No. 121943

In the

Supreme Court of Illinois

ANGELA ANTONICELLI,

Plaintiff-Appellee,

v.

DANIEL JUAN RODRIGUEZ,

Defendant-Appellee,

ARTEMIO RAMOS,

Defendant,

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

Defendants-Appellants.

(CAPTION CONTINUED ON INSIDE COVER)

On Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-15-3532.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 14 L 1184.
The Honorable **Moira S. Johnson**, Judge Presiding.

APPELLEE BRIEF OF DANIEL JUAN RODRIGUEZ

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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-Appellants,

v.

DANIEL JUAN RODRIGUEZ,

Counter-Defendant-Appellee.

POINTS AND AUTHORITIES

ISSUES PRESENTED FOR REVIEW

1. Whether the Illinois Joint Tortfeasor Contribution Act permits a tortfeasor sued in ordinary negligence to enter into a good-faith settlement before trial where allegations of intentional conduct are alleged in a counterclaim for contribution by Non-Settling Defendants.

2. Whether the trial court's entry of a good-faith finding was a proper use of its discretion after it considered the totality of the circumstances and, under this Court's precedent, found no reason to preclude such a finding and extinguish all liability for contribution.

STANDARD OF REVIEW

The first issue involves a question of statutory construction, which is a question of law that this Court reviews *de novo*. *See Ready v. United/Goedecke Services, Inc.*, 232 Ill. 2d 369, 375 (2008). The second issue involves a good-faith determination, which is reviewed on appeal for an abuse of discretion. *See Johnson v. United Airlines*, 203 Ill. 2d 121, 135 (2003).

STATEMENT OF FACTS

The facts as stated in the First District's opinion below are relevant to this Appellee Brief and correctly stated. *See Antonicelli v. Rodriguez*, 2017 IL App (1st) 153532.

Additionally, on May 18, 2015, Defendant, DANIEL JUAN RODRIGUEZ ("Mr. Rodriguez"), notified the trial court and Non-Settling Defendants of a $20,000 policy limits settlement with Plaintiff and Petition for Good-Faith Finding pursuant to the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 100/2(c) and (d) to dismiss Plaintiff's direct claims and to bar any contribution claims by Non-Settling Defendants, KARL BROWDER, CHICAGO TUBE AND IRON COMPANY, and TRILLIUM STAFFING, (collectively, "Non-Settling Defendants"). R. Vol. 1, C189. That Petition was continued for ruling for six months, to give Non-Settling Defendants time to complete discovery, which included deposing settling Defendant, Mr. Rodriguez, who was incarcerated at the time, and to file any counterclaims for contribution after Defendant's deposition. R. Vol. 1, C197. Non-Settling Defendants never sued Mr. Rodriguez previously in contribution for ordinary negligence or under any theory.

After deposing Mr. Rodriguez, Non-Settling Defendants, and each of them, did thereafter each file said counterclaims for contribution, on October 30, 2015. R. Vol. 2, C258-78. Each of the three counterclaims alleged that Plaintiff's injuries were the proximate result of Mr. Rodriguez's "intentional acts." R. Vol. 2, C260; 264; 277. The counterclaims made no pretense of suing Mr. Rodriguez for ordinary negligence or for willful and wanton misconduct. R. Vol. 2, C258-78. The counterclaims pleaded single counts of intentional acts only. R. Vol. 2, C258-78.

After the petition for good-faith finding was fully briefed and argued, the circuit court judge, on November 19, 2015, dismissed Count I of the Amended Complaint with prejudice, pursuant to the amicable good-faith settlement, and dismissed the counterclaims for contribution as being barred by that settlement, and provided Non-Settling Defendants with a $20,000 credit for setoff against any further judgment in favor of Plaintiff and against them. R. Vol. 2, C328-29. At no time prior to filing the original appeal before the First District, did Non-Settling Defendants ever seek leave to plead contribution under any other theory against Mr. Rodriguez.

ARGUMENT

I. CONTRIBUTION CLAIMS AGAINST MR. RODRIGUEZ ARE BARRED, WHETHER THIS COURT VIEWS HIS CONDUCT AS NEGLIGENT, INTENTIONAL, OR OTHERWISE.

Contribution claims are barred against Mr. Rodriguez, a good-faith settling defendant, whether this Court views his conduct as negligent, intentional, or otherwise. First, if this Court views Mr. Rodriguez's conduct in light of the actual allegations in Plaintiff's Complaint, which sued him only in ordinary negligence, then contribution claims against Mr. Rodriguez are barred because he settled in good faith, as determined by the trial court. *See* 740 ILCS 100/2 (West 2017) (the "Contribution Act"). There is nothing in the record, as presented by Non-Settling Defendants, that justifies overruling that decision under controlling Illinois law.

Second, if this Court views Mr. Rodriguez's conduct only in light of the allegations in the counterclaims for contribution, which plainly framed Mr. Rodriguez's acts as outright intentional, with no suggestion that the conduct was willful and wanton, then contribution claims against Mr. Rodriguez are barred because contribution is not authorized where the defendant's acts amount to purely intentional behavior. In fact, in such a situation, a good-faith finding is meaningless and unnecessary.

Third, if this Court reads in to the counterclaims' allegations only willful and wanton misconduct that is close to but does not rise to the level of outright intentional conduct, then contribution claims against Mr. Rodriguez are barred because contribution is not authorized where the defendant's acts amount to willful and wanton [intentional] or purely intentional

conduct. *See Ziarko v. Soo Line Rwy. Co.*, 161 Ill. 2d. 267, 280 (1994).

Fourth, if this Court further reduces the allegations of the counterclaims for contribution to only a level of willful and wanton conduct at a lower reckless level, then contribution claims against Mr. Rodriguez are barred by the good-faith policy limits settlement under the factual conduct alleged in both pleadings.

Under this Court's interpretations of the subject statutes, the appropriateness and viability of a contribution claim depends upon the type of conduct involved. For purposes of this argument, and to the extent this Court focuses on the allegations as drafted by Non-Settling Defendants in their dismissed contribution action, their counterclaims do nothing to defeat the good faith finding. The counterclaims do not purport to allege anything other than "intentional conduct," which is arguably not even a covered claim under a personal automobile insurance policy (and here, Mr. Rodriguez's insurer tendered full limits in his behalf, notwithstanding that potential coverage issue). For purposes of this appeal, this Court need not even reach the issue of a good faith finding for outright intentional acts.

Based on this Court's comments in *Ziarko*, this Court may choose to view Mr. Rodriguez's conduct on a spectrum, where negligence falls at one extreme and fully intentional conduct falls at the other, and willful and wanton conduct fills the space between. *See Ziarko*, 161 Ill. 2d at 275-76. Willful and wanton [reckless] conduct is closer to negligence, and willful and wanton [intentional] conduct is closer to outright intentional conduct, though never rising to the level of pure intentional conduct or actual malice. *See id.* ("Under the facts of one case, willful and wanton misconduct may be only degrees more than ordinary negligence, while under the facts of another case, willful and wanton acts may be

only degrees less than intentional wrongdoing"). This Court held that certain willful and wanton conduct that is merely reckless allows for comparative analysis in contribution, whereas other types of willful and wanton conduct that are closer to intentional conduct may not. *Ziarko*, 161 Ill. 2d at 184. Therefore, whether this Court views Mr. Rodriguez's conduct at either extreme of the spectrum, or somewhere in between, contribution claims against him are barred either due to his good-faith settlement, or because the conduct cannot be compared with negligence. If Mr. Rodriguez cannot be a joint tortfeasor for contribution under the Contribution Act, or for joint and several liability under 735 ILCS 2-1117 (West 2017) ("Section 2-1117"), then this appeal is unnecessary and this Court has no reason to change already established law on all the issues presented.

A. CONTRIBUTION CLAIMS AGAINST MR. RODRIGUEZ ARE BARRED BECAUSE HE SETTLED IN GOOD FAITH WITH PLAINTIFF, WHOSE COMPLAINT ALLEGED ONLY ORDINARY NEGLIGENCE.

This Court should adopt the reasoning of the First District, below, which held that under the plain language of the Contribution Act, Mr. Rodriguez was permitted to enter into a good-faith settlement with Plaintiff and be discharged from all liability for any contribution. *See Antonicelli v. Rodriguez*, 2017 IL App (1st) 153532, ¶ 25.

1. This Court Need Not Reach Non-Settling Defendants' Argument because Mr. Rodriguez was Sued Only in Ordinary Negligence.

This Court need not reach Non-Settling Defendants' argument because Mr. Rodriguez was sued by Plaintiff only in ordinary negligence. The First District recognized this and determined that there was no need to address whether a trial court may make a good-

faith finding in favor of an intentional tortfeasor. *See Antonicelli*, 2017 IL App (1st) 153532, ¶ 25. As settled Illinois law makes clear, the allegations in the counterclaims for contribution constitute a separate and independent cause of action. *Wilson v. Tromly*, 404 Ill. 307, 309–10 (1949) ("A counterclaim is an independent cause of action."). Non-Settling Defendants admitted as much at the hearing on Mr. Rodriguez's petition for good-faith finding, stating, "I think that our counterclaim for contribution is a stand-alone pleading." SR Vol. 2, 11. The extraneous allegations in Non-Settling Defendants' counterclaims do not act as a bar to Mr. Rodriguez's ability to settle and be discharged from liability in contribution. Any question as to whether his conduct was intentional is irrelevant in the underlying negligence action. A jury will be asked only to consider the 20.01 Issue Instruction submitted by Plaintiff as to ordinary negligence.

2. Mr. Rodriguez Settled with Plaintiff in Good Faith, which Discharged Any Contribution Liability to Any Other Tortfeasor.

Contribution claims against Mr. Rodriguez are barred because he is a good-faith settling defendant. Mr. Rodriguez was sued by Plaintiff for ordinary negligence. He entered into a settlement agreement with Plaintiff, as he is permitted to do by statute. The trial court found, after conducting a hearing and considering the totality of circumstances, that the settlement agreement was entered into in good faith. At that point, under the plain language of the Contribution Act, Mr. Rodriguez was "discharged from all liability for any contribution to any other tortfeasor." *See* 740 ILCS 100/2(d) (West 2017). The only limitation on the discharge of Mr. Rodriguez's contribution liability under the Contribution

Act is the good faith requirement. *See Johnson v. United Airlines*, 203 Ill. 2d 121, 128 (2003). That good faith determination is a matter "properly left to the trial court, and a trial court's finding as to good faith will not be reversed on appeal absent an abuse of discretion." *Halleck v. Coastal Bldg. Maintenance Co.*, 269 Ill. App. 3d 887, 899 (2d Dist. 1995) citing *In re Guardianship of Babb*, 162 Ill. 2d. 153, 162 (1994).

Non-Settling Defendants seek to skirt the findings of the trial court, as affirmed by the First District, by framing Mr. Rodriguez's actions as "intentional" in their counterclaims for contribution. The analysis here, though, is properly limited to the allegations of Plaintiff's Amended Complaint, which, in Count I, characterizes Mr. Rodriguez only as a negligent tortfeasor. Under that analysis, and pursuant to the finding of good faith entered by the trial court, below, Mr. Rodriguez's contribution liability is properly discharged.

B. IF THIS COURT VIEWS MR. RODRIGUEZ AS AN INTENTIONAL TORTFEASOR, CONTRIBUTION CLAIMS AGAINST HIM ARE BARRED AS OUTSIDE OF THE CONTRIBUTION ACT, JUST AS INTENTIONAL CONDUCT CANNOT BE COMPARED IN DETERMINING FAULT UNDER 735 ILCS 5/2-1116 AND 735 ILCS 5/2-1117.

If this Court views Mr. Rodriguez as an intentional tortfeasor, as urged by Non-Settling Defendants, contribution claims against him are barred as outside of the Contribution Act. The question of whether an intentional tortfeasor can seek contribution under the Contribution Act is long since settled by this Court and the reviewing courts—contribution claims are not authorized for intentional tortfeasors. *Ziarko*, 161 Ill. 2d at 280. Thus, even accepting Non-Settling Defendants' argument that Mr. Rodriguez should be viewed as an intentional tortfeasor for purposes of this case, any claim for contribution

against him cannot lie. As an intentional tortfeasor, Mr. Rodriguez may not seek contribution from co-defendants. Likewise, co-defendants, as negligent tortfeasors, may not seek contribution from Mr. Rodriguez, as an intentional tortfeasor, due to the qualitative distinction between negligent and intentional conduct and the purpose of the Contribution Act as interpreted by this Court.

This Court's interpretation of fault under 735 ILCS 5/2-1116 (West 2017) ("Section 2-1116") is in line with this reasoning as it applies to claims of contribution. *See Burke v. 12 Rothschild's Liquor Mart, Inc.*, 148 Ill. 2d 429, 451–52 (1992) ("Because of the qualitative difference between simple negligence and willful and wanton conduct . . . a plaintiff's negligence cannot be compared with a defendant's willful and wanton conduct."). Section 2-1116 defines "fault," in pertinent part, as follows:

> "Fault" means any act or omission that (I) is negligent, willful and wanton, or reckless . . . and (ii) is a proximate cause of death, bodily injury to person, or physical damage to property for which recovery is sought.

735 ILCS 6/2-1116 (West 2017). Therefore, Section 2-1116 cannot apply to intentional tortfeasors because Section 2-1116 allocates liability based on "fault," i.e., negligent, willful and wanton, or reckless acts or omissions. And although the definition of "tortfeasor" under Section 2-1116 includes settling parties, this Court already held in *Ready v. United/Goedecke Services, Inc.* that "defendants sued by the plaintiff" does not include settled defendants in determining joint and several liability under Section 2-1117. 232 Ill. 2d 369, 378 (2008).

By analogy, and for the same reasons that Plaintiff's contributory negligence cannot be compared with a Defendant's willful and wanton [intentional] conduct for purposes of reducing damages, so too it is inappropriate to compare non-settling co-defendants' conduct

for purposes of contribution and fault allocation, where one is determined to be negligent and the other is determined to be intentional. In *Poole v. City of Rolling Meadows*, this Court acknowledged *Ziarko*'s treatment of types of conduct for purposes of comparison in a contribution claim, and how that applied to determinations of contributory negligence for purposes of reducing damages. 167 Ill. 2d 41, 47-49 (1995). In fact, in *Poole*, the Court could not could not determine whether plaintiff's contributory negligence could properly be compared with defendant's willful and wanton conduct because it could not determine whether the conduct was reckless or intentional willful and wanton conduct. That distinction matters because intentional conduct (whether willful and wanton or purely intentional) cannot be compared with negligence under Section 2-1116.

In addition, just as the qualitative distinction between intentional and negligent conduct bars comparison under Section 2-1116, so too, the distinction between those types of conduct also bars comparison under Section 2-1117 for purposes of allocating fault and contribution recovery. As shown in Non-Settling Defendants' appellant brief (p. 21-25), and as further argued *infra*, Non-Settling Defendants' motivation in this appeal is to guarantee Mr. Rodriguez's continued inclusion on the verdict form, even after a good-faith settlement, for determining joint and several liability under Section 2-1117. Indeed, Non-Settling Defendants admitted at the hearing on Mr. Rodriguez's petition for good-faith finding that there is nothing further for them to recover from Mr. Rodriguez, stating, "Well, I suppose we would be entitled to whatever Rodriguez has, which probably is nothing." SR Vol. 2, 12.

By their own counterclaims, Non-Settling Defendants alleged that Mr. Rodriguez's conduct was intentional. Therefore, whether the conduct was willful and wanton intentional,

or purely intentional, the qualitative distinction between that intentional conduct and Non-Settling Defendants' negligent conduct precludes any comparison for purposes of fault allocation as well under Section 2-1117. This entire attack on the good-faith finding is mere pretext.

1. This Court Determined that Contribution is Not Authorized Where the Defendant's Acts Amount to Intentional Behavior.

This Court already determined, multiple times, that intentional tortfeasors are not entitled to contribution under the Contribution Act. *See Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill. 2d 179 (1989); *Burke*, 148 Ill. 2d 429 (1992); *Ziarko*, 161 Ill. 2d 267 (1994). In *Gerill*, this Court recognized that the Contribution Act was meant to create a right of contribution for only negligent, and not intentional, tortfeasors. *Gerill*, 128 Ill. 2d at 204–06. In *Burke*, this Court recognized the qualitative difference between simple negligence and willful and wanton [intentional] conduct, holding that a plaintiff's negligence cannot be compared with a defendant's willful and wanton [intentional] conduct. *Burke*, 148 Ill. 2d at 451–52. In *Ziarko*, this Court concluded that contribution "should not be authorized where the defendant's willful and wanton acts amount to intentional behavior," because it would contradict the *Gerill* holding as well as the purpose of contribution itself. *Ziarko*, 161 Ill. 2d at 280.

Under this Court's interpretation of the Contribution Act, Non-Settling Defendants' arguments place Mr. Rodriguez outside of the Contribution Act, and bar their ability to recover from him in contribution. Mr. Rodriguez maintains that Non-Settling Defendants' counterclaims for contribution are separate and independent actions that should not bear on

the allegations in Plaintiff's original Complaint. However, even if this Court determines that the counterclaims do bear on the analysis here, Mr. Rodriguez cannot be liable in contribution as an intentional tortfeasor. By the very arguments in their counterclaims, framing Mr. Rodriguez solely as an intentional tortfeasor, Non-Settling Defendants defeat their ability to recover in contribution against Mr. Rodriguez. Furthermore, as argued in Non-Settling Defendants' trial court brief in opposition to Mr. Rodriguez's petition for good-faith finding, any alleged intentional misconduct of Mr. Rodriguez is not covered by the Contribution Act. SR Vol. 1, C12.

Moreover, when viewing Mr. Rodriguez as an intentional tortfeasor, any question as to whether his settlement with Plaintiff was in good faith is irrelevant. Because an intentional tortfeasor cannot be brought in for contribution by a negligent tortfeasor, his settlement with Plaintiff was enough to remove him from the case, regardless of whether the settlement was in good faith. Therefore, if this Court decides to view Mr. Rodriguez as an intentional tortfeasor, it need not reach the question of whether Mr. Rodriguez's settlement was in good faith because that issue is irrelevant where the tortfeasor's conduct was intentional.

2. It is Inequitable to Allow Co-Defendants to Seek Contribution Against an Intentional Tortfeasor Who, Himself, is Prohibited from Seeking Contribution Against Those Co-Defendants.

It is inequitable to allow non-settling defendants to seek a contribution claim against Mr. Rodriguez as an intentional tortfeasor when, if he is viewed as such, he is prohibited from seeking a contribution claim against non-settling defendants. Because contribution is equitable in nature, it would be legally dubious to allow Mr. Rodriguez to be sued under the Contribution Act while simultaneously prohibiting him from suing non-settling defendants

under the very same Act.

Of course, this Court could reverse itself and determine that negligent tortfeasors may seek contribution from intentional tortfeasors under the Contribution Act. Even under such a ruling, however, the analysis should then return to whether the settlement is in good faith, as put forward by this Court in *Johnson v. United Airlines*, 203 Ill. 2d 121, 134 (2003). Once this Court opens the door to allowing contribution for or against an intentional tortfeasor under the Act, *Johnson* and its progeny apply because the Contribution Act would be triggered. At that point, an intentional tortfeasor's settlement should be viewed as any other tortfeasor settlement under the Contribution Act, with the only restriction on the protections the Act affords being the good faith finding.

Non-Settling Defendants, however, seek an even more specific and inequitable finding from this Court. Not only do they argue that a tortfeasor's allegedly intentional conduct should prevent any recovery under the Contribution Act, but also that it should prevent any discharge of liability under the Contribution Act. These competing positions cannot coexist under the Contribution Act. If Non-Settling Defendants wish to use the Contribution Act to seek contribution from Mr. Rodriguez, then they must abide by the statute in its entirety, not just the parts that benefit Non-Settling Defendants. And by the statute, if Mr. Rodriguez settles in good faith (even as an intentional tortfeasor, as Non-Settling Defendants allege), then any further contribution claims against him are extinguished. Nothing in the language of the statute supports Non-Settling Defendants' position that they should be able to pursue a contribution claim against Mr. Rodriguez, but that the Act should somehow not apply to Mr. Rodriguez, specifically.

C. NO MATTER HOW MR. RODRIGUEZ'S CONDUCT IS CHARACTERIZED, CONTRIBUTION CLAIMS AGAINST HIM ARE BARRED.

Even if this Court views Mr. Rodriguez's conduct as somewhere between negligent and intentional, contribution against him is still barred. In *Ziarko*, this Court acknowledged that a distinction may be drawn between willful and wanton conduct that is simply reckless versus that which is intentional. *Ziarko*, 161 Ill. 2d at 280. The Court determined that a defendant found guilty of simply reckless willful and wanton conduct may seek contribution from a defendant found guilty of ordinary negligence, so long as the conduct does not rise to the level of intentional. *Id.* The levels of conduct may be viewed on a spectrum, with negligence at one extreme, and intentional conduct at the other extreme. Between those two extremes lies willful and wanton misconduct, and the degree of that misconduct determines whether a contribution claim may appropriately stand. Willful and wanton misconduct that rises to the level of intentional conduct clearly falls on the intentional side of the spectrum, and therefore cannot be compared with the acts of a negligent tortfeasor. Willful and wanton misconduct that is simply reckless, however, may potentially be compared with negligent conduct, and a contribution claim could stand. *Id*. This approach was adopted by the Court to "preserve the important distinctions between negligence, willful and wantonness, and intentionally tortious behavior," and allow for the apportionment of damages in cases that involve misconduct that falls short of being intentional. *Id*. at 281.

Non-Settling Defendants' counterclaims for contribution frame Mr. Rodriguez's conduct on the intentional extreme of the spectrum, and their argument before this Court mirrors those allegations. Conduct at that end of the spectrum cannot be compared to conduct

at the negligence end of the spectrum due to its qualitative difference and the attendant standards in assessing each type of conduct, and therefore, Non-Settling Defendants cannot properly seek contribution from Mr. Rodriguez as an intentional tortfeasor. Non-Settling Defendants' own arguments before this Court, and in their counterclaims, place Mr. Rodriguez's conduct not on the willful and wanton reckless spectrum, but on the intentional extreme that precludes claims of contribution under *Ziarko*.

In support of their argument that a negligent tortfeasor may seek contribution from an intentional tortfeasor, Non-Settling Defendants rely upon the unpublished First District case, *AdGooroo, LLC v. Hechtman*, 2016 IL App (1st) 142531-U (improperly cited as precedent by Non-Settling Defendants, in violation of Supreme Court Rule 23), and a footnote in the Federal District Court opinion, *Long Beach Mortgage Co. v. White*, 918 F. Supp. 252 (N.D. Ill. 1996). The *Long Beach* footnote suggested that it would be bizarre to preclude a negligent tortfeasor from seeking contribution against an intentional tortfeasor. *Long Beach,* 918 F. Supp. at 254 n. 3. The *AdGooroo* Court acknowledged the *Long Beach* footnote, but emphasized that regardless of whether negligent tortfeasors may seek contribution against intentional tortfeasors, the salient point is that those claims do not survive a good-faith finding. In other words, even if a negligent tortfeasor may seek contribution from an intentional tortfeasor, once a trial court finds that a tortfeasor (negligent or intentional) settled in good faith, contribution claims against it are extinguished.

Even so, allowing Non-Settling Defendants' claim to proceed against an intentional tortfeasor "would be contradictory to the very purpose of contribution" because this Court "has affirmed as the 'governing principle in this jurisdiction' that 'the costs of *accidental*

injury are to be apportioned in accordance with the relative fault of all concerned in the action.'" *Ziarko*, 161 Ill. 2d at 280 (citation omitted) (emphasis original). If Mr. Rodriguez's acts were intentional, then apportionment of relative fault by way of contribution is inappropriate. And even if this Court finds that a contribution claim may be properly brought by a negligent tortfeasor against Mr. Rodriguez as an intentional tortfeasor, his good-faith settlement with Plaintiff extinguishes that claim. *Johnson* and its progeny dictate the requirements for a good-faith finding, even if the law is changed to allow a negligent tortfeasor to seek contribution from an intentional tortfeasor. There should not be one standard for determining good faith between negligent tortfeasors and an entirely different one when a tortfeasor's allegedly intentional conduct is involved.

If this Court chooses to disregard the arguments of Non-Settling Defendants' counterclaims and appellant brief to this Court, and view Mr. Rodriguez's conduct as simply reckless on the willful and wanton spectrum, then the question should again return to whether the settlement was entered in good faith. This appeal then rises and falls on this Court's dictates *in Johnson* and its progeny. Non-Settling Defendants put no argument before this Court to rebut a good-faith finding except their proposed change in the law—that an intentional tortfeasor's policy limit settlement can never pass muster as being in good faith, as a matter of law.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT APPROVED MR. RODRIGUEZ'S PETITION FOR A GOOD-FAITH FINDING.

The trial court did not abuse its discretion when it approved Mr. Rodriguez's petition for a good-faith finding under this Court's holding in *Johnson.* A court abuses its discretion

"only where its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would adopt the court's view." *Miranda v. Walsh Group, Ltd.*, 2013 IL App (1st) 122674, ¶ 10. Further, because *Ready* does nothing to change the factors that the trial court must consider in its good-faith determination, the trial court properly considered the totality of circumstances prior to entering its finding that the settlement between Plaintiff and Mr. Rodriguez was in good faith. *See Miranda*, 2013 IL App (1st) 122674, ¶ 15. The petition for good-faith finding was fully briefed by the parties. Non-Settling Defendants presented arguments in opposition to the entry of a good-faith finding in its response brief on the petition. Non-Settling Defendants argued that Mr. Rodriguez's petition should be denied for the following two reasons:

> (1) His misconduct was intentional, demonstrating a substantial certainty that he could cause injury and (2) the totality of circumstances, including the rights of CTI, Trillium, and Browder, under Section 2-1117 fail to support a Good Faith Finding.

SR Vol. 1, C15. These arguments were rejected by the trial court as insufficient to negate a good-faith finding. SR Vol. 2, 4-22. Non-Settling Defendants now seek a determination that a trial court must make a fault determination under Section 2-1117 before entering a good-faith finding. In considering this argument, the First District noted that:

> requiring a trial court to make a determination as to each defendant's fault before finding that a settlement agreement was entered into in good faith would be impracticable and would defeat the purpose of section 2 of the Contribution Act of encouraging compromise and settlement in the absence of bad faith, fraud, or collusion.

Antonicelli, 2017 IL App (1st) 153532, ¶ 31.

Non-Settling Defendants' argument that Mr. Rodriguez's settlement cannot be in

good-faith because it would unfairly subject them to joint liability is similarly misplaced. *Ready* and its progeny disposed of such an argument. In *Miranda v. Walsh Group, Ltd.*, the First District considered similar arguments. 2013 IL App (1st) 122674. There, plaintiff filed a complaint against an intoxicated driver who lost control of her vehicle and collided with another car, which caused serious injuries to the passengers in the other car. *Id*. at ¶ 2. The driver's insurance company paid settlement of its $20,000 policy limits in exchange for full release by plaintiff. *Id*. at ¶ 3. The trial court determined that there was no evidence that the settlement was not in good faith, and entered a good-faith finding. *Id*. at ¶ 6. Non-settling co-defendant appealed the good-faith finding and argued that the finding contravened the purposes of the Contribution Act, and unfairly exposed it to joint liability by removing the driver from the jury verdict form. *Id*. at ¶ 8. The First District rejected non-settling co-defendant's arguments that the driver's culpability should have barred the good-faith finding, and further rejected the argument that the settlement unfairly subjected non-settling co-defendant to joint liability under Section 2-1117. *Id*. at ¶ 14. Thus, the First District determined that the trial court did not abuse its discretion in entering the finding after reviewing the totality of circumstances. *Id*. at ¶16.

Miranda followed this Court's precedent to determine that the good-faith finding was appropriate and that Non-Settling Defendants' arguments fail under *Ready*. A defendant's culpability may be considered in the good faith determination, just as it was in *Miranda* and here. However, that culpability is not dispositive, but instead is one of the many relevant factors a court may consider in viewing the totality of the circumstances. *See id*. at ¶13. Here, Non-Settling Defendants filed a brief in opposition to Mr. Rodriguez's petition. SR Vol. 1,

C10-225. That brief included four exhibits, including police reports, and transcripts of depositions and criminal proceedings. The trial court considered the briefs and heard oral argument during which Non-Settling Defendants argued against the good-faith finding. SR Vol. 2, 11. The trial court determined that the arguments did not negate a good-faith finding. Non-Settling Defendants' suggestion that their right of contribution was "vetoed" because the court focused exclusively on the allegations of plaintiff's complaint is simply not true, nor is it supported by the facts of record. Contrary to Non-Settling Defendants' claim, the court did not focus exclusively on the allegations of plaintiff's complaint, but instead considered those allegations among other relevant factors, as evidenced by the briefs and oral argument transcript in the record. SR Vol. 1, C6-225; SR Vol. 2, 2-22.

Furthermore, Non-Settling Defendants' arguments illustrate that their objection to a good-faith finding here is pretextual and is not due to a genuine concern that the settlement was the result of wrongdoing, collusion, or fraud (or even against the purposes of the Act). Rather, Non-Settling Defendants argue against a good-faith finding here solely to keep Mr. Rodriguez (a judgment-proof defendant whose policy limits were already offered in full) on the verdict form at trial, in the hope of reducing their relative level of fault to below 25%. This appeal amounts to an overt attempt to overrule *Ready*. Although reversing *Ready* is certainly within this Court's purview, such an action is wholly unnecessary here, where the law is settled, and accomplishes the purposes of the Contribution Act and Section 2-1117. *See Iseberg v. Gross*, 227 Ill. 2d 78, 101 (2007). There is no compelling reason here for this Court to depart from its prior decisions, which the reviewing and circuit courts consistently and correctly follow, and the legislature declined to alter. Non-Settling Defendants' ends here

(reducing their fault on the verdict form) are not justified by their means (reversing *Ready*, and this Court's other settled law, and undermining the purpose behind the statutes, to encourage settlement and equitably apportion fault).

Furthermore, changing the characterization of Mr. Rodriguez's conduct as stated in the pleadings is unnecessary and against public policy, where the recoverable damages are the same. Here, Non-Settling Defendants seek to thwart the finding of good faith by alleging a different cause of action, with a different standard, for no reason other than to attempt to thwart the good-faith finding by arguing that intentional tortfeasors, as a matter of course, cannot be protected from contribution claims.

A. THE TRIAL COURT NEED NOT DETERMINE FAULT UNDER SECTION 2-1117 PRIOR TO THE ENTRY OF A GOOD-FAITH FINDING.

This Court already determined that the Contribution Act and Section 2-1117 do not conflict. *See Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 80 (2002). The First District, below, did not abrogate *Unzicker* when it decided that a trial court need not first consider a non-settling defendant's rights under Section 2-1117 before making a good-faith finding under the Contribution Act. *See Antonicelli*, 2017 IL App (1st) 153532, ¶ 30. Although *Unzicker* did state that Section 2-1117 comes into play before the Contribution Act, that case dealt with the two statutes in the context of apportioning fault after a trial, and not a settlement agreement, as is the case here. *Id*. *Unzicker* does not require that a trial court assess how Section 2-1117 affects other defendants' liability before entering a good-faith finding in favor of a settling defendant. The *Unzicker* Court stated that "the statutes simply do not conflict." *Unzicker*, 203 Ill. 2d at 80. This belies Non-Settling Defendants' argument

that the First District somehow needed to find a way to reconcile the two statutes — there is nothing here to reconcile.

This Court already determined that a good-faith determination is left to the discretion of the trial court upon its consideration of the totality of the circumstances. *Johnson*, 203 Ill. 2d at 135. Non-Settling Defendants raise *Johnson* and argue that the First District's opinion, below, is at odds with the public policy purposes behind the Contribution Act as outlined in *Johnson,* namely, (1) the encouragement of settlements and (2) the equitable apportionment of damages among tortfeasors. *See id.* at 133. Non-Settling Defendants claim that by not requiring a trial court to apportion fault among settled defendants prior to a good-faith finding, that the second of the two purposes is ruled out. Their claim is not supported, however, by statutes or case law, but instead only by a brief recitation of certain facts regarding the underlying accident, and the argument that a jury could determine that Mr. Rodriguez was the sole proximate cause of Plaintiff's injuries. Of course, the sole proximate cause argument is not ruled out simply because Mr. Rodriguez settles in good faith. Nothing prevents Non-Settling Defendants from arguing sole proximate cause at trial, even if that argument is directed at an empty chair. If a jury accepts such an argument, Non-Settling Defendants are released from liability, whether Mr. Rodriguez remains in the case or not.

Furthermore, equitable apportionment is upheld through the remedy provided by the statute — a setoff of the settlement amount in favor of Non-Settling Defendants. Here, the trial court order that granted Mr. Rodriguez's petition for good-faith finding specifically stated that Non-Settling Defendants "have the right of credit of $20,000 as against any future judgment in these proceedings in favor of Plaintiff." R. Vol. 2, C329. If this Court allows any

settlement to be negated by the argument that the setoff amount of that settlement is disproportionate to the liability of co-defendants, then settlements will be further discouraged. *Johnson* stated that courts must "strike a balance" between the two policy considerations; it did not state that equitable apportionment is given complete priority in a good-faith determination. *See Johnson*, 203 Ill. 2d at 133.

This Court already determined that "Section 2–1117 does not apply to good-faith settling tortfeasors who have been dismissed from the lawsuit." *Ready*, 232 Ill. 2d at 385. A settlement is not in bad faith merely because it does not inure to the benefit of Non-Settling Defendants. In fact, "[s]ettlements are not designed to benefit non-settling third parties." *Muro v. Abel Freight Lines, Inc.*, 283 Ill. App. 3d 416, 420 (1st Dist. 1996). Rather, they are "created by the settling parties in the interests of these parties." *Id*. Under *Ready*, once the trial court determined that Mr. Rodriguez's settlement with Plaintiff was in good faith, Section 2-1117 no longer applied, and claims against him under the Contribution Act are barred.

The settlement between Plaintiff and Mr. Rodriguez was created in the interest of those parties. Plaintiff could have decided not to settle with Mr. Rodriguez (a decision reached by plaintiffs in plenty of cases, for a variety of a reasons, including the law under *Ready*). Non-Settling Defendants do not need to keep Mr. Rodriguez in the trial. If they are truly not at fault, they should be found not guilty by a jury. If Mr. Rodriguez truly is the sole proximate cause of Plaintiff's injuries, Non-Settling Defendants can make that argument, as well and seek to instruct the jury as to same. *See* Illinois Pattern Jury Instruction 12.05 ("[I]f you decide that the sole proximate cause of injury to the plaintiff was something

other than the conduct of the defendant, then your verdict should be for the defendant."). The fact that this argument may be more difficult for Non-Settling Defendants is not reason enough to preclude Mr. Rodriguez from entering into a legally valid, good-faith settlement with Plaintiff.

The defendant in *Ready* argued to this Court that excluding settling defendants from the apportionment of fault results in unfairness. *See Ready*, 232 Ill. 2d at 383. There, this Court stated that such a decision was a task better left to the legislature. *Id*. That should remain true here. If Non-Settling Defendants believe that the remedies available to them under the statutes are insufficient or inequitable, then they should petition the legislature. Furthermore, *Ready*'s own analysis of legislative treatment of this Court's decisions is instructive here. Where the legislature chooses not to amend a statute after judicial construction, "it is presumed that the legislature has acquiesced in the court's statement of the legislative intent." *Id*. at 380. The legislature did not so amend the statutes post-*Ready*, which this Court should view as acquiescence in this Court's construction of the statutes and acceptance of the decision reached by this Court in *Ready*.

B. THIS COURT SHOULD NOT PERMIT NON-SETTLING DEFENDANTS TO THWART A GOOD-FAITH FINDING AND SETTLEMENT BASED ON A PRETEXTUAL AND DUPLICATIVE RECHARACTERIZATION OF MR. RODRIGUEZ'S CONDUCT.

This Court should not permit Non-Settling Defendants to thwart a good-faith finding based on a pretextual and duplicative recharacterization of Mr. Rodriguez's conduct. Mr. Rodriguez is not a municipal defendant. Ordinary negligence is not barred against him such that a willful and wanton conduct is required. Moreover, there are no additional damages that

underlying Plaintiff or Non-Settling Defendant can recover against Mr. Rodriguez for his alleged misconduct. Plaintiff will recover only bodily injury damages. Mr. Rodriguez will owe only his commensurate share of such compensatory damages. Apart from the arguments already contained herein, that the Contribution Act does not apply to intentional tortfeasors, is the separate issue of the duplicative nature of Non-Settling Defendants' counterclaims. If this Court reads in willful and wanton misconduct in place of the allegations of intentional conduct, as alleged in Non-Settling Defendants' counterclaims, the charge is duplicative, as the ultimate recoverable damages here are only compensatory, and not punitive. There is no reason to plead any higher level of misconduct here for anyone's recovery purposes. Thus, any charge of willful and wanton misconduct in Non-Settling Defendants' counterclaims are unnecessary. Under Illinois law, there is no separate, independent tort for willful and wanton misconduct. *Doe v. McLean County Unit Dist. No. 5 Bd. of Directors*, 2012 IL 112479, ¶ 19. Rather, willful and wanton misconduct is viewed as an aggravated form of negligence, where plaintiff must prove duty, breach, causation *plus* deliberate intention to harm, or conscious disregard for plaintiff's safety. *Id*. If Plaintiff will recover against Defendant for ordinary negligence, there is no need to elevate the standard of care to a higher evidentiary threshold that requires proof of fault.

Here, even if pleaded at the willful/wanton level, Non-Settling Defendants seek the same compensatory damages in their counterclaims, regardless of whether Mr. Rodriguez's conduct is considered negligent or willful and wanton. This case does not involve any claims for punitive damages. In fact, as this Court is well aware, the Illinois Legislature sought to exact a higher burden on any party claiming willful and wanton misconduct that aimed to

recover more than compensatory damages. *See* 735 ILCS 5/2-604.1 (West 2017). Therefore, any effort to frame the counterclaims in allegations of willful and wanton misconduct is pretextual and merely an effort to thwart the good-faith finding. This Court should thus consider Mr. Rodriguez's conduct under the negligence allegations in Plaintiff's original complaint, and allow the good-faith finding to stand. Alternatively, if this Court views Mr. Rodriguez's conduct under the intentional allegations in Non-Settling Defendants' counterclaims, then the Contribution Act should not apply and Non-Settling Defendants' counterclaims against Mr. Rodriguez should be barred.

C. AN EVIDENTIARY HEARING WAS NOT NECESSARY OR REQUIRED PRIOR TO THE ENTRY OF A GOOD-FAITH FINDING.

An evidentiary hearing was not necessary or required prior to the entry of a good-faith finding. Non-Settling Defendants contend that the statutes are at odds (even though this Court already plainly stated that they are not), and proposes requiring a trial court to conduct a preliminary Section 2-1117 analysis as part of an evidentiary hearing whenever a settling defendant petitions for a good-faith finding.

Evidentiary hearings are not, and should not be, required prior to the entry of a good-faith finding. To hold otherwise will unnecessarily burden trial courts by forcing them to engage in miniature trials on discrete issues. This will not only discourage settlements, but also will result in even more protracted litigation. The trial court's process of considering a petition for good-faith finding properly allows Non-Settling Defendants to submit its arguments against Mr. Rodriguez's petition. Here, the matter was fully briefed and Non-Settling Defendants submitted arguments and exhibits in opposition to Mr. Rodriguez's

petition. However, none of those arguments or exhibits served to negate a good-faith finding under *Johnson*. This Court stated that the trial court "is in the best position to decide what type of hearing is necessary to fully adjudicate the issue of good faith." *Johnson,* 203 Ill. 2d at 136. In some instances, the trial court may hold an evidentiary hearing, in others not. In this regard, *Johnson* is again directly on point:

> Courts have repeatedly and consistently held that a separate evidentiary hearing is not required and that a trial court need not decide the merits of the tort case or rule on the relative liabilities of the parties before making a good-faith determination.

Id. at 139. *Johnson* undercuts Non-Settling Defendants' argument that an evidentiary hearing should be required on every petition for good-faith finding, as well as the unnecessarily complicated and unworkable scheme they propose this Court impose for such hearings.

Under Non-Settling Defendants' proposed scheme for required evidentiary hearings, a petition for good-faith finding will be denied whenever a co-defendant can demonstrate by a preponderance of the evidence that "there is a likelihood at trial that a jury will find the non-settling defendant to be less than 25% at fault." Brief of Petitioner, p. 24-25. Once the petition is denied, a settling defendant must wait until the completion of trial to rehabilitate its petition, at which point the trial court also would consider the non-settling defendant's possible reduction in damages depending on the percentage of fault allocated.

Non-Settling Defendants' proposed scheme will strain judicial resources, require the trial court to speculate as to each party's potential liability, and result in unnecessary costs to settling parties (and their insurers). When counsel mentioned his proposed scheme at the hearing on Mr. Rodriguez's petition for good-faith finding, the trial court noted (and counsel

for Non-Settling Defendants acknowledged the veracity of the court's concerns) the noticeable problems that arise when an insurance company offers its limits as settlement, but still must remain in a case, and pay attorneys' fees and legal expenses to give a defendant a complete and competent legal defense when, as here, Plaintiff already agreed to accept the settlement and release Defendant. SR Vol. 2, 12. This is an even greater issue where, as here, Defendant cannot pay more than the policy limits settlement. When a Plaintiff is not willing to accept policy limits to a release a defendant, and decides to forgo settlement, certainly the insurance company will expend what is necessary in order to fulfill its defense obligation in good faith to its insured driver. Here, though, Plaintiff did not seek any excess recovery, and accepted the limits in exchange for a full release in favor of Mr. Rodriguez.

To force a defendant or company to complete discovery and a full trial, and then only allow a good-faith finding after the verdict is returned, makes no sense from any economic, legal, temporal, or practical perspective. Nothing justifies these unnecessary fees and costs, which is why the Contribution Act intends to avoid them by way of a prompt and good-faith settlement. Under Non-Settling Defendants' proposed scheme, a defendant must endure the cost, time, and expense of a full trial. Furthermore, companies are still on the hook to pay defense costs in a case where they already offered the full limits of their policy. This is hardly the equitable resolution Non-Settling Defendants purport to propose.

1. Non-Settling Defendants' Further Proposals are Inapposite in this Context and Under the Facts of this Case.

Non-Settling Defendants' further proposals, loosely based on this Court's decision in *Kotecki v. Cyclops Welding Corp.* are inapposite in this context and under the facts of this

case. *Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155 (1991). *Kotecki* dealt with whether an employer, sued as a third-party defendant in a product liability case, is liable for contribution in an amount greater than its statutory liability under the Workers' Compensation Act. *Id.* at 156. *Kotecki* reconciled the Contribution Act and the Workers' Compensation Act because they conflicted with regard to the extent of an employer's liability. Such reconciliation is not necessary or warranted in this case, where the Contribution Act and Section 2-1117 do not conflict. *See Unzicker*, 203 Ill. 2d at 80. Non-Settling Defendants seek to create a conflict where none exists in the hope of reducing their percentage of fault on a verdict form, and not because they genuinely believe that these statutes are actually in conflict with one another. *Kotecki* is hardly the blue print for this Court to follow when an employer's fault under Section 2-1117 is not even factored into joint and several liability, and the entire reason Non-Settling Defendants are pressing this appeal is so that Mr. Rodriguez's fault is factored in.

Furthermore, under *Kotecki*, an employer has the option of waiving its Workers' Compensation lien to set off its contribution liability and achieve a good-faith finding. *See LaFever v. Kemlite Co.*, 185 Ill. 2d 380 (1998). Under Non-Settling Defendants' proposal, no such waiver option is available to Mr. Rodriguez. It is not possible for him to do so, which is why Non-Settling Defendants' proposed scheme cannot achieve any workable result. Regardless of the outcome, the only amount that Mr. Rodriguez is able to pay is $20,000 anyway. This represents the limits of his insurance policy. Any judgment beyond that amount is limited by the fact that Mr. Rodriguez does not have the resources to pay it—he is young, indigent, and incarcerated. This is not in dispute. Non-Settling Defendants

are seeking to change decades of settled law in the hope of achieving a finding of less than 25% fault on a verdict form by way of a proposal that is not legally sound, nor practically workable.

CONCLUSION

This Court need not overturn its own settled law in the areas raised on this appeal. Since *Ready*, "appellate courts and parties have uniformly interpreted *Ready* as preventing settling defendants from appearing on a verdict form." *Ramirez v. FCL Builders, Inc.*, 2014 IL App (1st) 123663, ¶ 187 (listing multiple examples of *Ready*'s application since its inception). There is no conflict between the Contribution Act and Section 2-1117, and no reason to find that the trial court's entry of a good-faith finding was an abuse of discretion. For the reasons contained herein, the First District's ruling should be affirmed.

Respectfully submitted,

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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(h)(1) statement of points and authorities, 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 30 pages.

/s/ Esther Joy Schwartz
Esther Joy Schwartz

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

ANGELA ANTONICELLI,	)	
	)	
Plaintiff-Appellee,	)	
v.	)	
	)	
DANIEL JUAN RODRIGUEZ,	)	
	)	
Defendant-Appellee,	)	
	)	
ARTEMIO RAMOS,	)	
	)	
Defendant,	)	No. 121943
	)	
KARL BROWDER, et al.,	)	
	)	
Defendants-Appellants,	)	
	)	
KARL BROWDER, et al.,	)	
	)	
Counter-Plaintiffs-Appellants,	)	
v.	)	
	)	
DANIEL JUAN RODRIGUEZ,	)	
	)	
Counter-Defendant-Appellee.	)	

The undersigned, being first duly sworn, deposes and states that on the 1st day of August, 2017, there was electronically filed and served upon the Clerk of the above court the Brief of Appellee Daniel Juan Rodriguez and that on the same day, a pdf of same was e-mailed to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Brief bearing the court's file-stamp will be sent via Federal Express to the Illinois Supreme Court.

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.

/s/ Esther Joy Schwartz
Esther Joy Schwartz