

15-0112

NOTED DOCKET
DATE: JAN 27 2014
DAVID "BUGS" STOVER
CLERK CIRCUIT COURT
WYOMING COUNTY

IN THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

JASON D. O'NEAL, and ANDREA O'NEAL,
his wife, Individually and as the parents and
next-friends of ANDREW SCOTT O'NEAL,
ANNA LEIGH GRACE O'NEAL, and
AUSTIN MATTHEW O'NEAL, Infants
under the age of 18 years, Third Party Plaintiffs
and Third Party Cross Claim Defendants,

v.

Civil Action No.: 10-C-20
Judge Warren R. McGraw

OLD REPUBLIC INSURANCE COMPANY,
Third Party Defendant and Third Party Cross
Claim Plaintiff.

**[PROPOSED]ORDER GRANTING PLAINTIFF
JASON D. O'NEAL'S MOTION FOR SUMMARY JUDGMENT**

The Parties have submitted to the Court, by their respective counsel, (1) *Plaintiff Jason D. O'Neal's Motion for Summary Judgment*, (2) *Old Republic Insurance Company's Response in Opposition to Third-Party Plaintiff Jason D. O'Neal's Motion for Summary Judgment*, and (3) *Plaintiff Jason D. O'Neal's Reply To "Old Republic Insurance Company's Response In Opposition To Third Party Plaintiff Jason D. O'Neal's Motion For Summary Judgment"*. The Parties have further submitted (1) *Old Republic Insurance Company's Motion For Summary Judgment On Its Third-Party Cross-Claim For Subrogation Pursuant To West Virginia Code § 23-2a-1 and Against Third Party Plaintiffs' Declaratory Judgment Action In The Circuit Court Of Wyoming County, West Virginia*, (2) *Plaintiff Jason D. O'Neal's Response In Opposition To "Old Republic Insurance Company's Motion For Summary Judgment On Its Third-Party Cross-Claim For Subrogation Pursuant To West Virginia Code § 23-2a-1 And Against Third Party Plaintiffs' Declaratory Judgment Action In The Circuit Court Of Wyoming County, West*

Virginia, and (3) Old Republic Insurance Company's Reply to Third-Party Plaintiff Jason D. O'Neal's Response in Opposition to Old Republic Insurance Company's Motion for Summary Judgment.

In compliance with the Court's Order entered August 23, 2013, both Parties filed Motions for Summary Judgment on August 30, 2013. The Parties filed *Responses* to the above-referenced *Motions* on September 27, 2013. The Parties then filed their *Replies* on October 16, 2013. The Court held a hearing on this matter on December 18, 2013.

The Court having fully considered the parties' written submissions, the proffered evidence, and the arguments of counsel hereby **GRANTS** *Plaintiff Jason D. O'Neal's Motion For Summary Judgment* and **DENIES** *Old Republic Insurance Company's Motion For Summary Judgment On Its Third-Party Cross-Claim For Subrogation Pursuant To West Virginia Code § 23-2a-1 and Against Third Party Plaintiffs' Declaratory Judgment Action In The Circuit Court Of Wyoming County, West Virginia* as moot, based on the following findings by the Court:

Introduction

Third-Party (and original) Plaintiff, Jason D. O'Neal, is an underground coal miner and electrician. During work on June 20, 2009, Mr. O'Neal was struck and run over by a shuttle car operated by a co-worker, who was oblivious to Mr. O'Neal's presence around a blind corner near the face of the underground mine where they were working.

Mr. O'Neal filed the instant case in the Circuit Court of Wyoming County on February 11, 2010.¹ In his original suit, Mr. O'Neal asserted a so-called "deliberate intent" claim against his employer, Speed Mining, pursuant to W.Va. Code §23-4-2, and a common law negligence

¹ Mr. O'Neal's lawsuit also included loss of consortium/support claims on behalf of his wife and their three young children.

claim against Patriot Coal, the parent company of Speed Mining. Mr. O'Neal also sued certain related companies and individuals collectively known as the "CAI defendants" (or simply "CAI") under a theory of products liability, alleging that the shuttle car that struck him was defective insofar as it was manufactured and sold without "proximity detection" technology. Such technology can prevent mobile mining equipment from colliding with miners who wear a special electro-magnetic transmitter.

All parties involved in this matter agree that Mr. O'Neal was horrifically injured as a result of the collision. Mr. O'Neal lost his leg, pelvis, and genitalia as a result of the collision. Jason O'Neal is 32 years old. His wife Andrea is 33 years old. They have three children: Andrew, who is 8 years old, and twins Austin and Annaleigh, who are 5 years old. The O'Neal family lives in Pratt, West Virginia.

Because of the catastrophic nature of Mr. O'Neal's workplace injuries, Mr. O'Neal has received a substantial sum of workers compensation benefits. As more fully set forth herein, whether or not Third-Party Defendant Old Republic Insurance Company may assert a subrogation lien, pursuant to W.Va. Code §23-2A-1(b)(1), against Mr. O'Neal to recover these benefits is the subject of the current parties' dispute and the subject of the current parties' competing motions for summary judgment.

Summary of Mr. O'Neal's Motion for Summary Judgment

Mr. O'Neal asserts that Old Republic has no right to assert a subrogation lien pursuant to W.Va. Code §23-2A-1 against him for settlement monies he received from the CAI defendants in this case, because Old Republic never actually provided any workers compensation benefits to him. Mr. O'Neal asserts that his workers compensation benefits were paid entirely by Patriot

Coal on behalf of its subsidiary (and his employer), Speed Mining. Mr. O'Neal asserts that Speed Mining and Patriot Coal previously waived their right to be reimbursed for workers compensation benefits paid by them by the terms of Mr. O'Neal's settlement of his "deliberate intent" claim against Speed Mining.

Summary of Old Republic's Motion for Summary Judgment

Old Republic asserts that it has a right to assert a subrogation lien pursuant to W.Va. Code §23-2A-1(b)(1) against Mr. O'Neal for settlement monies he received from the CAI defendants. Old Republic asserts that it is entitled to assert a lien by virtue of its status as Speed Mining's workers compensation insurance carrier at the time of Mr. O'Neal's injury. Old Republic asserts that it is entitled to subrogation pursuant to the plain language of W.Va. Code §23-2A-1(b)(1) irrespective of the fact that it never actually paid for or provided workers compensation benefits to Mr. O'Neal. Old Republic further argues that Mr. O'Neal and his counsel failed to protect Old Republic's interests in recovering these benefits.

Summary Judgment Standard

The Supreme Court of Appeals of West Virginia has recognized the role of summary judgment in the litigation of cases in this State. The Supreme Court's decision in *Williams v. Precision Coil, Inc.* held that:

"Rule 56 of the West Virginia Rules of Civil Procedure plays an important role in litigation in this State. It is 'designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,' if there essentially "is no real dispute as to salient facts" or if it only involves a question of law. *Painter*, 192 W. Va. at 192 n.5, 451 S.E.2d at 758 n.5, quoting *Oakes v. Monongahela Power Co.*, 158 W. Va. 18, 22, 207 S.E.2d 191, 194 (1974). Indeed, it is one of the few safeguards in existence that prevent frivolous lawsuits from being tried

which have survived a motion to dismiss. Its principal purpose is to isolate and dispose of meritless litigation. To the extent that our prior cases implicitly have communicated a message that Rule 56 is not to be used, that message, hereby, is modified.

Williams v. Precision Coil, Inc., 194 W.Va. 52, 58, 459 S.E.2d 329, 335 (1995). A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories," and other admissible evidence "show that there is no genuine issue as to any material fact . . ." W. Va. R. Civ. P. 56(c). As described herein, the majority underlying facts in this matter are not disputed. Rather what is disputed is the significance and relevance of the underlying facts with respect to a party's right to subrogation under W.Va. Code §23-2A-1(b)(1).

Findings of Fact and Conclusions of Law

1. On the date of Mr. O'Neal's workplace accident, his employer, Speed Mining, was a named insured on a workers' compensation policy that had previously been issued to Magnum Coal Company by Third party Defendant Old Republic Insurance Company. The aforementioned policy with Old Republic included a \$2 million deductible. (*Old Republic Insurance Policy; Exhibit 1 to Old Republic Motion.*)
2. Approximately one year prior to Mr. O'Neal's workplace accident, the Patriot Coal Corporation acquired Magnum Coal and all its subsidiaries, including Speed Mining. After this acquisition, Patriot Coal wound up the affairs of Magnum Coal while continuing to operate its newly acquired subsidiaries, including Speed Mining. (*Affidavit of Lawrence Bell; Exhibit A to O'Neal Motion.*)

3. As Mr. O'Neal's employer on the date of the accident in question, Speed Mining was obligated to provide WV workers' compensation benefits to Mr. O'Neal. Because of the catastrophic nature of Mr. O'Neal's injuries, these benefits would be quite substantial.
4. Prior to Patriot Coal's acquisition of Magnum Coal and its subsidiaries in 2008, Patriot Coal was self-insured for their workers compensation claims, and it remained self-insured after the acquisition of Magnum Coal (and Speed Mining). Patriot Coal administered workers compensation claims from its newly acquired Magnum Coal subsidiaries in the same manner as it had been with its existing self-insured claims. (Depo. of Betsey Sellers, at pp. 26-27; Exhibit G to O'Neal *Motion*.)
5. Speed Mining provided workers compensation benefits to Mr. O'Neal through its parent corporation, Patriot Coal. A Patriot Coal administrator testified that Patriot Coal utilized the services of a third-party administration services company, Avizent, to process and to manage the workers compensation claims of miners employed by its various subsidiaries, including Mr. O'Neal. To do so, Patriot Coal maintained an account with Avizent from which workers compensation benefits would be provided on behalf of its subsidiaries. The Patriot Coal Administrator testified that Patriot Coal was "the only entity funding the Avizent maintained workers compensation account." (Affidavit of Gary Kennedy; Exhibit B to O'Neal *Motion*.) In short, Patriot Coal paid Mr. O'Neal's workers' compensation benefits on behalf of Speed Mining, its subsidiary.

6. During the underlying litigation of Mr. O'Neal's civil claim, and on or about June 17, 2010, Speed Mining and Patriot Coal advised Mr. O'Neal that they were "self-insured" with respect to Speed Mining's obligations to Mr. O'Neal, at least until such date as the benefits paid to Mr. O'Neal exceeded \$2 million:

Currently, the claimant [Jason O'Neal] has had monies paid on his behalf or directly to him [in the amount of] \$1,068,993.77 from the underlying Workers' Compensation claim. Speed Mining is self insured up to its \$2 million self insured retention on the policy applicable to Mr. O'Neal. Old republic is the carrier after that \$2 million, so any subrogation [r]ights after that amount will be the statutory right of Old republic.

(Letter from Christopher A. Brumley, Esq; Exhibit C to O'Neal *Motion*.)

7. Patriot Coal's third-party administrator, Avizent, would later reiterate these facts to Mr. O'Neal on or about November 22, 2011:

Currently the claimant has had monies paid on his behalf or directly to him \$1,678,346.57 from the underlying Workers' Compensation claim. Speed Mining is self insured up to its \$2 million self-insured retention on the policy applicable to Mr. O'Neal. Old republic is the carrier after that \$2 million, so any subrogation rights after that amount will be the statutory right of Old republic.

(Letter from Michelle Craft; Exhibit D to O'Neal *Motion*.)

8. On or about October 13, 2011, Mr. O'Neal (and his family) settled their claims against Mr. O'Neal's employer, Speed Mining, and entered into a written settlement agreement. At this same time, Mr. O'Neal agreed to dismiss his claim against Patriot Coal.

9. The parties' *Release and Settlement Agreement* clearly states that the settlement reached was a settlement of all rights and claims that might exist between the parties as a result of Mr. O'Neal's catastrophic workplace accident:

...[T]his Agreement is the entire agreement and encompasses all terms and agreements negotiated by them *in settlement of any and all claims relating to the subject incident* and that there is no other writings whatsoever.

(*Release and Settlement Agreement*; Exhibit E to O'Neal Motion.) The terms of the settlement expressly preserved Mr. O'Neal's right to continue to receive future workers compensation medical benefits from Speed Mining. (*Id.*) However, the terms of the settlement *did not* expressly preserve Speed Mining's right to be reimbursed for workers compensation benefits paid to Mr. O'Neal should he recover monies from third-parties, such as the CAI defendants.

10. Under the terms of the Release and Settlement Agreement, the "parent companies" of Speed Mining were "Releasees" and included within the scope of the agreement. (*Id.*) This would include Patriot Coal, the parent company of Speed Mining.
11. Following Mr. O'Neal's settlement with Speed Mining, he continued to litigate his claims against the CAI defendants. As this litigation continued, Mr. O'Neal received the aforementioned letter from Avizent, regarding the purported workers compensation lien on any monies that might be received from these defendants.
12. Shortly after receiving the aforementioned letter from Avizent, Mr. O'Neal received a letter from Betsey Sellers from Old Republic, purporting to clarify the information provided by

Avizent and stating that Old Republic, by virtue of its status as the private workers compensation carrier for Speed Mining, “has paid workers compensation benefits to both Mr. O’Neal and his medical providers.” (Letter from Betsey Sellers; Exhibit S to Old Republic *Motion*.) Ms. Sellers would later testify that, at the time she drafted this letter, she was not aware of the fact that Patriot Coal had actually paid all of Mr. O’Neal’s workers compensation benefits on behalf of Speed Mining, its subsidiary. Ms. Sellers did not become aware of this fact until she was reviewing discovery requests and responses in the Parties’ declaratory judgment action. (Depo. of Betsey Sellers at p. 53; Exhibit G to O’Neal *Motion*.)

13. On March, 21, 2012, Mr. O’Neal moved the Court for permission to amend his complaint to add a count for declaratory relief against Old Republic with respect to any lien it might assert under W.Va. Code §23-2A-1(b)(1).

14. Upon hearing Mr. O’Neal’s motion, this Court, *sua sponte*, ruled from the bench that Old Republic would not have a lien on any recovery from the CAI-defendants, based on the information contained in the above-referenced letter from Avizent and the apparent fact that Old Republic has never paid any workers compensation benefits to Mr. O’Neal. (Court’s *Order* entered May 1, 2013.)

15. Following the Court’s ruling from the bench, Plaintiffs later amended their complaint to add Old Republic as a party and the pending count for declaratory relief. (Plaintiffs’ *Third Amended Complaint and Request for Declaratory Judgment*, May 21, 2012.)

16. Mr. O’Neal (and his family) settled their claims against the CAI defendants on or about April 26, 2012. On the date of the settlement, the total dollar amount of workers compensation benefits paid for Mr. O’Neal’s benefit (entirely by Patriot Coal for its subsidiary Speed Mining) did not exceed the \$2 million limit referenced in the aforementioned communications from Speed Mining, Patriot Coal and Avizent. All of these benefits had been paid by Patriot Coal, on behalf of Speed Mining, through the process described above.

17. W.Va. Code §23-2A-1(b)(1) sets forth the subrogation rights of employers and insurers with respect to an injured worker’s recovery against third-parties, including Mr. O’Neal’s recovery against the CAI defendants:

With respect to any claim arising from a right of action that arose or accrued, in whole or in part, on or after January 1, 2006, the private carrier or self-insured employer, whichever is applicable, shall be allowed statutory subrogation *with regard to indemnity and medical benefits paid* as of the date of the recovery.

W.Va. Code §23-2A-1(b)(1) (emphasis added).

18. The term “subrogation” is not defined in the aforementioned statute. Under its usual and customary definition, subrogation refers to right of a party, under certain circumstances, who has actually paid a debt to then be reimbursed for that payment:

[T]he doctrine of subrogation is that one who has the right to pay, *and does pay*, a debt which ought to have been paid by another is entitled to exercise all the remedies which the creditor possessed against that other.

Bush v. Richardson, 199 W.Va. 374, 377, 484 S.E.2d 490, 493 (1997) (emphasis added), citing Syl. Pt. 4, *Ray v. Donohew*, 177 W.Va. 441, 352 S.E.2d 729 (1986). See also, *Travelers Indem. Co. v. Rader*, 152 W.Va. 699, 703, 166 S.E.2d 157, 160 (1969)

("[S]ubrogation is an equitable right which arises out of the facts and which entitles the subrogee to collect *that which he has advanced.*") (emphasis added); *Kittle v. Icard*, 185 W.Va. 126, 130, 405 S.E.2d 456, 460 (1991) ("[Subrogation provides a remedy to] one secondarily liable *who has paid the debt of another* and to whom in good conscience should be assigned the rights and remedies of the original creditor.") (emphasis added).

19. In the instant case, Old Republic did not pay any workers compensation benefits whatsoever to Mr. O'Neal. Having never paid any workers compensation benefits on Mr. O'Neal's claim, Old Republic has no right of subrogation.

20. The Court's ruling in this regard is supported by the plain text of the statute. The statute provides that the "applicable" insurance carrier or self-insured employer is entitled to subrogation "*with regard to indemnity and medical benefits paid as of the date of recovery.*" In other words, the right of subrogation under the statute is premised on a party's payment of benefits to the injured worker. This is consistent with the ordinary meaning of the term "subrogation," whereby a subrogee is entitled "to collect that which he has advanced." *Travelers Indem. Co. v. Rader, supra.*

21. Old Republic's argument that it is entitled to subrogation, under *Bush v. Richardson*, 199 W.Va. 374, 377, 484 S.E.2d 490, 493 (1997), irrespective of the fact that it never actually paid or provided workers compensation benefits to Mr. O'Neal, is not persuasive. In *Bush v. Richardson*, the Supreme Court of Appeals of West Virginia held that the common law "made whole" rule had been explicitly written out of W.Va. Code 23-2A-1. *Id.*, at Syl. Pt. 4.

However, the Supreme Court still recognized the fundamental rule that “subrogation” applies to a person who has, in fact, paid debts owed by another:

[T]he doctrine of subrogation is that one who has the right to pay, *and does pay*, a debt which ought to have been paid by another is entitled to exercise all the remedies which the creditor possessed against that other.

199 W.Va. at 377, 484 S.E.2d at 493 (1997) (emphasis added), citing Syl. Pt. 4, *Ray v. Donohew*, 177 W.Va. 441, 352 S.E.2d 729 (1986). The West Virginia Supreme Court did not rule in *Bush v. Richardson* that the fundamental equitable principle which defines “subrogation” had been written out of W.Va. Code 23-2A-1. On the contrary, the West Virginia Supreme Court reiterated this fundamental definition of “subrogation” in its ruling.

22. Old Republic’s argument that its status as the private workers compensation carrier for Speed Mining under the Magnum Coal policy makes it the “applicable” party entitled to subrogation under W.Va. Code 23-2A-1(b)(1) ignores the manner by which Patriot Coal actually provided workers compensation benefits to Mr. O’Neal on behalf of Speed Mining, following Patriot Coal’s acquisition of Magnum Coal. Patriot Coal was self-insured for its workers compensation claims in West Virginia and directly funded Mr. O’Neal’s workers compensation benefits on behalf of its subsidiary. Speed Mining was a de-facto self-insured employer under the statute, given the fact that its injured employee’s workers compensation benefits were actually paid by its parent corporation, Patriot Coal, who was self-insured. This factor also supports this Court’s ruling that Old Republic does not have a right of subrogation with respect to workers compensation benefits that it never paid.

23. Old Republic argues that a fundamental purpose of W.Va. Code 23-2A-1(b)(1) is to prevent an injured worker from obtaining a windfall in the form of workers compensation benefits plus a third party recovery for the same injury. This Court does not disagree. However, this purpose is not served when – as is the case here – the actual provider of workers compensation benefits reaches a bargained-for settlement with the injured worker and waives its right to be reimbursed for the workers compensation benefits it has paid. Mr. O’Neal is not receiving a windfall by retaining workers compensation benefits paid by Patriot Coal on behalf of its subsidiary Speed Mining, given that Speed Mining did not bargain for a reimbursement of these monies as part of the settlement agreement it reached with Mr. O’Neal. On the other hand, Old Republic, through its corporate representative, testified that it would turn over any money it recovered via subrogation “directly to Patriot [Coal].” If this were to occur, then Patriot Coal would be receiving a windfall, given the previous settlement agreement negotiated by Mr. O’Neal.

24. Old Republic’s argument that Speed Mining lacked authority to waive its subrogation rights under W.Va. Code 23-2A-1(b)(1) is not persuasive. Old Republic admits in its briefing that “the Old Republic Policy [with Speed Mining] expressly states that Old Republic retains all rights to subrogate under the policy, *and obligates Speed Mining to protect those rights.*” (Old Republic’s *Memorandum* at p. 33, emphasis added.) This language is evidence that Speed Mining *had* authority to waive subrogation – not that it lacked such authority. The fact that the policy language “obligates Speed Mining to protect those [subrogation] rights” is evidence that Speed Mining, through its own actions or inactions, could fail to protect those rights – in other words, waive them.

25. Old Republic does not appear to contest the fact that, assuming Speed Mining had the authority to waive its subrogation rights under W.Va. Code 23-2A-1(b)(1), that any rights to subrogation or reimbursement were waived by the terms of the settlement agreement with Mr. O'Neal. The Court finds that Speed did have such authority and that it waived any such subrogation rights by the terms of its settlement with Mr. O'Neal.

26. Old Republic's citation to Argonaut Ins. Co. v. Baker, 87 S.W.3d 526 (Tex. 2002), does not support its argument that it has a right to subrogation. In *Argonaut*, the Texas Supreme Court ruled that a private workers compensation insurer was entitled to recover all of the benefits it had paid, including a deductible. The court held that basic principles of subrogation dictated that the insurer ought to be able to recover those monies that it had actually paid. *Id.* at 529-30. ("[The statutory right to subrogation] applies equally to all subrogation claims to allow the carrier to be *reimbursed* from a third-party recovery for all benefits *it has paid*, regardless of whether a deductible is involved.") (Emphasis added.) This concept of subrogation as a tool to permit the reimbursement of monies actually paid is consistent with the black letter definition of subrogation under West Virginia law, as stated in *Bush v. Richardson, supra*:

[T]he doctrine of subrogation is that one who has the right to pay, *and does pay*, a debt which ought to have been paid by another is entitled to exercise all the remedies which the creditor possessed against that other.

199 W.Va. at 377, 484 S.E.2d at 493 (1997) (emphasis added), citing Syl. Pt. 4, *Ray v. Donohew*, 177 W.Va. 441, 352 S.E.2d 729 (1986). Given this fact, the *Argonaut* decision supports Mr. O'Neal's position, not Old Republic's position. Unlike the insurer in *Argonaut*,

Old Republic has not paid any workers' compensation benefits to Mr. O'Neal. Old Republic cannot be reimbursed for that which it never previously paid.

27. The doctrine of subrogation originated from equity rather than out of statute or common law and is related closely to the equitable principles of "restitution" and "unjust enrichment." *Porter v. McPherson*, 198 W.Va. 158, n. 8, 479 S.E.2d 668, n. 8 (1996). Because the doctrine of subrogation is based in equity, "the right of subrogation depends on the facts and circumstances of each particular case." Syl. Pt. 3, *Bush v. Richardson*, 199 W.Va. 374, 484 S.E.2d 490 (1997). There are additional facts which do not support Old Republic's right to subrogation under the circumstances of this case.

28. Although Old Republic, through its corporate representative, has testified that it will provide any recovery it obtains from Mr. O'Neal to Patriot Coal, there is no evidence before the Court that Patriot Coal believes it is owed a reimbursement by Mr. O'Neal. On the contrary, in its pending bankruptcy proceedings, Patriot Coal identified Mr. O'Neal as a creditor to whom it owes workers compensation medical benefits. (*Notice of Chapter 11 Bankruptcy and Notice for Filing Proofs of Claim* served on Mr. O'Neal; Exhibit B to O'Neal Reply.) Old Republic has identified no filings in Patriot Coal's bankruptcy which would indicate that Patriot Coal or its subsidiaries considered Old Republic to be a debtor in the bankruptcy proceedings with respect to the purported lien against Mr. O'Neal. (*Old Republic's Response to Request for Production No. 3*; Exhibit A to O'Neal Reply.) These facts call into question Old Republic's stated intent to "pass-through" any money obtained from Mr. O'Neal to Patriot Coal. Instead, these facts raise the possibility that Old Republic, should it be

permitted to be "reimbursed" for a debt it never incurred, will either simply pocket the money or otherwise receive some other type of financial windfall from Patriot Coal, all at the expense of Mr. O'Neal.

29. The evidence submitted by the parties also indicates that Old Republic lacks standing to seek a recovery from Plaintiff Jason O'Neal. It is undisputed that Old Republic did not pay any workers' compensation benefits whatsoever to Mr. O'Neal prior to his settlement with the CAI defendants. Nor has Old Republic claimed it has suffered any other particularized harm or injury as a result of the workers compensation benefits paid by others to Mr. O'Neal. Without having suffered any such particularized harm or injury, Old Republic lacks standing to assert a right of recovery for monies that it did not previously advance. "[S]tanding is defined as a party's right to make a legal claim or seek judicial enforcement of a duty or right." *State ex rel. Leung v. Sanders*, 213 W. Va. 569, 578, 584 S.E.2d 203, 212 (2003) (internal quotation marks omitted). Standing requires satisfactory proof of the following:

First, the party attempting to establish standing must have suffered an 'injury-in-fact' -- an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

Syl. Pt. 5, *Findley v., State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002).

The West Virginia Supreme Court has previously held that particularized injury requires "that the injury [complained of] must affect the plaintiff in a personal and individual way."

See *Men & Women Against Discrimination v. Family Protection Servs. Bd.*, 229 W. Va. 55, 61, 725 S.E.2d 756, 762 (2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.

1 (1992)). The evidence is clear that Old Republic has suffered no such particularized injury or harm. Moreover, Old Republic cannot get around this fact simply by arguing that it has standing under W.Va. Code 23-2A-1(b)(1) to recover monies paid to Mr. O'Neal by another party. As discussed above, the aforementioned statute only allows an applicable party to *subrogate* with respect to workers compensation benefits paid to an injured worker. Here, Old Republic has nothing to subrogate because Old Republic never paid any benefits to Mr. O'Neal and, therefore, cannot be reimbursed. The plain language of the statute does not permit a party to engage in general debt collection under the circumstances proposed by Old Republic.

30. In sum, the aforementioned facts and circumstances of this case support Mr. O'Neal's motion that he is entitled to a ruling, as a matter of law, that Old Republic has no right to assert a subrogation lien, pursuant to W.Va. Code 23-2A-1(b)(1) against Plaintiff Jason O'Neal for any monies he has recovered in this litigation from the CAI defendants, and that such assertion by Old Republic is void. The Court so finds.

31. Old Republic's pending Motion for Summary Judgment, and all the issues raised therein, including the issue of whether Mr. O'Neal and his counsel adequately protected Old Republic's subrogation interests under W.Va. Code 23-2A-1, are mooted by the Court's findings as aforesaid.

It is therefore **ORDERED** that the aforementioned *Plaintiff Jason D. O'Neal's Motion for Summary Judgment* is **GRANTED** and *Old Republic Insurance Company's Motion For*

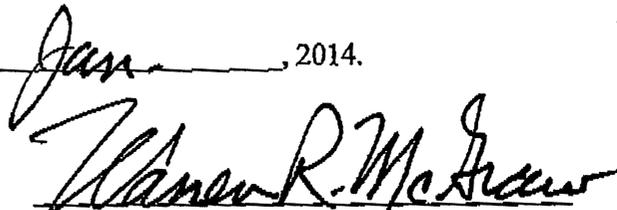
Summary Judgment On Its Third-Party Cross-Claim For Subrogation Pursuant To West Virginia Code § 23-2a-1 and Against Third Party Plaintiffs' Declaratory Judgment Action In The Circuit Court Of Wyoming County, West Virginia be **DENIED**.

The objections of all Parties are noted and preserved.

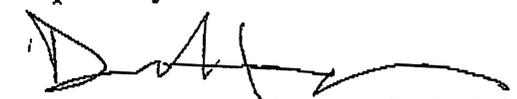
It is so **ORDERED**.

The Clerk of the Court is directed to deliver true copies of this Order to counsel of record as set forth below.

Entered this 24 day of Jan, 2014.


The Honorable Warren R. McGraw
Circuit Court Judge

Prepared By:



Stuart Calwell (WV Bar No, 0595)
David H. Carriger (WV Bar No. 7140)
THE CALWELL PRACTICE, LC
Law and Arts Center West
500 Randolph Street
Charleston, WV 25302
(304) 343-4323
Counsel for Plaintiffs/Third Party Plaintiffs

I. CORPORATE DISCLOSURE STATEMENT

The Old Republic Insurance Company is a 100% wholly owned subsidiary of the Old Republic International Corporation, a Delaware Company headquartered in Chicago, Il, as a publicly traded company on the New York Stock Exchange (Symbol: ORI). Old Republic International Corporation owns 10.13% of its own stock; there is no other institutional, mutual fund, or individual investor who holds an ownership interest exceeding 10% ownership as of December 30, 2014.

IN THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

JASON D. O'NEAL, and ANDREA O'NEAL,
his wife, Individually and as the parents and
next-friends of ANDREW SCOTT O'NEAL,
ANNA LEIGH GRACE O'NEAL, and
AUSTIN MATTHEW O'NEAL, Infants
under the age of 18 years,

Third-Party Plaintiffs and Third-Party Cross Claim Defendants,

v.

Civil Action No.: 10-C-20
Judge Warren R. McGraw

OLD REPUBLIC INSURANCE COMPANY,

Third-Party Defendant and Third-Party Cross Claim Plaintiff.

ORDER DENYING OLD REPUBLIC INSURANCE COMPANY'S
RULE 60 MOTION FOR RELIEF FROM JUDGMENT ORDER
AND FOR ENTRY OF FINAL ORDER

On December 3, 2014, came the Parties, by counsel of record, for hearing on Third-party Defendant *Old Republic Insurance Company's Rule 60 Motion For Relief from Judgment Order and for Entry of Final Order*. The Court has reviewed the pleadings and the record in this matter, including the aforementioned *Motion*, Third-Party Plaintiff Jason D. O'Neal's *Response* to same, and Third-Party Defendant Old Republic Insurance Company ("Old Republic's") *Reply*. The Court, having fully considered the written record as well as the arguments of counsel, **DENIES** Old Republic's *Motion* based on the following findings of fact and conclusions of law:

1. Third-Party (and original) Plaintiff, Jason D. O'Neal, is a former underground coal miner and electrician. During work on June 20, 2009, Mr. O'Neal was struck and run over by a shuttle car operated by a co-worker, who was oblivious to Mr. O'Neal's presence around a blind corner near the face of the underground mine where they were working.

2. Mr. O'Neal filed the instant case in the Circuit Court of Wyoming County on February 11, 2010.¹ In his original suit, Mr. O'Neal asserted a so-called "deliberate intent" claim against his employer, Speed Mining, pursuant to W.Va. Code §23-4-2, and a common law negligence claim against Patriot Coal, the parent company of Speed Mining. Mr. O'Neal also sued certain related companies and individuals collectively known as the "CAI defendants" (or simply "CAI") under a theory of products liability, alleging that the shuttle car that struck him was defective insofar as it was manufactured and sold without "proximity detection" technology. Such technology can prevent mobile mining equipment from colliding with miners who wear a special electro-magnetic transmitter.

3. All Parties in this litigation have agreed that Mr. O'Neal was horrifically injured as a result of the collision. Mr. O'Neal lost his leg, pelvis, anus and genitalia as a result of the collision. Because of the catastrophic nature of Mr. O'Neal's workplace injuries, Mr. O'Neal received a substantial sum of workers compensation benefits from his employer, Speed Mining. Speed Mining through its parent, Patriot Coal, paid all of these worker's compensation benefits to Mr. O'Neal.

4. Mr. O'Neal and his young family eventually settled their claims against the aforementioned original Defendants. In May 2012, following Mr. O'Neal's settlement with the aforementioned CAI defendants, Mr. O'Neal filed the pending declaratory judgment action against Old Republic, the workers compensation insurance carrier for Speed Mining. Mr. O'Neal sought a ruling from this Court that Old Republic had no right to assert a subrogation lien pursuant to W.Va. Code §23-2A-1 against him for settlement monies he received from the CAI defendants in this case, because Old Republic had never provided a penny in workers compensation benefits to him. In support of his argument, Mr. O'Neal produced evidence that all of the workers compensation

¹ Mr. O'Neal's lawsuit also included loss of consortium/support claims on behalf of his wife and their three young children.

benefits he received had been paid by Patriot Coal on behalf of its subsidiary (and his employer) Speed Mining, in the manner of a self-insured retention, and that Patriot Coal and Speed Mining had waived their right to be reimbursed workers compensation benefits paid by them by the terms of Mr. O'Neal's settlement of his "deliberate intent" claim against Speed Mining.

5. Old Republic, in turn, filed a competing declaratory judgment action, asserting it was entitled to assert a subrogation lien against Mr. O'Neal pursuant to W.Va. Code §23-2A-1, irrespective of the fact that Old Republic never actually paid for or provided workers compensation benefits to Mr. O'Neal.

6. On December 18, 2013, the Court held a hearing on Mr. O'Neal and Old Republic's competing motions for summary judgment as to whether a worker's compensation lien could be asserted against Mr. O'Neal's recovery. During the hearing, the parties requested the opportunity to revise their previously-submitted proposed orders to the Court. The Court agreed and directed the Parties to "submit" their revised proposed orders "on or before January 15, 2014, with service of same by mail ... upon opposing counsel." (*Order Permitting Submission of Revised Proposed Orders*, Jan. 3, 2014.)

7. Plaintiff's Counsel complied with the Court's order by submitting Plaintiff's "[Proposed] Order Granting Plaintiff Jason D. O'Neal's Motion for Summary Judgment" to the Judge by letter attachment on January 15, 2014, and by copying Defense Counsel with same. (*Correspondence* from Plaintiff's Counsel, Jan. 15, 2014.) There is no question that Old Republic intended to appeal this order, should the Court rule in Mr. O'Neal's favor.

8. On January 24, 2014, the Court signed Plaintiff's proposed order, thus ruling that Old Republic could not assert a worker's compensation lien against benefits that it had never

provided to Mr. O'Neal. The order was entered by the Clerk on January 27, 2014.² Old Republic then had a 30-day window to file a Notice of Appeal under Rule 5(b) of the *West Virginia Rules of Appellate Procedure*.

9. On or about January 29, 2014, Plaintiff's counsel received a copy of the signed order from the Clerk via U.S. Mail. Old Republic alleges in its *Motion* that its counsel never received a copy of the order from the Clerk's office via U.S. Mail and that the Clerk must have failed to mail the order to its counsel as required by Rule 77 of the *West Virginia Rules of Civil Procedure*. The Plaintiff does not dispute this allegation, and the Court assumes it is true.³

10. However, on February 25, 2014, prior to expiration of the 30-day window for filing a Notice of Appeal of the order, Old Republic's counsel checked the Court's docket utilizing "Circuit Express" – a third-party vendor that provides electronic docket information to lawyers in West Virginia via the Internet. (*Affidavit of Tina M. Harrison* dated September 12, 2014.) At this time, Old Republic's counsel saw that the "[Proposed] Order Granting Plaintiff Jason D. O'Neal's Motion for Summary Judgment" – the very same order submitted by Plaintiff's counsel which Old Republic intended to appeal – had previously been entered on the docket by the Clerk. (*Id.*) There was no indication on the docket that any other order had been entered by the Court during this time period. (*Id.*) Old Republic's counsel then attempted to view the "[Proposed] Order Granting Plaintiff Jason D. O'Neal's Motion for Summary Judgment" electronically,

² As the Court did not strike the bracketed word "[Proposed]" from the title of the order when it was signed, the Clerk entered the title of the order exactly as it called when it was submitted by Plaintiff to the Court and to Old Republic's counsel: "[Proposed] Order Granting Plaintiff Jason D. O'Neal's Motion for Summary Judgment."

³ Due to a drafting error in the proposed order submitted by Plaintiff's counsel and ultimately entered by the Court, the Clerk was directed to send a copy of the order to "undersigned" counsel of record. However, only the signature block for Plaintiff's counsel was included in the order. Old Republic had an ample opportunity to review the proposed order prior to entry and likewise did not catch this drafting error.

because Old Republic's counsel knew it needed to "confirm the content" of this order with an eye toward Old Republic's potential appeal. (*Id.*) However, Old Republic's counsel was unable to view the order electronically (for reasons that have not been explained) and, thus, could not confirm its content online. (*Id.*)

11. Old Republic's counsel then called by telephone the office of the Clerk of the Court in Wyoming County. (*Id.*) At this time Old Republic's counsel simply asked the Clerk whether the Court had entered a "final order" in this matter. The official in the Clerk's office responded that the only recently-docketed order was the "[Proposed] Order Granting Plaintiff Jason D. O'Neal's Motion for Summary Judgment." (*Id.*) Inexplicably, Old Republic's counsel neither requested a hard copy of the docketed order from the Clerk's office nor affirmatively asked the Clerk if the order in question had been signed by the Judge. Old Republic's counsel failed to do so in spite of his prior failed efforts at viewing the document online, Old Republic's intention to appeal the order submitted by Mr. O'Neal, and the looming deadline for filing a Notice of Appeal. (*Id.*)

12. Old Republic's counsel continued to electronically monitor the docket in this case for the next six months but was never able to "confirm the content" of the "[Proposed] Order Granting Plaintiff Jason D. O'Neal's Motion for Summary Judgment" utilizing Circuit Express's website. (*Id.*) In spite of this fact, there is no evidence that Old Republic's counsel ever contacted Circuit Express during this six-month period regarding his inability to view the order in question. Moreover, there is no evidence that, during this six-month period, Old Republic's counsel ever attempted to obtain a hard copy of the order in question from the Circuit Clerk, Plaintiff's counsel, the Court, or anyone else, nor did Old Republic's counsel simply ask the Clerk or the Court if the order in question had been signed by the Judge. In the meantime, Plaintiff's counsel and, more importantly, Mr. O'Neal himself believed that this lengthy litigation was finally over.

13. Old Republic's counsel finally contacted the Court and Plaintiff's counsel in late August 2014 regarding the status of the order that had long been docketed. He was advised that the order had, in fact, been signed by Court prior to entry. On or about September 12, 2014, Old Republic filed its pending Rule 60 *Motion*, requesting that the Court (1) vacate the order in question entered January 27, 2014, (2) re-name the order "Final Order," and (3) re-enter the order so Old Republic may timely file a Notice of Appeal. Old Republic filed its *Motion* nearly eight months after the original order was entered and seven months after the missed deadline for filing a Notice of Appeal.

14. Old Republic argues that its failure to timely file a Notice of Appeal and its subsequent failure to file the pending Rule 60 *Motion* until nearly seven months after the appeals deadline had elapsed are due solely to the fact that it did not originally receive a mailed copy of the appealable order in question from the Clerk. Old Republic argues that its failure to timely file a Notice of Appeal and its subsequent seven-month delay in filing its Rule 60 *Motion* should be excused by this "mistake" by the Clerk. Old Republic argues that the Court should exercise its discretion under Rule 60 and grant its *Motion*, otherwise Old Republic will be unfairly denied an opportunity for appeal.

15. Under the unusual and particular circumstances of this case, where Old Republic's counsel has admitted that he received actual notice from another source that the order in question was entered by the Clerk on the docket prior to the deadline for filing a Notice of Appeal, the Court does not find Old Republic's arguments persuasive. Under the circumstances described above, the Clerk's failure to initially mail a copy of the order in question to Old Republic's counsel was relatively immaterial. It does not provide cover for Old Republic's counsel's own

lack of diligence in failing to timely file a Notice of Appeal and, perhaps more importantly, in allowing nearly seven months to elapse before filing Old Republic's pending *Motion*.

16. "It is generally held that an attorney's negligence will not serve as the basis for setting aside a default judgment on grounds of 'excusable neglect.'" *White v. Berryman*, 187 W.Va. 323, 332, 418 S.E.2d 917, 926 (1992). While this case does not involve a default judgment, the Court finds the aforementioned reasoning in *White* to be germane to its ruling herein. Here, Old Republic's counsel was alerted at least by February 25, 2014,⁴ that the Clerk had entered the very same order that Plaintiff's counsel had previously sent to the Judge for entry. This was the very order that Old Republic intended to appeal. Because of this, Old Republic's counsel admitted that he knew that he needed to obtain a copy of the order in order to "confirm its content" for purposes of filing a Notice of Appeal. Old Republic's counsel tried to obtain a copy of the order electronically by utilizing Circuit Express but was unable to do so. After this occurred, Old Republic's counsel inexplicably elected to make no further efforts to obtain a copy of the order, despite the looming deadline for filing a Notice of Appeal. Old Republic's counsel failed to request a copy from the Clerk or from anyone else. If Old Republic's counsel was truly confused as to whether the order in question (which had been docketed by the Clerk) had been signed by the Judge, counsel could have simply asked the Clerk, the Judge's office, or Plaintiff's counsel. Instead, Old Republic's counsel elected to remain in the dark. Furthermore, Old Republic's counsel opted to continue to do nothing for six additional months.

17. Old Republic's counsel's lack of diligence over a period of many months is antithetical to a claim that Old Republic failed to timely file a Notice of Appeal (and failed to file its pending Rule 60 *Motion* until nearly seven months after the missed deadline) solely because it did not originally receive a copy of the order in question from the Clerk by mail. Old Republic's

⁴ This date was prior to the deadline for filing a Notice of Appeal.

argument on this issue is an effort to deflect attention away from its own counsel's inexplicable actions (and inactions). Under these circumstances, Old Republic cannot now avail itself of discretionary relief from the Court, when the need for such relief is significantly the result of the lack of diligence of Old Republic's own counsel.

18. Old Republic argued during the Court's hearing that a denial of its *Motion* by the Court would be tantamount to a ruling that a party is obligated to "mine the docket" for notice of entered orders. This is clearly not so, given the circumstances of this case. Here, Old Republic's counsel testified that he did "mine the docket" electronically, where he actually saw the docket entry for the order in question. Thus the Court is not ruling that a party must mine the docket; rather, the Court's finds that a party who, in fact, reviews the docket and has actual notice that an appealable order has been entered, cannot use the fact that it did not receive a paper copy of that order in the mail from the Clerk as an excuse for its own lack of diligence (1) in failing to file a timely Notice of Appeal and (2) in subsequently delaying filing a Rule 60 motion until nearly seven additional months have elapsed. To grant the relief sought by Old Republic under these circumstances would be to reward the sort of "inconceivable" and "cavalier" lack of action by its counsel that the West Virginia Supreme Court has held makes such relief unwarranted. *White, supra*, at 332-333. Moreover, it would be grossly unfair to Mr. O'Neal and his young family, who for nearly seven months reasonably believed that this tragic chapter in their lives had finally come to a conclusion.

19. Lastly, the Court notes that it is expressing no opinion on certain hypothetical sets of facts that are not before it at this time, namely: (1) What if Old Republic's counsel had relied exclusively on the U.S. Mail for notice and had never received actual notice, by other means, that the order in question had been entered; or (2) What if Old Republic had filed its Rule 60 *Motion*

significantly closer in time to the missed deadline for filing its Notice of Appeal. As set forth above, the Court's ruling herein is limited to the unusual and particular facts of this case.

Based on the forgoing, the Court **DENIES** *Old Republic Insurance Company's Rule 60 Motion For Relief from Judgment Order and for Entry of Final Order.*

The exceptions and objections of Old Republic are noted and preserved.

The Clerk of the Court is directed to send a certified copy of this Order to all counsel of record.

ENTERED this the 5 day of December, 2014.



Honorable Warren R. McGraw

Prepared by:



Stuart Calwell (WV Bar No. 7595)
David H. Carriger (WV Bar No. 7140)
THE CALWELL PRACTICE, LC
Law and Arts Center West
500 Randolph Street
Charleston, WV 25302
(304) 343-4323
Counsel for Plaintiffs/Third Party Plaintiffs

Served on:

Michael J. Schessler (WV Bar No. 5549)
Bowles Rice LLP
P.O. Box 1386
Charleston, WV 25325-1386
(304) 347-1728
Counsel for Old Republic

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

OLD REPUBLIC INSURANCE COMPANY,

Appellant and Petitioner,

v.

Civil Action No.: 10-C-20
Judge Warren A. McGraw
Circuit Court of Wyoming County, West Virginia

JASON D. O'NEAL, and ANDREA O'NEAL,
his wife, Individually and as the parents and
next-friends of ANDREW SCOTT O'NEAL,
ANNA LEIGH GRACE O'NEAL, and AUSTIN
MATTHEW O'NEAL, Infants under the age of
18 years, Third Party Plaintiffs and Third Party
Cross Claim Defendants,

Appellees and Respondents.

CERTIFICATE OF SERVICE

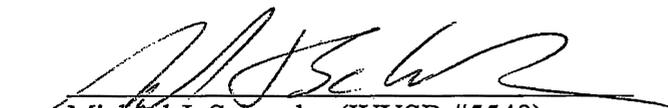
I, Michael J. Schessler, counsel for Appellant and Petitioner, hereby certify that I have served a copy of the foregoing Notice of Appeal on this 2nd day of January, 2015, by forwarding a true and exact copy of the same by United States Mail, postage pre-paid, to:

David H. Carriger, Esquire
The Calwell Practice
Law and Arts Center West
500 Randolph Street
Charleston, West Virginia 25302

Karen Stollings, Court Reporter
Wyoming County Courthouse
P. O. Box 581
Pineville, West Virginia 24874

Clerk of the Court, Wyoming County
David Stover, Clerk
P.O. Box 190
Pineville, West Virginia 24874

The Honorable Cathy Gatson, Clerk,
Kanawha County Courthouse
Judicial Annex
111 Court Street, F1 2
Charleston, West Virginia 25301



Michael J. Schessler (WVSB #5549)