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IN THE MISSOURI SUPREME COURT

CASE NO. SC92429

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA and
JACOBSMEYER-MAULDIN CONSTRUCTION COMPANY,
Plaintiffs

vs.

THE MANITOWOC COMPANY, INC.
Defendant/Third-Party Plaintiff/Appellant

vs.

UNITED STATES STEEL CORPORATION, as successor-in-interest to
LONESTAR TECHNOLOGIES, INC. a/k/a LONESTAR STEEL
Third-Party Defendant/Respondent

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
DIVISION 8, THE HONORABLE TOM W. DePRIEST, JR. AND
MISSOURI COURT OF APPEALS - EASTERN DISTRICT CASE NO. ED96780

SUBSTITUTE REPLY BRIEF OF APPELLANT THE MANITOWOC COMPANY, INC.

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RESPONSE TO RESPONDENT'S STATEMENT OF FACTS

The statement of facts in Respondent's Substitute Brief is replete with citations that do not support the propositions asserted. Consequently, counsel for Appellant is compelled to respond to these facts in order to point out those inaccuracies for this Court.

Respondent contends that Appellant "asserted a new argument, not made in its Response to U.S. Steel's Motion to Dismiss, namely that Manitowoc is entitled to pursue a claim for contribution/indemnity for settlement amounts Manitowoc anticipated paying to Plaintiffs for property damage allegedly sustained by Plaintiffs as a result of the January 9, 2006 crane accident." This contention inaccurately asserts this was a new argument when, in fact, the argument was raised in the trial court in Appellant's Response to Respondent's Motion to Dismiss. The record reflects that Appellant specifically argued in its Response that the claim for contribution was based on Appellant's status as a joint tortfeasor for the property damage sustained by Plaintiffs. LF 51. Appellant argued

> Plaintiffs' Petition cites a failure of the main hoist lift cylinder as an allegation in its Petition. This is the same allegation made by Manitowoc against United in its Third Party Petition. While the original Petition also alleges settlement agreements and breaches of those agreements, <u>that does not change the fact that it also alleges product liability tort failure of the machine itself.</u>

LF 51 (emphasis added). Further, Appellant argued "[c]ertainly, United as the original designer, provider or manufacturer of the cylinder could have been named by Plaintiffs in this suit as a Co-Defendant responsible for the negligent failure of the cylinder." LF 51 (emphasis added).

Respondent contends that Appellant raised an entirely new argument at the hearing on March 18, 2011, regarding property damage and contribution/indemnity for the same. As detailed above, this argument was raised in Appellant's Response to the Motion to Dismiss. Respondent also inserts argument, which should be disregarded as legal argument is not to be included in the Statement of Facts.

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ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING THE MANITOWOC COMPANY, INC.'S THIRD-PARTY PETITION BECAUSE IT STATED A CLAIM FOR CONTRIBUTION AND/OR INDEMNITY IN THAT THE MANITOWOC COMPANY, INC.'S CLAIMS SOUGHT CONTRIBUTION AND/OR INDEMNITY FOR ALL OR PART OF PLAINTIFFS' CLAIMS FOR PROPERTY DAMAGE AND TO ENFORCE SETTLEMENT AGREEMENT, AND IN THAT THE MANITOWOC COMPANY, INC. PROPERLY PLEADED THE CLAIM FOR CONTRIBUTION AND/OR INDEMNITY

A. Section 507.080 and Rule 52.11 permit Appellant's third-party petition in that the claim for contribution and/or indemnity asserts that Respondent is or may be liable to Appellant for Plaintiffs' damage claims against Appellant.

Respondent argues it "could not be liable to [Appellant] or to Plaintiffs for Plaintiffs' breach of contract claims, arising from [Appellant's] alleged breach of the settlement agreement" because Respondent was not a party to the settlement agreement. Respondent again relies upon the fact that it was not a party to the settlement agreement to support dismissal of the third-party action.

The language of § 507.080 and Rule 52.11 is broad and specifically states that the third-party defendant is someone who is <u>or may</u> be liable. Section 507.080 provides a

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defendant may "file a petition and serve a summons upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claims against him." RSMo. 507.080 (2010) (emphasis added). Moreover, Rule 52.11 similarly provides "a defending party, as a third-party plaintiff, may cause a summons and petition to be served upon a person not a party to the action who is or may be liable to the defending party for all or part of the plaintiff's claim against the defending party." Mo. R. Civ. P. 52.11(a) (emphasis added).

Respondent argues that Appellant cannot seek contribution from Respondent as "Respondent could not be liable to Plaintiffs or [Appellant] for any part of the claims asserted in Plaintiffs' Petition" because Respondent was not a party to the settlement agreement. "Since the only claims asserted by Plaintiffs against [Appellant] were for breach of contract, the only claims on which a trier of fact could have found [Appellant] liable were for breach of contract." *See* Respondent's Substitute Brief, page 7. However, it is ***not*** necessary that Appellant base its third-party claims upon the same claim or theory of recovery as the original plaintiff's claims. *See State ex rel. Green v. Kimberlin*, 517 S.W.2d 124, 127 (Mo.banc 1974) (emphasis added). Rather, it is only necessary that the claim asserted in the third-party petition, if proven, "would transfer the liability asserted against the defendant/third-party plaintiff to the third-party defendant. There must be an attempt to *pass on to the third party all or part of the liability asserted against the Defendant*." *Id.* (emphasis added).

Appellant's allegations against Respondent seek to transfer liability for all or part

of the damages claimed by Plaintiffs. Appellant's liability to Plaintiffs is based upon property damage sustained on or about January 9, 2006. Appellant maintains that the hydraulic cylinder and/or the materials which form the hydraulic cylinder were provided by Respondent, and that these materials were defective and caused Plaintiffs' property damage. Appellant's claims for contribution and/or indemnity would transfer the liability of Appellant to Respondent for the *amounts paid to Plaintiffs for the property damage sustained on or about January 9, 2006.* Appellant's claim for contribution and/or indemnity was properly pleaded as a third-party petition as Appellant seeks to "pass on to [Respondent] all or part of the [property damage] liability asserted against the [Appellant]." *Kimberlin*, 517 S.W.2d at 127.

Further, to split this cause of action and require Appellant to bring a lawsuit against Respondent in yet another case has the exact opposite result of the purposes expounded in *Hipp v. Kansas City Public Service Company,* 237 S.W.2d 928 (Mo.App. 1951), and, *State ex rel. Perkins Coie, LLP v. Messina,* 138 S.W.3d 815 (Mo.App. 2004), i.e., to avoid two actions and to further efficient use of judicial resources. As a result, Appellant's third-party petition against Respondent sufficiently pleaded a cause of action, and dismissal was in error.

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B. Appellant has sufficiently pleaded a cause of action for contribution and/or indemnity in that Appellant has pled some inference or reasonable intendment of its own liability; therefore, dismissal on the basis of Appellant's failure to plead its own fault was in error.

A party seeking contribution from a joint tortfeasor must allege that it was a joint tortfeasor. *Stephenson v. McClure*, 606 S.W.2d 208, 213 (Mo.App. 1980). However, Appellant must only assert an "inference or reasonable intendment" that Appellant is or may be liable to Plaintiffs. *See id.* (the pleader must assert any "inference or reasonable intendment" that Appellant was liable to Plaintiffs); *see also Mid-Continent News Co., Inc. v. Ford Motor Co.*, 671 S.W.2d 796 (Mo.App. 1984) ("no inference or reasonable intendment" that appellant was liable based upon mere conclusory allegations); *but see Major v. Frontenac Indus., Inc.*, 899 S.W.2d 895 (Mo.App. 1995) (an "inference or reasonable intendment" of fault existed where more than mere conclusory allegations were pleaded).

Respondent argues that Appellant has failed to plead its own fault in that Appellant has denied its own liability. However, Appellant's denials are not dispositive. In order for Respondent's argument to prevail, an overly restrictive reading of the pleadings is necessary. Such a narrow and one-sided reading is against the weight of authority on the matter and vastly inappropriate. Respondent's analysis would require the court to ignore relevant provisions in the third-party petition, and look only to the denials set forth in paragraphs 18 and 22. Respondent cannot assert dismissal is

necessary where there is *any* denial of liability. *See Major*, 899 S.W.2d at 899 (Frontenac specifically denied its liability). Respondent's assertion can only pass muster by ignoring the inferences of liability asserted. This court must review the petition as a whole and not simply review those provisions in support of Respondent's theory. *See City of Lake Saint Louis v. City of O'Fallon*, 324 S.W.3d 756, 759 (Mo.banc 2010)(Appellant's averments are taken as true, and all reasonable inferences are construed in favor of Appellant).

Moreover, while Appellant "outright denied its own liability at paragraphs 18 and 22 of its Third-Party Petition," Appellant also, alternatively, pleaded its own fault sufficiently to state a cause of action for contribution. More than mere conclusory allegations were set forth in Appellant's Third-Party Petition. Appellant's numerous allegations establish that the crane was owned by Appellant, that the crane fell, and that the crane fell due to a defective steel cylinder, thereby creating an "inference or reasonable intendment" that Appellant is or may be liable to Plaintiffs for all or part of the damages asserted, i.e., that Appellant is or may be a joint tortfeasor.

Respondent argues that "[Appellant] did not allege in its Third-Party Petition that it placed a defective steel cylinder on the crane, that said crane was defective, or that the defect caused injuries to Plaintiffs." Respondent's argument is based on specific language, in which Appellant alleges that Plaintiffs made various allegations regarding the cause of the incident and the damages. The inclusion of the phrase "Plaintiffs allege" does not alter the effect of the Appellant's allegations.

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Respondent attempts to distinguish *Major v. Frontenac Indus., Inc.*, 899 S.W.2d 895 (Mo.App.E.D. 1995), arguing that Appellant "never pled that the crane was defective, unsafe or dangerous, and, in fact, denied all such allegations made by Plaintiffs." As stated above, Respondent's contention that Appellant "never pled that the crane was defective, unsafe or dangerous" is without merit.

Respondent further attempts to distinguish *Major* on the basis that the contribution defendant was also a defendant in the underlying tort cause of action, and that, therefore, "when the seller/contribution plaintiff in Major pled in the alternative that 'in the event [the seller] was found liable, [the seller] was entitled to indemnity or contribution from [the manufacturer],' the seller was pleading its liability as a *tortfeasor*." However, this argument is without merit, in that Appellant has pleaded nearly identical allegations. The only distinction is that Respondent was not a party, nor was it required to be a party, in the underlying cause of action.

Of note is Respondent's failure to even address pleading in the alternative. As previously stated, Missouri law has fundamentally allowed inconsistent positions to be alternatively taken in pleadings. Mo. R. Civ. P. 55.10. This Rule does not *exclude* parties asserting claims for *contribution* from pleading in the alternative. To deny Appellant the right to expressly deny its liability has the effect of denying *only* contribution plaintiffs of the explicit right created under Rule 55.10. Respondent's only mention of alternative pleading was its agreement that Appellant "pled in the alternative its liability to the plaintiffs for the alleged breach of the settlement agreement as a party

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to the contract."

Respondent concludes by arguing that reliance upon *Clemmons v. King*, 265 N.C. 199 (1965), is misplaced. However, *Clemmons* is instructive regarding the requirements for pleading contribution *alternatively*. *Clemmons* clearly sets out the requirements under North Carolina law, which is significantly similar to Missouri law. The court stated that the contribution pleader is not required "to make a judicial admission that his negligence was one of the proximate causes of the injury for which plaintiff sues." *Id.* at 202. Rather, the pleader "may deny negligence and allege, conditionally or alternatively, that *if* he was negligent, the third party's negligence concurred with his as a proximate cause of plaintiff's injuries." *Id.* While Respondent seeks to require an admission of fault in order to state a claim for contribution, such cannot be required under Missouri law.

In order for Respondent's argument to prevail, the court must ignore relevant provisions in the Third-Party Petition, alleging inferences and reasonable intendment of liability, and look only to the denials. In reviewing the Third-Party Petition as a whole, taking Appellant's averments as true, and construing all inferences in favor of Appellant, Appellant met the pleading requirements for contribution and/or indemnity. Therefore, the dismissal of Appellant's Third-Party Petition was in error.

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II. THE TRIAL COURT ERRED IN DISMISSING THE MANITOWOC COMPANY, INC.'S THIRD-PARTY PETITION WITH PREJUDICE BECAUSE THE APPROPRIATE DISPOSITION IS TO STRIKE THE THIRD-PARTY PETITION OR TO DISMISS WITHOUT PREJUDICE IN THAT "DISMISSAL" OF A THIRD-PARTY PETITION UNDER RULE 52.11 OR § 507.080 IS BASED UPON A LACK OF JURISDICTION AND, THEREFORE, IS NOT A DETERMINATION OF THE MERITS OF THE CASE

A. The proper disposition where a court lacks jurisdiction under Rule 52.11 or § 507.080 is to strike the third-party petition or to dismiss without prejudice, and dismissal with prejudice was in error

Respondent does not dispute that the proper remedy is to simply strike the third-party petition where the petition "sufficiently pled a cause of action, but the cause of action was not the proper subject of a third-party petition." *See* Respondent's Brief, page 15. Rather, Respondent argues that Appellant has not sufficiently pled a cause of action for contribution, and that dismissal *with* prejudice was proper. Yet, Respondent can cite to no authority supporting the conclusion that all rights to contribution must be foreclosed based upon an allegedly improperly pleaded third-party petition. In fact, none of the cases relied upon by Respondent dismissed the claims *with* prejudice. *See Stephenson v. McClure*, 606 S.W.2d 208 (Mo.App. 1980); *Mo. Pac. R.R. v. Whitehead & Kales Co.*, 566 S.W.2d 466 (Mo. 1978); *Mid-Continent News Co. v. Ford Motor Co.*, 671 S.W.2d 796

(Mo.App. 1984). Appellant's third-party petition meets the pleading requirements for contribution and/or indemnity. To deny Appellant the right to contribution and/or indemnity would create an unfair burden on Appellant, and improperly deny Appellant its day in court and a determination on the merits of the contribution and/or indemnity claims.

The record clearly reflects that Respondent originally sought dismissal based exclusively on the fact that Appellant's cause of action was not a proper subject of a third-party petition[1]. See LF 45-48. Respondent argued that under § 507.080 and Rule 52.11(a), both providing for third-party practice, Appellant could not support a cause of action. See LF 46, ¶¶ 4-7.

Now, Respondent's argument is exclusively regarding the alleged failure of Appellant to plead its own fault.[2] Respondent relies upon *Mid-Continent News Co., Inc. v. Ford Motor Co.*, 671 S.W.2d 796 (Mo.App.W.D. 1984), in support of dismissal ***with*** prejudice. In *Mid-Continent*, the court found that, based upon the specific pleading,

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[1] It was not until Respondent's Reply in Support of its Motion to Dismiss when Respondent first raised the argument regarding Appellant's alleged failure to plead its own fault.

[2] Appellant only asserts that Respondent's argument is exclusively regarding the alleged failure of Appellant to plead its own fault only as regarding the disposition of the third-party petition, i.e. strike, dismissal without prejudice, or dismissal with prejudice.

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third-party plaintiffs failed to allege ***any*** facts establishing their own liability. The third-party petition alleged that "appellants had settled with the Kilbreths, but 'have at all times denied any and all liability to the said Anna M. Kilbreth and Larry Kilbreth,'" that "plaintiffs [are] not admitting liability on the Kilbreths' Petition," "that any damage sustained by the Kilbreths was the direct and proximate result of the fault of defendants," and that "[s]hould plaintiffs, or any of them, be found by the jury to have been at fault (which plaintiffs specifically deny), then any fault found on the part of plaintiffs, or any of them, is relatively disproportionate to that greater degree of fault on the part of defendants, and each of them." *Id.* at 798. Based upon the specific allegations pled, the court could find "no inference or reasonable intendment" that appellant was liable. *Id.* Rather, appellants had "repeatedly, consistently and unequivocally denied their own liability." *Id.* at 800.

In the present case, Appellant alleged more than the mere conclusory allegations at issue in *Mid-Continent.* Appellant denied liability, while alternatively pleading its own fault. *See* Section I, Appellant's Substitute Brief, *see also* Section I, above. If the petition is to remain "dismissed," the dismissal should be modified to a dismissal *without* prejudice.

Respondent argues that none of Appellant's cited authority is on point. However, Appellant relied upon these cases, as specifically referenced in Appellant's brief, to illustrate the court's prior determinations in similar jurisdictional contexts. Missouri courts have found that dismissal *with* prejudice is not the proper result in a variety of

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jurisdictional contexts. Dismissal with prejudice is a harsh sanction, which in effect denies a party its day in court. Consistent with the reasoning of the cases cited by Appellant, the trial court's dismissal of this case *with* prejudice was error.

CONCLUSION

This Court possesses jurisdiction to conduct a *de novo* review of the Circuit Court's dismissal of Appellant's third-party petition. The Circuit Court committed reversible error in dismissing the third-party petition because Appellant's claims for contribution and/or indemnity were within the jurisdiction of third-party practice, and Appellant appropriately pleaded a claim for contribution and/or indemnity in that Appellant sufficiently pleaded its own fault.

Additionally, the Circuit Court committed reversible error in dismissing the third-party petition *with* prejudice because the proper remedy in such a case is to strike the petition, or dismiss *without* prejudice. Therefore, Appellant respectfully requests this Court to reverse the Circuit Court's dismissal with prejudice and remand the case to the Circuit Court for continued proceedings. In the alternative, Appellant requests this Court to exercise its authority pursuant to Rule 84.14 and reverse the dismissal with prejudice and order the petition stricken, or affirm the dismissal and modify it to "without prejudice," in accordance with Missouri law.

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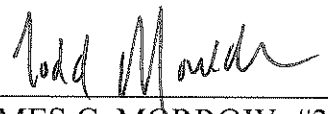
CERTIFICATE OF COMPLIANCE 84.06(b)

The undersigned hereby certifies that the Brief herein is in compliance with Missouri Rule of Civil Procedure 84.06. According to the word count of the word processing system used to prepare the Brief, the Brief contains 3,406 words.

MORROW WILLNAUER KLOSTERMAN CHURCH, L.L.C.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed with the Clerk of the Court via ECF on this 20th day of July, 2012, with a copy of the same being served via electronic mail (ECF) by the Clerk of the Court, to:

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