *Ready*, the trial court was presented with a motion for good faith finding resulting from a pre-trial settlement between the Plaintiff and two defendants. The settlement was reached without objection by the non-settling defendant. At trial the non-settling defendant made a motion in limine seeking to include the settling defendants on the jury verdict form for purposes of an apportionment of damages under §2-1117 of the Code of Civil Procedure. The trial court denied the motion in limine. The Appellate court reversed. The Supreme Court reversed

the Appellate Court after addressing a split in authority on the issue of whether a settling party should be included on the jury verdict form. *Ready* at 385.

The procedural history of *Ready* demonstrates that the §2-1117 implications were not addressed at the time the trial court entered its good faith finding. The only issue addressed by the trial court was whether or not a settling party could be listed on the jury verdict form for purposes of an apportionment of damages under §2-1117.

On appeal, this Court was asked to address competing policy arguments raised by the non-settling defendant and the plaintiff regarding the statutory construction of §2-1117. The non-settling defendant argued that the exclusion of settling defendants from the apportionment of fault at trial would result in unfairness. The plaintiff argued that the inclusion of settling tortfeasors in the allocation of fault would discourage future settlements. This Court declined to decide between competing policy positions stating, by way of dicta, that this task is better left to the legislature. *Ready* at 383. The *Ready* court never addressed the issue of whether §2-1117 must be taken into consideration by the trial court when faced with a motion for good faith finding.

For the same reason, Appellee's reliance on the Appellate Court decision in *Miranda vs. Walsh Group Ltd.*, 213 Ill. App (1st) 122674 is misplaced. *Miranda*, like the instant case, was an appeal from the trial court's entry of a good faith finding in a settlement under the Contribution Act. The non-settling defendant similarly argued that the policy of protecting minimally culpable parties should be taken into consideration. The Appellate declined to do so, expressly noting that the issue was never discussed by this Court in *Ready*. The *Miranda* court similarly declined to discuss the issue. *Miranda* can be distinguished on the grounds that the *Ready* court was never asked to rule upon a

motion for a good faith finding. Had it been asked to do so, it would have necessarily considered the totality of circumstances, including the equitable apportionment of damages and the adverse consequences upon a minimally culpable non-settling defendant.

Appellee further argues that, given this Court's ruling in *Unzicker* that the Contribution Act and Section 2-1117 can be read consistently, there is no reason to develop a framework for reconciling them. Appellee misapprehends the argument of the Browder Defendants. It is not that the two statutes are inconsistent, but rather that this Court's ruling in *Ready* creates an impediment to their consistent application. The problem arises in cases such as this where a minimally culpable defendant is forced to go to trial without the protection of the Contribution Act or Section 2-1117. It is for this reason that this Court must fashion a framework for implementing the statutory protections that the legislature envisioned for the protection of defendants.

According to the Appellee, a non-settling defendant has no right to make an argument that as a minimally culpable tortfeasor, he should only be required to pay damages commensurate with his relative culpability. Under the current procedural framework, the jury will have no opportunity to apportion damages to Mr. Rodriguez, who, in all probability, will remain incarcerated through the date of trial. The jury's choices will be limited to either turning the plaintiff away with no recovery, or making the minimally culpable defendant pay the entire verdict. Appellee's position would effectively make minimally negligent defendants into insurers, which is not consistent with the purpose of the Act.

As this Court is well aware, there is a large body of case law construing the Contribution Act and Section 2-1117 under a variety of factual settings. The overarching considerations giving rise to the protections afforded Defendants by these statutes include the equitable apportionment of damages, and the protection of minimally culpable defendants. The *Skinner* Court and the subsequent codification of *Skinner* by the enactment of the Contribution Act provided the first line of protection by creating a remedy in which a defendant could ask for an apportionment of damages based upon the relative culpability of all defendants subject to liability in tort. Later, when it became apparent that a right of contribution against a co-defendant who has limited assets provides little, if any, protection to a defendant who has the ability to satisfy a judgment, the legislature enacted Section 2-1117 to protect minimally culpable defendants regardless of the solvency of any of the co-defendants. However, the case law has eroded these statutory protections.

First, the cases regularly disregard one of the fundamental purposes of the Contribution Act in providing for an equitable apportion of damages, by limiting the inquiry in a motion for a good faith finding to the issue of whether the settlement was procured through fraud or collusion. Similarly, the characterization of the term "good faith" as being limited to the absence of fraud or collusion is nowhere to be found in the language of the Contribution Act. As a result, rarely, if ever, are motions to approve settlements denied because the apportionment of damages is inequitable. More recently, as a result of the decision in *Ready*, the apportionment of fault analysis under Section 2-1117 has been further eroded by limiting the Court's consideration of the relative degrees of fault to only those parties remaining in the case at the time of trial. It is against this

historical background that this Court is now being asked to consider whether the goal of the legislature in protecting defendants who are only partially at fault from paying 100% of a judgment has been effectuated by existing case law interpreting and applying the Contribution Act and Section 2-1117. The Appellants have proposed a reasonable procedural framework that effectuates the statutory purposes of both statutes.

The procedural framework that has been proposed in this case will not place an undue burden on the court or the litigants. The type of evidentiary hearing need not be anything more than what was presented in the trial court in this case. However, the trial court must make a determination of whether a non-settling defendant has shown by preponderance of the evidence that there is a reasonable basis for concluding that the non-settling defendant will be found to be less than 25% at fault at trial. If the court finds in the non-settling defendant's favor, the Motion for Good Faith Finding should be denied without prejudice. The parties are free to proceed with the settlement, absent the good faith finding. They are also free to enter into a covenant not to execute, which could relieve the settling defendant of any need to continue his participation in the case. Whether or not the defendant's insurance carrier determines that it is contractually obligated to continue to defend its insured should not control the analysis; nor is it relevant. The statutory protection of the Contribution Act and Section 2-1117 were not created to benefit insurance carriers, who are free to adjust their premiums if necessary.

Finally, Appellee's attempt to discount the analogy between the Appellants' proposed procedural framework and the accommodation reached by the *Kotecki* court is misplaced. The *Kotecki* decision simply serves to illustrate a precedent for thinking "outside the box" in order to reach an accommodation in the application of two statutes.

While Appellee is correct that the Contribution Act and Section 2-1117 are not in conflict, the case law construing them has served to frustrate the fundamental goals of the legislature. Accordingly, the Browder Defendants respectfully request this Court consider the solution that they have offered.

Conclusion

The order of the Appellate Court affirming the trial court's order finding that the settlement between the Plaintiff and the Defendant, Daniel Juan Rodriguez, was in good faith should be reversed and vacated, with instructions to remand the case to the trial court for further proceedings consistent with this court's order.

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 9 pages.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing Appellants' Reply Brief with the Clerk of the Supreme Court of Illinois on September 8, 2017. I certify that I served the foregoing Brief by placing copies in an envelope with sufficient postage affixed and directed to the persons and addresses listed below, and depositing said envelopes in a United States mail box in Chicago, Illinois, before 5:00 on September 8, 2017.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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