

**IN THE MISSOURI SUPREME COURT**

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**CASE NO. SC92429**

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**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**

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**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**

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**SUBSTITUTE BRIEF OF RESPONDENT UNITED STATES STEEL CORPORATION**

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## STATEMENT OF FACTS

The original action in this case was one to enforce a settlement agreement - i.e. a breach of contract claim - between Travelers Property Casualty Company of America and Jacobsmeier-Mauldin Construction Company (hereinafter “Plaintiffs”) and Appellants The Manitowoc Company, Inc. and its subsidiary Grove U.S. LLC (hereinafter collectively referred to as “Manitowoc”). *See* LF 7-13. In that action, Manitowoc filed a Third-Party Petition for Contribution against Respondent United States Steel Corporation (hereinafter “U.S. Steel”). It is the dismissal of Manitowoc’s Third-Party Petition for Contribution that is the subject of this appeal.

The claims and allegations asserted in Plaintiffs’ action against Manitowoc are critical to understanding the basis for the trial court’s dismissal of Manitowoc’s Third-Party Petition. In short, every Count in Plaintiffs’ four-count First Amended Petition (hereinafter “Petition”) asserted a claim for breach of contract against Manitowoc. LF 7-13. While the settlement agreement at issue in Plaintiffs’ action against Manitowoc purportedly arose out of property damage sustained by Plaintiffs on January 9, 2006 when a crane collapsed damaging buildings and equipment, no tort claims were ever brought by Plaintiffs against Manitowoc.

On March 12, 2010, Manitowoc filed its Answer to Plaintiffs’ Petition to Enforce Settlement, along with a Third-Party Petition for contribution and/or indemnity against U.S. Steel. LF 29-40. In its Third-Party Petition, Manitowoc alleged “in the event the trier of fact finds that [Manitowoc] is liable to Plaintiffs,

[Manitowoc] is entitled to contribution and/or indemnity from U.S. Steel...” LF 39 at ¶22.

In response to Manitowoc’s Third-Party Petition, U.S. Steel filed a Motion to Dismiss for failure to state a claim on the grounds that U.S. Steel could not be held liable to Manitowoc on Plaintiffs’ breach of contract claims against Manitowoc. LF 45-47. In its Motion to Dismiss, U.S. Steel specifically argued that Manitowoc’s Third-Party Petition must be dismissed because Plaintiffs’ claims against Manitowoc were for breach of a settlement agreement to which U.S. Steel was not a party; and therefore, U.S. Steel could not be liable to Plaintiffs or Manitowoc for any part of the claims asserted in Plaintiffs’ Petition against Manitowoc. LF 46 at ¶¶ 5-7.

On August 4, 2010, Manitowoc filed its Response to U.S. Steel’s Motion to Dismiss. Manitowoc argued that its third-party claim for contribution against U.S. Steel was proper because Plaintiffs’ Petition asserted claims for both breach of settlement agreement *and* tort. LF 49-53. Plaintiffs’ Petition, however, did not assert a tort claim against Manitowoc. *See* LF 7-13.

On March 18, 2011, U.S. Steel’s Motion to Dismiss was heard. *See* LF 3. At that hearing, U.S. Steel reiterated the grounds for dismissal set forth in its Motion to Dismiss and further pointed out to the trial court that Plaintiffs’ Petition did not assert a tort claim, as argued by Manitowoc, and only asserted claims for breach of contract, for which U.S. Steel could not be held liable. In response, Manitowoc 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.

U.S. Steel requested, and was granted leave to submit a written Reply in support of its Motion to Dismiss (*see* LF 3) in order to respond to Manitowoc's new argument that its Third-Party Petition asserted 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.

U.S. Steel filed its Reply in Support of its Motion to Dismiss on March 22, 2011. LF 56-61. In its Reply, U.S. Steel argued that Manitowoc's claim for contribution was foreclosed under Missouri law because Manitowoc failed to allege its own liability as a joint tortfeasor, outright denied its own liability to Plaintiffs, and alleged that "Plaintiffs' alleged injuries were the direct and proximate result of the acts and omission of U.S. Steel," and thereby, Manitowoc pled itself out of court on its contribution claim. LF 58-59.

Although Manitowoc now claims that it "was not afforded an opportunity to respond to [U.S. Steel's] claims regarding failure to plead its own fault" (App. Br. at p. 6), Manitowoc did not seek leave to file a sur-reply, or attempt in any other way to respond to the arguments set forth in U.S. Steel's Reply. Nor did Manitowoc seek leave to amend its Third-Party Petition. Manitowoc chose to stand on its Third-Party Petition as pled.

On March 24, 2011, the trial court entered its Order/Judgment dismissing Manitowoc's Third-Party Petition with prejudice. LF 62. On April 12, 2011,

Manitowoc filed a Motion to Reconsider or in the Alternative to Modify Judgment, arguing that the dismissal of its Third-Party Petition should have been without prejudice. LF 63-64; *see also* LF 66-71. Notably, in its Motion to Reconsider, Manitowoc, still did not address the issues raised in U.S. Steel's Reply in Support of its Motion to Dismiss, namely that Manitowoc's claim for contribution was foreclosed because Manitowoc denied its own liability to Plaintiffs as a joint tortfeasor and therefore pled itself out of court. *See* LF 63-71.

On April 19, 2011, U.S. Steel filed its Response and Suggestions in Opposition to Manitowoc's Motion to Reconsider. LF 72-79. U.S. Steel argued that dismissal with prejudice was proper because, Manitowoc had no right to contribution/indemnity from U.S. Steel for any payment to Plaintiffs for their alleged property damage because Manitowoc denied its own liability to Plaintiffs as a joint tortfeasor, which resulted in Manitowoc pleading itself out of court under Missouri law. LF 78.

Manitowoc's Motion to Reconsider was heard on April 20, 2011. *See* LF 2. At that hearing, Manitowoc requested leave to file a written Reply in support of its Motion to Reconsider in order to finally respond to the argument that Manitowoc had failed to plead its own liability to Plaintiffs as a joint tortfeasor. The court granted Manitowoc leave to file a written reply in support of its Motion to Reconsider. *See* LF 2.

Manitowoc subsequently filed its Reply in Support of its Motion to Reconsider (LF 81-87) and argued that 1) the dismissal of its Third-Party Petition

should have been without prejudice; and 2) that Manitowoc was not required to plead its own fault as a joint tortfeasor; and 3) Manitowoc did sufficiently plead its own fault. LF 81-87.

Manitowoc asserts, albeit improperly, in its Statement of Facts that “[although the hearing was not on the record, Judge DePriest indicated that he believed the dismissal was intended only to be with regard to the present case, i.e. stemming out of the settlement contract.” App.’s Br. at p. 5. Notably, however, after receiving Manitowoc’s Reply in Support of its Motion to Reconsider, and “being duly advised” of the issues before it, the trial court entered its Order denying Manitowoc’s Motion to Reconsider. LF 97.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

While an appellate court reviews the granting of a Motion to Dismiss *de novo*, the judgment of the trial court is to be presumed correct, and Manitowoc has the burden of affirmatively establishing the incorrectness of the judgment complained of on appeal. Hardy v. McNary, 351 S.W.2d 17, 20 (Mo. 1961). U.S. Steel has neither the burden nor duty to establish the correctness of the trial court’s judgment. Id.

**II. APPELLANT’S POINT ONE RELIED ON: Manitowoc contends that “[t]he 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.”**

Manitowoc has failed to show that the dismissal of its Third-Party Petition against U.S. Steel was incorrect. In fact, dismissal of Manitowoc’s Third-Party Petition was proper on two grounds, and therefore the judgment of the trial court should be affirmed.

First, as set forth in U.S. Steel’s Motion to Dismiss, Manitowoc’s Third-Party Petition, as pled, sought contribution and/or indemnity from U.S. Steel for breach of contract damages claimed by Plaintiffs against Manitowoc. U.S. Steel was not a party to the agreement at issue in Plaintiffs’ Petition against Manitowoc, and therefore, U.S. Steel could not be liable to Manitowoc or Plaintiffs for any part of the breach of contract damages claimed by Plaintiffs.

Second, when Manitowoc argued at the hearing on U.S. Steel’s Motion to Dismiss that its third-party claim was not seeking contribution and/or indemnity for Plaintiffs’ breach of contract damages per se, but rather contribution to recover settlement amounts that Manitowoc anticipated paying to Plaintiffs for damages

arising out of the January 9, 2006 crane collapse, the issue became whether Manitowoc sufficiently pled a claim for contribution as a joint tortfeasor. Under that analysis, Dismissal of Manitowoc's Third-Party Petition was proper because Manitowoc denied its own liability to Plaintiffs as a tortfeasor, and thereby pled itself out of court.

**A. Point I of Appellant's Brief Must Be Denied Because U.S. Steel Cannot be Held Liable to Manitowoc on Plaintiffs' Claim for Breach of Settlement Agreement Against Manitowoc; therefore, Dismissal of Manitowoc's Third Party Petition was proper.**

Plaintiffs' Petition asserted four counts against Manitowoc all for breach of contract, arising out of an alleged settlement agreement between Plaintiffs and Manitowoc. LF 7-13. It is undisputed that U.S. Steel was not a party to the settlement agreement at issue in Plaintiffs' action against Manitowoc.

Nevertheless, on March 12, 2010, Manitowoc filed a Third-Party Petition against U.S. Steel, seeking contribution and/or indemnity from U.S. Steel on Plaintiffs' claim for breach of contract. Specifically, Manitowoc alleged that "in the event the trier of fact finds that [Manitowoc] is liable to Plaintiffs, [Manitowoc] is entitled to contribution and/or indemnity from U.S. Steel..." LF 39 at ¶22. Since the only claims asserted by Plaintiffs against Manitowoc were for breach of contract, the only claims on which a trier of fact could have found Manitowoc liable were for breach of contract.

Missouri Rule of Civil Procedure 52.11 and Section 507.080 of the Missouri Revised Statutes allow a party to file a Third-Party Petition only against a non-party to the original action “who is or may be liable to him or to the plaintiff for all or part of the plaintiffs’ claims against him.” §507.080 RSMo. (2010); *see also* Mo. R. Civ. Proc. 52.11(a) (2010). Accordingly, U.S. Steel filed its Motion to Dismiss Manitowoc’s Third-Party Petition for failure to state a claim on the grounds that U.S. Steel could not be liable to Manitowoc or to Plaintiffs for Plaintiffs’ breach of contract claims, arising from Manitowoc’s alleged breach of the settlement agreement between Plaintiffs and Manitowoc. LF 45-47.

U.S. Steel specifically argued that Plaintiffs’ claims against Manitowoc were for breach of a settlement agreement to which U.S. Steel was not even a party. Therefore, U.S. Steel could not be liable to Plaintiffs or Manitowoc for any part of the claims asserted in Plaintiffs’ Petition. LF 46 at ¶¶ 5-7.

In its written Response to U.S. Steel’s Motion to Dismiss, Manitowoc argued that its third-party claim for contribution against U.S. Steel was proper because Plaintiffs’ Petition asserted causes of action for breach of settlement agreement *and* a tort claim. LF 51. However, no tort claim was asserted against Manitowoc in Plaintiffs’ Petition.

The causes of action asserted by Plaintiffs against Manitowoc were for breach of contract. *See* LF 9 at ¶¶20-25; LF 10 at ¶¶18-23. Therefore, when Manitowoc pled in its Third-Party Petition that “in the event the trier of fact finds that [Manitowoc] is liable to Plaintiffs, [Manitowoc] is entitled to contribution and/or

indemnity from U.S. Steel...” (LF 39 at ¶22), any such liability would be for breach of contract damages, as that is the only cause of action that would have been submitted to a trier of fact in that case. Thus, Manitowoc’s Third-Party Petition, as pled, sought contribution and/or indemnity from U.S. Steel on claims for breach of a settlement agreement to which U.S. Steel was not even a party.

Accordingly, dismissal of Manitowoc’s Third-Party Petition against U.S. Steel was proper on the grounds stated in U.S. Steel’s Motion to Dismiss because Manitowoc could not plead or prove facts showing that U.S. Steel was liable to Manitowoc “for all or part of” the plaintiffs’ breach of contract claims against Manitowoc as required under Rule 52.11 and Section 507.080 RSMo. However, the analysis does not end there.

At the hearing on U.S. Steel’s Motion to Dismiss, upon realizing that the trial court was inclined to grant U.S. Steel’s Motion, Manitowoc argued that its claim for “contribution/indemnity” was not for contribution for Plaintiffs’ breach of contract damages, but rather, Manitowoc was actually seeking contribution 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.

Notably, Manitowoc never raised this point in its written Response to U.S. Steel’s Motion to Dismiss. Manitowoc only argued, albeit erroneously, that Plaintiffs had asserted tort claims against Manitowoc in addition to the claims for breach of the settlement agreement, and that U.S. Steel was liable to Manitowoc under the purported tort claims. *See* LF 49-53. Therefore, U.S. Steel requested leave to file a

written Reply in support of its Motion to Dismiss in order to respond to Manitowoc's new characterization of its third-party claims against U.S. Steel.

In its Reply in Support of its Motion to Dismiss, and as set forth below in section (B), U.S. Steel argued that Manitowoc's Third-Party Petition should be dismissed because, if Manitowoc was in fact seeking contribution for settlement amounts it anticipated paying to Plaintiffs for property damage sustained by Plaintiffs, then Manitowoc pled itself out of court when it denied its own liability to Plaintiffs as a joint tortfeasor.

**B. Point I of Appellant's Brief Must Be Denied Because Manitowoc Pled itself Out of Court When it Denied its Own Liability to Plaintiffs as a Joint Tortfeasor**

After arguing that its Third-Party Petition sought contribution for settlement amounts to be paid by Manitowoc to Plaintiffs, the issue before the trial court was no longer whether Manitowoc's third-party claim fell within the scope of Rule 52.11. The issue became whether Manitowoc had sufficiently pled a claim for contribution against U.S. Steel as a joint tortfeasor. Dismissal of Manitowoc's Third-Party Petition for contribution is further warranted because Manitowoc failed to plead its own fault as a joint tortfeasor, which is a necessary element for a claim for contribution.

It is a well-recognized rule that one seeking contribution from a joint tortfeasor must allege his own status as a joint tortfeasor. Stephenson v. McClure, 606 S.W.2d 208, 213 (Mo. Ct. App. S.D. 1980) (citations omitted); *see also* Mo. Pac.

R.R. v. Whitehead & Kales Co., 566 S.W.2d 466, 468 (“It should be borne in mind that the right to non-contractual indemnity presupposes actionable negligence of both parties toward a third party.”)

“While it may seem anomalous to require a pleader to assert his own liability, *that element is fundamental* to the doctrine of Whitehead and Kales. That doctrine is based upon the premise that the party seeking contribution is or was liable to the injured party.” Id. (emphasis added). Notwithstanding this strict pleading requirement, Manitowoc outright denied its own liability at paragraphs 18 and 22 of its Third-Party Petition and further pled that Plaintiffs’ alleged injuries were “a direct and proximate result of the acts and omission of [Respondent].” LF 39 at ¶¶18 and 22. As a result, Manitowoc pled itself out of court. *See Stephenson*, 606 S.W.2d at 213; *see also Mid-Continent News Co. v. Ford Motor Co.*, 671 S.W.2d 796 (Mo. Ct. App. W.D. 1984).

Manitowoc attempts to analogize this case with Major v. Frontenac Indus., Inc., 899 S.W.2d 895 (Mo. Ct. App. E.D. 1995), arguing that Manitowoc’s Third-Party Petition, like the third-party petition in Major, sufficiently alleged Manitowoc’s liability to Plaintiffs. More specifically, Manitowoc claims that it “specifically pleaded that it manufactured the crane at issue, placed a defective steel cylinder on the crane, and that said crane was defective, causing the alleged injuries to Plaintiffs.” App.’s Br. at p. 18 *citing* LF 36-37, ¶¶1-2, 8-9. However, the only allegation actually made by Manitowoc is that it manufactured the crane at issue. LF 36 at ¶2.

Manitowoc 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. Rather, Manitowoc alleged that the *plaintiffs* have made allegations that “the accident in question occurred as a result of the failure of a Grove 855B crane’s (bearing serial number 82200) hydraulic cylinder” and that the *plaintiffs* have alleged that as a direct result of the failure of said hydraulic cylinder both the crane itself and the adjacent building suffered damage.” LF 37 at ¶¶ 8, 9. Furthermore, in its Answer to Plaintiffs’ Petition, Manitowoc effectively denied said allegations of the plaintiffs. LF 30 at ¶¶ 6, 9.

As a result, this case is distinguishable from Major v. Frontenac in a very significant way. The court in Major found that the third-party plaintiff sufficiently pled its own liability as a tortfeasor because it “pleaded that it sold or leased the [product] to plaintiff’s employer” and further “pleaded that [the product] was defective, unsafe and dangerous for its intended uses and purposes.” Major, 899 S.W.2d at 899. Manitowoc, on the other hand, never pled that the crane was defective, unsafe, or dangerous, and in fact, denied all such allegations made by Plaintiffs. LF 30 at ¶¶6 and 9.

Major, 899 S.W.2d 895 is further distinguishable from the case at bar in several respects, including without limitation, the fact that Major was a products liability action in which the contribution defendant was also a defendant in the underlying tort action brought by the plaintiff. 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*.

Here, Plaintiffs’ action against Manitowoc was for breach of a settlement agreement – i.e. breach of contract. Therefore, when Manitowoc expressly denied “any and all liability to Plaintiff” but then stated “however, in the event the trier of fact finds that [Manitowoc] is liable to Plaintiffs, [Manitowoc] is entitled to contribution and/or indemnity from U.S. Steel....” Manitowoc did not plead its liability as a tortfeasor. Manitowoc only pled in the alternative its liability to the plaintiffs for the alleged breach of the settlement agreement as a party to the contract.

An allegation that Manitowoc is, or may be, liable to the plaintiffs for breach of the settlement agreement does not constitute “an inference or reasonable intendment of a pleaded liability” as a tortfeasor. *See* Mid-Continent News, 671 S.W.2d at 801 *citing* Stephenson, 606 S.W.2d 208. Accordingly, the trial court’s dismissal of Manitowoc’s Third-Party Petition was not inconsistent with the opinion of the court in Major or any other opinions of the courts of this State cited by Manitowoc.

In fact, the courts in Stephenson and Mid-Continent also held that, under allegations similar to those made by Manitowoc, the parties seeking contribution failed to plead their own liability as tortfeasors, and that the contribution plaintiffs had pled themselves out of court. *See* Stephenson, 606 S.W.2d at 213; Mid-Continent News Co., 671 S.W.2d at 800.

Finally, Manitowoc's reliance on a 1965 decision of the Supreme Court of North Carolina - Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965) – is further evidence that the judgment of the trial court was not inconsistent with *Missouri* law. Furthermore, contrary to Manitowoc's characterization of the holding in Clemmons, that court actually held that the party seeking contribution failed to properly allege that the co-defendants were joint tortfeasors. Id. at 87.

Under Missouri law, dismissal of Manitowoc's Third-Party Petition was proper and the judgment of the trial court should be affirmed because Manitowoc denied its own liability to Plaintiffs as a tortfeasor, and thereby pled itself out of court on its claim for contribution against U.S. Steel.

**III. APPELLANT'S POINT TWO RELIED ON: Appellant contends that 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.**

Point II of Appellant's Brief must be denied because merely striking a third-party claim is not the proper remedy when a Third-Party Petition for contribution fails entirely to state a claim upon which relief can be granted.

After arguing that its Third-Party Petition sought contribution for settlement amounts to be paid by Manitowoc to Plaintiffs, the issue before the trial court was no

longer whether Manitowoc's third-party claim fell within the scope of Rule 52.11. The issue was then, and is now, whether Manitowoc had sufficiently pled a claim for contribution against U.S. Steel as a joint tortfeasor.

All of the cases cited by Manitowoc for the proposition that the proper remedy is to simply strike Manitowoc's third-party claim involved third-party petitions that sufficiently pled a cause of action, but the cause of action was not the proper subject of a third-party petition. Thus the courts lacked jurisdiction over the claims. *See* Wedemeir v. Gregory, 872 S.W.2d 625 (Mo. Ct. App. E.D. 1994); AAA Excavating, Inc. v. Francis Const., Inc., 678 S.W.2d 889 (Mo. Ct. App. E.D. 1984); State ex rel. Ashcroft v. Gibbar, 575 S.W.2d 924 (Mo. Ct. App. 1978).

Here, Manitowoc failed entirely to state a cause of action for contribution against U.S. Steel. Accordingly, dismissal of Manitowoc's Third-Party Petition with prejudice was the appropriate remedy. *See* Stephenson, 606 S.W.2d 208; Whitehead & Kales Co., 566 S.W.2d 466; Mid-Continent News Co., 671 S.W.2d 796.

Manitowoc relies on AAA Excavating, Inc. v. Francis Const., Inc., 678 S.W.2d 889 (Mo. Ct. App. E.D. 1984) for that court's holding that "a Petition is not to be dismissed for failure to state a claim for relief unless it appears that the plaintiff can prove no set of facts in support of his claim...." Notably, however, that case did not involve a claim for contribution, let alone a party seeking contribution that denied its own liability to the plaintiffs.

In fact, none of the cases cited by Manitowoc are on point. *See* Consolidated Elec. & Mechanicals, Inc. v. Schuerman, 185 S.W.3d 773 (Mo. Ct. App. E.D. 2006)

(appeal of a trial court's judgment granting a Motion to Dismiss for lack of *personal* jurisdiction); Hagen v. Rapid Am. Corp., 791 S.W.2d 452 (Mo. Ct. App. E.D. 1990) (addressing issues of personal jurisdiction); Seldomridge v. Gen. Mills Operations, Inc., 140 S.W.3d 58 (Mo. Ct. App. W.D. 2004) (appeal of a trial court's judgment granting a Motion to Dismiss based on the exclusivity of the Workers' Compensation Law).

Manitowoc is incorrect when it argues that there is no authority to support the conclusion that Manitowoc's right to contribution/indemnity is foreclosed and thus dismissal with prejudice is proper. Missouri law is clear that when a party seeking contribution against a third-party fails to plead its own liability to the plaintiffs, that party pleads itself out of court and is foreclosed from pursuing contribution from another party for amounts paid by it to the plaintiffs. *See* Stephenson, 606 S.W.2d at 213 (citations omitted); Whitehead & Kales Co., 566 S.W.2d at 468; and Mid-Continent News Co., 671 S.W.2d 796.

In Mid-Continent News Co., the Missouri Court of Appeals affirmed the trial court's entry of summary judgment against a contribution plaintiff when that plaintiff failed to allege that he was a joint tortfeasor. 671 S.W.2d 796 *citing* Stephenson, 606 S.W.2d 208 and Whitehead & Kales Co., 566 S.W.2d 466. The court found that the contribution plaintiff pled itself out of court by its allegation that the damages sustained by the injured party were the direct and proximate result of the fault of the party from whom contribution was being sought. *Id.*

Manitowoc has pled nearly identical allegations in its Third-Party Petition against U.S. Steel. LF 39 at ¶¶21, 22. Manitowoc outright denied its liability at paragraphs 18 and 22 of its Third-Party Petition and further pled that Plaintiffs' alleged injuries were "a direct and proximate result of the acts and omission of [U.S. Steel]." LF 39 at ¶21. As a result, Manitowoc pled itself out of court, and was thereby foreclosed from pursuing its claim for contribution against U.S. Steel.

When a contribution plaintiff fails to plead its status as a joint tortfeasor and alleges that the contribution defendant's actions were the direct and proximate result of the injuries for which contribution is sought, that party pleads itself out of court and is foreclosed from pursuing its claim for contribution. Accordingly, Manitowoc cannot show that under the particular facts in this case, the trial court misapplied the law when it dismissed Manitowoc's Third-Party Petition with prejudice.

### **CONCLUSION**

Manitowoc has failed to show that the trial court's judgment erroneously declared or applied the law. Accordingly, Manitowoc's appeal should be denied in all respects and the Court should affirm the Judgment of the trial court dismissing Manitowoc's Third-Party Petition against U.S. Steel with prejudice.

**CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)**

The undersigned hereby certifies, in accordance with Rule 84.06(c), that this brief complies with Rule 84.06(b), in that it consists of 4,254 words, (not including the cover, the table of contents, the table of authorities, the appendix, the certificate of service, this certificate and the signature block).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the above and foregoing was filed with the Clerk of the Court via ECF on this 10th 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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