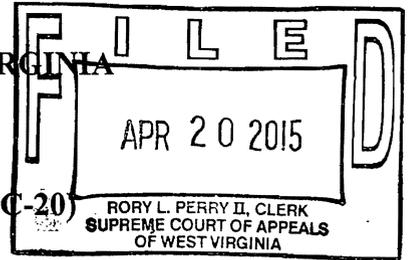


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0012

(Circuit Court of Wyoming County, Civil Action No. 10-C-20)



**OLD REPUBLIC INSURANCE COMPANY,  
a foreign corporation,**

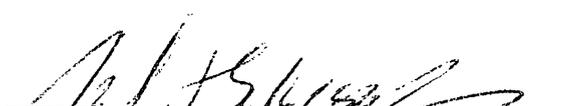
**Appellant and Petitioner,**

v.

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

**Appellees and Respondents.**

**OLD REPUBLIC INSURANCE COMPANY'S  
PETITION FOR APPEAL**

  
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### III. ASSIGNMENT OF ERRORS

- A. The Circuit Court below abused its discretion when it denied ORIC Rule 60 Motion for Relief from the entry of the “[Proposed] Order Granting Plaintiff Jason D. O’Neal’s Motion for Summary Judgment,” entered January 24, 2014, failing to follow the remedial purposes of Rule 60 motions requiring it to correct the Circuit Clerk’s failure to serve a copy of the said Order by mail to counsel, appearing of record, as required by Rule 77(d), W. Va. R. Civ. P. and Rule 24, W. Va. T.C.R., arbitrarily and capriciously depriving ORIC of its right to appeal the merits of the underlying ruling.
1. The Circuit Court below abused its discretion denying ORIC’s Rule 60 Motion for Relief from the entry of the “[Proposed] Order, holding that the Court and Clerk had no obligation to follow Rule 77(d) W. Va. R. Civ. P., concluding such error was immaterial and did not deprive ORIC of its opportunity to appeal.
  2. The Court below abused its discretion when it held that ORIC and its counsel were “negligent and lacked diligence” and had “actual notice” that a final appealable order had been entered by the Court, despite admitting that it did not serve the Order upon ORIC and did not change the style of the [Proposed] Order to reflect entry of a final order.
  3. The Circuit Court abused its discretion finding that the prejudice to the Respondents, who benefited from the Court’s refusal to serve ORIC, outweighed the prejudice to ORIC.
- B. In the underlying Order, the Circuit Court erred in the application of statutory and substantive law, granting O’Neal’s Motion for Summary Judgment, errantly holding that ORIC, a “private carrier,” was not entitled to subrogation under *West Virginia Code* § 23-2A-1, for benefits paid to O’Neal through its Workers’ Compensation insurance policy for Speed Mining, O’Neal’s employer, from the proceeds of a settlement paid to O’Neal by third parties who caused or contributed to cause O’Neal’s work related injuries.
1. The Circuit Court erred in the application of the statute, substantive law and contract when it held that ORIC was not entitled to enforcement of its workers compensation private carrier’s statutory subrogation lien provided by *West Virginia Code* § 23-2A-1(b)(1); provided by statute and the ORIC Workers’ Compensation Insurance Policy, No. OBC 1786302.
  2. The Circuit Court erred, as a matter of substantive law, and abused its discretion when it granted O’Neal’s Motion for Summary Judgment, and denied ORIC’s Motion for Summary Judgment, improperly applying principles of equitable subrogation to extinguish ORIC’s statutory workers compensation lien.

#### IV. STATEMENT OF THE CASE

First, ORIC will show that the Circuit Court below abused its discretion when it arbitrarily, capriciously, and irrationally, denied ORIC's Rule 60 Motion, ignoring the remedial purposes of Rule 60, West Virginia Rules of Civil Procedure. Specifically, Rule 60 requires the court below to correct the unfair prejudice to ORIC, namely the loss of its right to appeal, arising from the failure of the Circuit Clerk of Wyoming County ("Circuit Clerk") and the court, to follow Rule 77(d) of the West Virginia Rules of Civil Procedure, and Rule 24.01, West Virginia Trial Court Rules, requirements that a copy of the court's order entered on January 24, 2014, styled: "[Proposed] Order Granting O'Neal's Motion for Summary Judgment" [App. 10-27] be served by mail upon ORIC, a party represented by counsel of record immediately after the entry. The [Proposed] Order was originally submitted to the court below by Respondent's counsel, with a copy sent to ORIC's counsel. [App. 971-989, [Proposed] Order Submitted by O'Neal, January 15, 2014]. Neither the Circuit Clerk, nor the court below served a copy of that Order upon counsel for ORIC, after it was entered by the Court as required by Rule 77(d). See Rule 77(d) W. Va. R. Civ. P. Before its entry, the court below contacted O'Neal's counsel, *ex parte*, to notify him that their [Proposed] Order" would be entered. The Court did not contact ORIC's counsel before entering the [Proposed] Order [App. 106-112, Schessler Affidavit, September 12, 2014, para. 8]. The Court's Rule 60 Order admits that the entered "[Proposed] Order" contained direction to send it only to 'counsel listed below,' omitting ORIC's counsel. [App. 4, December 5, 2014, Order Denying Rule 60 Motion]. The court below failed to correct this drafting error despite requiring the parties to send a "Word Format" copy of any proposed order to permit necessary changes. [App. 231-234, Order Permitting Submission of Revised Orders, January 3, 2014]. The court below did not direct the Clerk to send copies to ORIC, despite the obligation under Rule 77(d) to serve it by mail to appearing counsel of record. Rule 77(d) W.

Va. R. Civ. P. The Circuit Clerk did not send the order to ORIC's counsel, despite its appearance on the record.

As a result, ORIC, a party of record, was not served notice of the entry of a "final" order adverse to its interests, as required by Rule 77(d), until after ORIC inquired by letter to the Court from ORIC's counsel dated August 27, 2014, whether the Court needed additional information to enter a final order. [App. 180-181]. After receiving the letter, the court's Law Clerk, Josephine Peters, apparently contacted O'Neal's counsel, *ex parte*, by e-mail to inquire about his receipt of the entered "[Proposed] Order." Mr. Carriger sent an e-mail to Ms. Peters, apparently responding to her *ex parte* contact on behalf of the court, confirming that he received a copy by mail, months ago, when entered. [App. 182-183, September 3, 2014 E-mail: Carriger to Peters, cc: Schessler]. Next, without contacting ORIC's counsel, the court, sent a copy of the "[Proposed Order]," apparently signed and entered January 24, 2014, for the first time, by facsimile, on September 4, 2014. [App. 10-27].

On September 12, 2014, ORIC promptly filed a Rule 60 Motion for Relief from the entry of the Judgment Order based on the failure, or refusal, of the court, and the Circuit Clerk to send a copy of the Order upon entry to **all** parties appearing of record,<sup>1</sup> as required by the Rules, and the resulting prejudice to ORIC. See Rule 77(d) W. Va. R. Civ. P.; Rule 24, W. Va. T.C.R. ORIC's Rule 60 Motion sought only re-entry of the "[Proposed Order]," without modification, to cure the court and clerk's error below, to permit ORIC to appeal the merits of the underlying ruling. [App. 88-105]. ORIC's failure to timely appeal the merits of the

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<sup>1</sup> The court and clerk sent previous orders to ORIC's counsel, including the orders regarding a motion to amend, requiring the parties to submit proposed orders, and revised proposed orders. [App. 997-998, Order Granting Motion to Amend Answer; App. 231-234, Order Permitting Submission of Revised Orders, January 3, 2014].

“[Proposed] Order,” entered on January 24, 2014, constituted “excusable neglect,” because its failure to file an appeal was caused by the court and the clerk’s error in failing to serve the “[Proposed] Order Granting O’Neal’s Motion for Summary Judgment,” a final ruling adverse to ORIC’s interests to “all counsel of record,” known to have appeared, as mandated. Rule 77(d) W. Va. R. Civ. P.; Rule 24, W. Va. T.C.R. [App. 88-105].

Contrary to the court’s findings below, there was no degree of “intransigence” on ORIC’s part in failing to file its appeal, because the entered order was listed as “[Proposed] Order Granting O’Neal’s Motion for Summary Judgment” on the WV Circuit Express Docket [See App. 178-179; and the Circuit Court Docket Sheet; App. 000176-177; December 5, 2014, Order Denying Rule 60 Motion, App. 1-9]. The parties sent in their Proposed Orders as requested by the Judge’ Scheduling Order. [App. 929-970, ORIC Proposed Order with Clerk Letter; App. 971-989, O’Neal Proposed Order with Clerk Letter]. The listing of the “[Proposed] Order” appearing on the docket apparently noting its receipt was not surprising to ORIC’s counsel since both parties submitted proposed orders on January 15, 2014. The court below even admits that it “did not strike the bracketed word “[Proposed]” from the entered order. The Court also admits that it did not add ORIC’s counsel’s name to the “[Proposed] Order to assure its service upon all counsel of record, as mandated by Rule 77(d). [App. 4, December 5, 2014, Order Denying Rule 60 Motion].

Nevertheless, the court below arbitrarily blamed ORIC for the court, and its clerk’s failure to serve the entered “[Proposed] Order” to a party of record, to whom other orders were sent. The court abused its discretion by refusing to correct its error, by simply re-entering the January 24, 2014 [Proposed] Order to remedy or cure the prejudice to ORIC caused by the clerk’s error, to permit an appeal on the merits of the decision. The court, arbitrarily excusing its

own, and the clerk's failure to follow the Rules, blames ORIC's counsel for relying on the court and the clerk to follow Rule 77(d) of the Rules of Civil Procedure. [See December 5, 2014, Order Denying Rule 60 Motion, App. 000001-000009].

ORIC, a party litigant appearing by counsel, must be entitled to rely upon the court and the clerk to follow the Rules of Civil Procedure, to fulfill their legal, and statutory obligation to serve notice upon all parties of record all orders entered immediately upon entry. The court's refusal to correct its and its clerk's failure to follow the requirements of Rule 77(b) of the West Virginia Rules of Civil Procedure was an abuse of discretion, which must be reversed by this Court to cure the prejudice caused to ORIC and to permit the underlying order to be reviewed on its merits..

Since this Court's consideration of the denial of ORIC's Rule 60 Motion requires showing the merits of ORIC's lost appeal of the substance of the underlying order, ORIC simultaneously appeals the grant of summary judgment memorialized by the "[Proposed] Order Granting Jason O'Neal's Motion for Summary Judgment." [App. 10-27]. The court below erred denying and terminating ORIC's statutory subrogation rights as "private carrier" providing workers' compensation insurance coverage to Mr. O'Neal's employer, Speed Mining. First, the court below erred, misapplying *West Virginia Code* § 23-2A-1, the source of ORIC's rights to subrogation from third party settlements as a "private carrier" defined by statute. Second, the court below errantly applied the plain language of ORIC's policy, which provided that all benefits were paid through the policy; that obliged ORIC to pay and defend the claim, when it was filed, and specifically provided that ORIC held all rights to subrogation, even to amounts within the deductible paid by the insured. [App. 853-856, ORIC Workers' Compensation and Employers' Liability Deductible Plan Optional Endorsement; App. 256, 258-260, 266, 270, Old

Republic Insurance Policy No. OBC 1786302, Part One, A, B, C, p. 1 of 6; G, p. 2 of 6]. Under the policy, only ORIC has the right to defend and to unilaterally settle the workers' compensation claim. [App. 258, Workers' Compensation and Employers' Liability Insurance Policy Part 1, para. C]. By the terms of the policy, the insured, Speed Mining, had no rights to settle any statutory workers' compensation rights held by ORIC as a private carrier.

The Court below also erred holding that ORIC's statutory rights to subrogation as a "private carrier" under *West Virginia Code* § 23-2A-1 were subject to doctrines of equitable subrogation, and holding that Mr. O'Neal's employer was *de facto* "self-insured," by payment of benefits through the insurance policy deductible by its parent company. [App. 21-22, [Proposed] Order, para. 22]. The findings and holdings, by the court below, were contrary to the statute and precedent of this Court, which hold that Workers' Compensation subrogation rights are controlled by statute, and not to be modified or affected by principles of equitable subrogation. *Bush v. Richardson*, 484 S.E.2d 490 (W. Va. 1997). Thus, the court below erred as a matter of law when it terminated ORIC's subrogation rights. The court compounded its error, or perhaps sought to sustain it, by failing to serve a copy of the entered "[Proposed] Order" Granting O'Neal's Motion for Summary Judgment upon ORIC, by mail, as mandated by Rule. See Rule 77(d) W. Va. R. Civ. P.; and Rule 24, W. Va. T.C.R.

## V. SUMMARY OF ARGUMENT

Petitioner, ORIC, provided workers' compensation insurance coverage to Respondent Jason D. O'Neal's employer, Speed Mining, LLC ("Speed Mining"), through ORIC Policy No. OBC 1786302 and retained all rights to subrogation, even as to deductible amounts paid by or on behalf of its insured. [App. 256, 258-260, 266, 270, Old Republic Insurance Policy No. OBC 1786302, Part One, G, p. 2 of 6; App. 853-856, Workers' Compensation and

Employers' Liability Deductible Plan Endorsement With Optional Aggregate, Page 2 of 3, Para. 8; App. 326-327, Affidavit of B. Sellers, July 10, 2012]. This provision gives ORIC the rights to subrogation, to recover all advances and payments, including those amounts within the deductible, and the right to apply any such recovery to any payments made by ORIC in excess of the Deductible Amounts. [App 854-855]. Workers' compensation benefits of \$1.84 million were paid to, or for the benefit of, Mr. O'Neal through ORIC's policy, before settlement. [App. 335-336, Avizent Letter to Carriger, April 19, 2012]. Benefits continue to be paid through ORIC's policy due to Mr. O'Neal's catastrophic work-related injuries. As of December 15, 2013, three days before the hearing below, ORIC had already paid \$239,454,65 over the deductible, and had conservatively reserved \$6,565,914.35 in benefits payments for this claim. [App. 924-925, Sellers Affidavit, 12/15/2013]. O'Neal received a settlement from the non-employer defendants, below for the same work related injuries on July 2, 2012.<sup>2</sup> [App. 000357-000364 Settlement Agreement]. Despite notice of ORIC's statutory lien before the settlement, O'Neal refused to settle the lien. [App. 000329-000330 Avizent Letters to Carriger].

After settlement, the court below entered an Order permitting O'Neal to file an action seeking to extinguish ORIC's statutory lien. In that Order, the court below also held that ORIC had no rights to subrogation.<sup>3</sup> [App. 837-839, Order Granting Motion to Amend, May 1,

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<sup>2</sup> The defendants below were Baughan Group, Incorporated; Coal Age, Incorporated d/b/a CAI Industries; Robertson, Inc. d/b/a Gauley Robertson; and Roger Baughan. Mr. O'Neal settled with them at a mediation. The Settlement Agreement and Release was executed on July 2, 2012 [App. 357-364], Jason O'Neal Settlement Agreement and Release]. Mr. O'Neal is the only party plaintiff who received settlement proceeds. The underlying civil action was dismissed by Final Dismissal Order, entered August 21, 2012. [App. 365-367]. The CAI defendants have no role in this appeal.

<sup>3</sup> The Order granting the Motion to Amend, entered without briefing by ORIC, shows the court's predisposition, against ORIC's statutory subrogation claim. This predisposition may explain the court's failure to serve a copy of the entered "[Proposed]" Order Granting O'Neal's Motion for Summary Judgment, dated January 24, 2014 upon counsel for ORIC; the *ex parte* communication with counsel for O'Neal before entry, and its subsequent *ex parte* contact with O'Neal's counsel before sending a copy of

2012]. O’Neal filed an Amended Complaint. ORIC answered. Discovery followed. Both parties filed motions for summary judgment and supporting memoranda with exhibits. Each participated in a hearing on December 18, 2013. Each party submitted “proposed” orders. [App. 929-970, ORIC’s Proposed Order; App. 971-989, O’Neal’s Proposed Order].

On January 24, 2014, the Court below, without notice to ORIC’s counsel, after notifying Respondents’ counsel, entered the “[Proposed] Order Granting Jason D. O’Neal’s Motion for Summary Judgment,” directing service only to O’Neal’s counsel. Neither the court, nor the clerk, served, mailed, or sent a copy of the “[Proposed] Order” entered January 24, 2014, to ORIC, and its known counsel of record, until September 4, 2014. The copy of the order was sent by facsimile as the only response to counsel’s inquiring whether the Court needed additional information to enter a final order. [App. 10-27, Facsimile [Proposed] Order; App. 180, Schessler Letter, August 27, 2014]. There are no exceptions to the obligation of the court and its clerk to serve all known parties of record by mail with orders adversely affecting their interests. Rule 77(d) W. Va. R. Civ. P.; Rule 24.01 W. Va. T.C.R.

Due to the clerk and the court’s failure to comply with the requirements of Rule 77(d) and Rule 24.01 W. Va. T.C.R., ORIC failed to receive the “[Proposed] Order,” in fact a final order, within the time frame for an appeal provided by Rule 5 of the West Virginia Rules of Appellate Procedure. The Circuit Court’s Order denying ORIC’s Rule 60 Motion, actually holds that “. . . the Clerk’s failure to initially mail a copy of the order in question to Old Republic’s counsel was relatively immaterial,” and by order creates an affirmative duty for a party to

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the “[Proposed] Order, dated January 24, 2014 to ORIC’s counsel on September 4, 2014. [App. 182-83]. In fact, the Court and Clerk did not send a copy of the December 5, 2014, Order denying ORIC’s Rule 60 Motion until Josephine Peters attached it to an e-mail sent on December 19, 2014 [App. 1032], responding to ORIC’s inquiry of December 15, 2014 [App. 1031].

monitor the docket, to find any disguised entry, and investigate that entry, even if the court or clerk failed, or refused, to serve an entered order to the party appearing before the Court as required. Rule 77(d) W. Va. R. Civ. P.; Rule 24.01 W. Va. T.C.R.

On September 4, 2014, after again contacting O’Neal’s counsel, *ex parte*,<sup>4</sup> the Court sent ORIC a copy of the entered order entitled “[Proposed] Order Granting Plaintiff Jason D. O’Neal’s Motion for Summary Judgment,” for the first time, by facsimile. [App. 000010-000027]. On September 12, 2014, ORIC filed a Rule 60 Motion for Relief from Judgment Order, requesting only that the court correct the clerical error, the failure to immediately service ORIC, to cure prejudice to ORIC, by simply vacating the entry of the “[Proposed] Order” then re-entering it to permit an appeal on the merits.

After briefing, and hearing, on December 5, 2014, in an abuse of discretion, ignoring the remedial purpose of Rule 60, the court entered an Order denying ORIC’s Rule 60 Motion. The Circuit Clerk docketed the signed order on December 18, 2014. [App. 1-9]. On December 19, 2014, the Judge’s law clerk sent a copy of the Order denying ORIC’s Rule 60 Motion to ORIC by email attachment, stating that the Clerk’s office due to the holiday may not mail the order out timely. [App. 1032, Peters’ e-mail, December 19, 2014]. The clerk did not mail a copy of the Order denying ORIC’s Rule 60 Motion until January 2, 2015, only after counsel’s request. Based on the foregoing, ORIC requests that this Court hold that the Circuit Court abused its discretion, when it arbitrarily, and irrationally refused to correct its and the clerk’s violation of Rule 77(d), or Rule 24.01 which deprived ORIC of its due process right to appeal. ORIC further requests that the Court review and reverse the “[Proposed] Order” entered

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<sup>4</sup> Mr. Carriger, O’Neal’s counsel included ORIC’s counsel in a response to an *ex parte* contact by the Court inquiring whether Mr. O’Neal’s counsel received the January 24, 2014 Order from the Clerk. [App. 182-183, Email from Carriger to J. Peters cc: M. Schessler, September 3, 2014].

January 24, 2014, and issue an order enforcing ORIC's *West Virginia Code* § 23-2A-1 lien, in full, and provide such other relief as justice requires.

## VI. SUMMARY OF ARGUMENT

The law favors the determination of all matters on their merits, and disfavors, as an abuse of discretion, a Circuit Court's refusal to grant a Rule 60 Motion for relief seeking only correction of the court, and its clerk's failure serve a copy of a final order upon by mail a party of record, known to the Court, as mandated by Rule, when such error results in the affected party's inadvertent waiver of due process rights to appeal the merits of the underlying decision of the court, below. See Rule 77(d), W. Va. R. Civ. P. and Rule 24.1, W. Va. T.C.R.

Here, the Circuit Court arbitrarily and irrationally abused its discretion to hold that neither the court, nor its clerk, had any obligation whatsoever to serve a copy of a final order, upon a party of record and no obligation to correct such prejudicial error. The court errantly held that its clerk's failure to "initially mail a copy of the order in question to ORIC's counsel was relatively immaterial" because ORIC's counsel, checked the electronic docket to see if a final order had been entered and noticed the "[Proposed] Order" listed. [App. 1-9, December 5, 2014, Order Denying Rule 60 Motion]. The court further abused its discretion by holding that ORIC had an affirmative obligation to obtain the January 24, 2014 "[Proposed] Order granting O'Neal's Motion for Summary Judgment" on its own, when the clerk failed to serve it as required to check the content of a document counsel had previously received from Respondent's counsel. The court below held that it had no obligation whatsoever to comply with the Rules 77(d) or Rule 24, despite the court's admission that its entered Order directs service only to Respondent's counsel. [App. 4-7, December 5, 2014, Rule 60 Order].

Finally, since the underlying order of the Circuit Court was a final order denying ORIC's statutory rights to subrogation, ORIC requests that this Court consider the merits of that judgment, to further hold that the Circuit Court erred in the application of the law, statute and contract when it extinguished ORIC's private carrier's statutory subrogation rights provided under *West Virginia Code* § 23-2A-1.

## **VII. STATEMENT REGARDING ORAL ARGUMENT**

Pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, Petitioner asserts that oral argument will assist this Court's adjudication of this case. Although Rule 77(d) W. Va. R. Civ. P. and Rule 24.01, W. Va. T.C.R. require that orders and all notices be served by the Court to all parties appearing in the action, the court below, in an arbitrary abuse of discretion has contrarily held that a party, appearing of record, has the affirmative burden to obtain an Order, if they are aware that a decision is pending from the Court and notice questionable entries in the docket. The court, to sustain its ruling in favor of the Respondents below, denied any obligation of the Court or the Circuit Clerk to follow the West Virginia Rules of Civil Procedure. Also, in the underlying matter, while *West Virginia Code* § 23-2A-1 unambiguously provides statutory subrogation rights to ORIC, the court below errantly chose to apply equitable subrogation principles previously held to be inapplicable to modify the application of the Workers' Compensation statutes. Oral argument would permit the parties an opportunity to respond to any question this Court may have relating to the issues presented. For these reasons, Petitioner requests this Court grant oral argument in this matter.

## VIII. ARGUMENT

### A. **The Circuit Court Erred and abused its discretion denying Petitioner's Rule 60 Motion for Relief from Judgment Order by failing to apply its remedial purpose to avoid unfair prejudice to an affected party and decide the case on its merits.**

As a threshold matter, “[t]he appellate standard of review for the denial of a Rule 60 Motion for Relief From Judgment Order is an abuse of discretion standard. In *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85, this Court held that “[a] motion to vacate a judgment made pursuant to Rule 60(b), West Virginia Rules of Civil Procedure, is addressed to the sound discretion of the court, and the court’s ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion.” *Id.*, at Syl. Pt. 5. This Court has held that “[a]n appellate court should find an abuse of discretion only when the trial court has acted arbitrarily or irrationally.” *State v. Beard*, 194 W. Va. 740, 750, 461 S.E.2d 486, 496 (1995). An appellate court may reverse a circuit court’s ruling for an abuse of discretion if “a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the circuit court makes a serious mistake in weighting them.

The court below arbitrarily dismissed its own, and the Circuit Clerk’s failure to serve a copy of what amounted to a signed final order entered by the court, dispositive of all pending issues, upon on all parties appearing of record before the court as “immaterial error,” when it denied ORIC’s Rule 60(b) Motion to correct the prejudicial error by re-entry of the Order. The court held that when ORIC’s counsel checked the docket to find the “[Proposed] Order Granting Jason O’Neal’s Motion For Summary Judgment,” listed, the court’s and its clerk’s obligation to serve the adverse order, was extinguished, because ORIC obtained “notice” that a final dispositive order was entered. The court below so held, despite its appearance on the

docket as a “[Proposed] Order Granting O’Neal’s Motion for Summary Judgment,” submitted by a party pursuant to a prior order of the court. [App. 1-9, Rule 60 Order].

The court below admits that it “. . .did not strike the bracketed word “[Proposed]” from the title of the order when it was signed and the Clerk entered the title of the order exactly as it [*sic*] was called when it was submitted by Plaintiff. . . .” [App. 1-9, Rule 60 Order, para. 8, n. 2]. Thus, that final order, adverse to ORIC’s interests, was stealthily listed on the electronic docket and the Circuit Clerk’s own docket as “[Proposed] Order Granting Jason O’Neal’s Motion for Summary Judgment.” [App. 178, WV Circuit Express Docket Sheet, App. 1039, Circuit Court Docket Sheet].

Further, before entering the Respondent’s “[Proposed] Order Granting Jason O’Neal’s Motion for Summary Judgment, the Circuit Court contacted only O’Neal’s counsel, to notify him that Plaintiffs’ [Proposed] Order denying ORIC’s subrogation interest, would be entered. The court’s Rule 60 Order denying ORIC’s Motion also admitted that the entered “[Proposed] Order” submitted by [Respondents’] counsel, and signed by the court, was sent by the court and the clerk, only “. . . to “undersigned” counsel of record. . . .” as directed by the judge. [App. 4, December 5 Order]. The court’s *ex parte* contact with Respondent’s counsel before entry, shows that the court was well aware of the discrepancy. Nevertheless, the court below chose not to even call ORIC’s counsel to provide notice to ORIC of its intent to enter the Respondent’s order. The court below further arbitrarily concluded that ORIC’s Rule 60 Motion was untimely because it was filed several months after entry of the [Proposed] Order. [App. 1-9]. ORIC filed its Rule 60 Motion September 12, 2014 [App. 88-105], after the court sent the “[Proposed] Order, by facsimile for the first time, on or about September 4, 2014, from Judge Warren McGraw’s Fax line. [App. 10-27].

The Circuit Court further abused its discretion when it irrationally held that O'Neal would be unfairly prejudiced by granting ORIC's Rule 60 Motion to permit an appeal because plaintiffs' relied on ORIC's failure to appeal. The Court arbitrarily determined that O'Neal should be the beneficiary of the court's and its clerk's refusal to follow the Rules of Civil Procedure mandating service of adverse orders to all counsel, appearing before the court. The prejudice to ORIC, the inadvertent loss of its due process right to appeal, far exceeds the prejudice to Respondents who would have been required to respond to an appeal, as originally contemplated. [App. 3, Paragraph 7, Rule 60 Order, App. 48-87 Hearing Transcript December 18, 2013].

Further, the Circuit Court arbitrarily and capriciously imposed the duty upon ORIC to obtain a copy of an order which the Court itself had the obligation to serve, upon entry, to sustain its own error. Without question, ORIC, a party known by the Court to be represented by counsel, who is not in default for failure to appear, and the party itself, are entitled to receive, and must be served, by mail from the Circuit Clerk, a copy of any order entered by the Court that denies their motions and grants judgment to the adverse party. Specifically, Rule 77(d) provides:

“Notice of orders or judgments.—”Immediately upon the entry of an order or judgment the clerk, except as to parties who appear of record to have had notice thereof, **shall** serve by mail a notice of the entry in the manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear, and shall make a note of the mailing in the docket. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules.” Rule 77(d), W. Va. R. Civ. P. Emphasis added.

By use of the word “shall,” the Rule mandates that the court and its clerk must serve by mail, notice of any order entered “immediately” upon every party not in default. There

is no exception or excuse for a court's failure to direct service upon all parties of record appearing before it because such required mailing by Rule is the only sufficient notice to a party for all purposes for which notice of the entry of an order is required. See Rule 77(d) W. Va. R. Civ. P. Old Republic, and its counsel are entitled to rely upon the court and its clerk to follow the rule to serve the "[Proposed Order]" by mail, immediately upon entry.

There is no other means of notices which "shall" be sent to any party by the Rules. It was an arbitrary capricious abuse of discretion for the court to refuse to correct its and the clerk's failure to follow Rule 77(d). The [Proposed] Order was not served by e-mail or facsimile when entered. There was no courtesy call to ORIC's counsel by the court to provide notice of entry as there was to Respondent's counsel. Since the Rules governing the procedures of the court require that a known, appearing party, **shall** be served a copy of any order entered by the court, by mail, the failure to do so is a violation of the rules which must be corrected when the error or violation causes unfair prejudice to a party by precluding its opportunity to appeal. Thus, because of the substantial prejudice to ORIC, it was an arbitrary abuse of discretion for the court below to refuse to correct its failure to serve the entered order by mail upon a party of record. Rule 77(d) W. Va. R. Civ. P.

Further, a party appearing on the record of the Court should not have to "mine" the docket in order to discern that an entry listed as a "[Proposed] Order" Granting Plaintiff Jason D. O'Neal's Motion for Summary Judgment" is actually a final order granting summary judgment to the opposing party which the court neglected to serve by mail to all counsel, as required by see Rule 77(d), W. Va. R. Civ. P.

The Circuit Court below errantly relies on *White v. Berryman*, 187 W. Va. 323, 332, 418 S.E.2d 917, 926 (1992), for the principle that an attorney’s negligence provides no basis to set aside the “[Proposed] Order on the grounds of excusable neglect. In *White*, the entire syllabus point 8 states: “It is generally held that [a]n attorney’s negligence will not serve as the basis for setting aside a default judgment on the grounds of excusable neglect,” in a case where the defaulting party was told by counsel not to file an answer. *Id.* at Syl. Pt. 8 [emphasis added]. In *White*, Berryman, an individual, was served with Complaint and Summons. He failed to answer or appear, resulting in the entry of “default judgment.” *Id.*, 187 W. Va. at 332-33, 418 S.E.2d at 925-926. Arguing to set aside the default, Berryman alleged that he failed to answer because his attorney told him to disregard the complaint. *Id.*, 187 W. Va. at 333, 418 S.E.2d at 926. This Court held that the attorney’s advice to disregard the Complaint, was not excusable neglect. This Court refused to set aside the default judgment because there was proof that Berryman was actually served with summons and complaint, had knowledge of the obligation to answer, and disregarded it. The attorney’s negligence was in telling his client not to answer, not in failing to receive a notice from the court. *White* was not a case where the party failed to receive the Summons and Complaint. *Id.*, 187 W. Va. at 333-34.

Contrarily, here, ORIC was not served with a final order, and no final order appeared on the docket of the court maintained by the Clerk. Thus, contrary to the court’s order below, *White* does not apply because the court below assumes and admits that ORIC was not served with a copy of the [Proposed] Order by mail upon entry, before its appeal time ran, as required by Rule 77(d). [App. 4, Rule 60 Order, December 5, 2014].

The resolution of ORIC’s appeal should be guided by this Court’s recent Memorandum Decision in an action more closely similar to this case: *Prima Marketing LLC v.*

*Hensley*, 2015 WL 869265 [W. Va. 2015] (unpublished Memorandum Decision). There, this Court held that it was an abuse of discretion by the court below to refuse to set aside a default judgment entered against a defendant who did not receive summons and complaint because it was served to an incorrect address or file with the West Virginia Secretary of State. The defendant changed his address submitting forms to the Secretary of State, which failed to make the change. The court below held that the defendant's failure to confirm that the address change was listed correctly by the Secretary of State for two years was not "excusable neglect." *Id.*, slip op. 3-4. This Court reversed, holding that good cause existed as to the failure of the petitioner to file a responsive pleading because the defendant below was not served, and that the Circuit Court abused its discretion ruling otherwise. *Id.* at 5. Likewise, here, the court below sought to blame ORIC for the court's admitted failure to serve ORIC with a copy of the entered order. The court arbitrarily determined that its error was "immaterial" because ORIC's counsel saw the "Proposed Order" listed in the docket. Thus, the court arbitrarily excused its duty to serve an order to a party appearing of record as required by Rule 77(d). Rule 77(d), W. Va. R. Civ. P.

The fact that defense counsel was "alerted" that the "[Proposed] Order Granting Plaintiff Jason D. O'Neal's Motion for Summary Judgment" was listed on the docket, did not provide actual notice of entry of a final order, or create a duty to "confirm its content" because Respondent's counsel had already served a copy of the "[Proposed] Order" Granting Plaintiff Jason D. O'Neal's Motion for Summary Judgment" earlier in the proceedings. [App. 971-989]. There was no need to confirm its content.

Further, the court, by the Circuit Clerk, immediately, upon entry, mailed a copy of the "[Proposed] Order to respondent's counsel according to the e-mail, dated September 3, 2014. Respondent's counsel, responding to an e-mail sent by Ms. Peters, law clerk, after the Court

received ORIC's August 27, 2014 letter inquiring about the status of entry of a final order in this matter, acknowledged receiving the entered "Proposed Order" months ago. [See App. 182, App. 106-112, Schessler Affidavit para. 17 and Schessler Affidavit, Ex. 6].

The Circuit Court below arbitrarily attributed negligence and intransigence to ORIC and its counsel, citing counsel's periodic review of Circuit Express to determine whether a final order was entered, as providing notice that an appealable final order was entered by the court, listed as a "[Proposed] Order." [App. 4-6]. The Court attributes its neglect, in failing to serve a copy of its order as required by Rule 77(d) to ORIC, to protect its underlying ruling in favor of Respondents' below from appeal. However, there are no procedural provisions which relieve the court, or its clerk of such obligation, merely because a party may periodically checks an electronic docket. Moreover, the Rules do not provide an electronic filing system by which the Circuit Court of Wyoming provides electronic service of any court document upon the parties. Rather, the rules provide that the court, through the clerk shall immediately serve copies of all entered orders, upon counsel of record, by mail. Rule 77(d) W. Va. R. Civ. P. ORIC, the Respondents below, the Court, and the Clerk all relied upon service by mail to send and receive pleadings and orders. Respondent's counsel was sent, and received, a copy of the "[Proposed] Order" immediately after it was entered January 29, 2014. [App. 4, Rule 60 Order].

Contrary to the Court's Order, below, ORIC's Rule 60 Motion for Relief from Judgment Order was timely. ORIC filed its Rule 60 Motion on September 12, 2014, within 8 days of receiving a copy of the [Proposed] Order for the first time, by facsimile from the Court, on September 4, 2014. [App. 88-105]. That facsimile was the court's only response to ORIC's letter to the court inquiring whether more information was needed to enter a final order. ORIC's motion was filed within one year after the court below failed or refused to immediately serve, by

mail, a copy of its entered order to counsel appearing of record. Rule 60 requires that a Motion for Relief From Judgment Order be filed within a reasonable time, and for reasons of (1) mistake, inadvertence, surprise, excusable neglect, or unavoidable cause, or (2) for newly discovered evidence, and (3) fraud, not more than one year after the judgment order was entered. Rule 60(b) W. Va. R. Civ. P.

Further, consistent with the remedial purposes of Rule 60 (a) and (b), ORIC requested only that the court vacate the entry of the [Proposed] Order; correct its caption to “Final Order;” and serve it upon all counsel of record, to cure the prejudice arising from the failure of the court and clerk to comply with Rule 77(d) after they failed to immediately serve the entered “[Proposed] Order” upon ORIC. [App. 88, 92, ORIC Rule 60 Motion]. Such failure by the court and the clerk renders ORIC’s failure to timely file an appeal, or other motion pursuant to Rule 59, to be excusable neglect, caused by events outside of its control, due to the failure of the clerk to immediately serve ORIC by mail with a copy of the entered order as required. See Rule 77(d), W. Va. R. Civ. P.

Rather than correct its error, the court also held that ORIC’s Rule 60 motion, was untimely, because ORIC waited 7 months after entry of the “[Proposed] Order” to file its Rule 60 Motion, implying that ORIC should have known that the Court entered a final order. [App. 1-9, December 5, 2014, Order, para. 15-16]. The refusal of the Court below to correct its own failure to follow the requirements of Rule 77(d), and to impute ORIC’s counsel’s failure to discover the court’s error to counsel’s negligence, is an arbitrary abuse of discretion. The Court’s denial of ORIC’s timely Rule 60 Motion, and imposing a duty upon ORIC to request an item appearing on the docket as a “[Proposed] Order to see if the Court failed to follow its procedural obligations to

serve orders adversely affecting parties by mail, upon all counsel appearing of record, is arbitrary and capricious.

Contrary to Court's order below, the entry of an Order that simply vacated the entry of the "[Proposed] Order, on January 24, 2014, re-entering it as a "Final Order, without substantive modification, to be served upon all counsel of record was a reasonable, and necessary remedy to cure the prejudicial effect of the court's own failure to follow procedure. Such remedy would cure the unfair prejudice to ORIC caused by the court and the Circuit Clerk's error, consistent with the remedial provisions of Rule 60(b), and its liberal construction for the purpose of accomplishing justice, facilitating the desirable legal objective that cases are to be decided on the merits. Syllabus Point 6, *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974).

Respondents would not have suffered any undue or unfair prejudice by the Court's correction of its error, to permit ORIC to appeal. The court and the respondent below were aware of ORIC's intent to appeal if the court refused to uphold ORIC's statutory lien. [See App. 1-9, Rule 60 Order, para. 7]. Further, Respondents' brought the underlying declaratory judgment action, because they, and their counsel, wished to challenge rather than settle ORIC's statutory subrogation lien. The Respondents cannot be permitted to benefit from the court's failure to comply with the requirements of Rule 77(d) and denial of due process to ORIC. Moreover, there is no unfair prejudice to the Respondents by permitting ORIC to appeal the underlying decision of the Court below that outweighs the prejudice to ORIC arising from the lost chance to appeal to have the case decided on its merits.

Contrary to the Circuit Court's order denying ORIC's Rule 60 Motion for Relief from Judgment order, ORIC, and its counsel, must be entitled to rely on the court below, and the

Circuit Clerk, to follow the rules to serve by mail copies of orders signed by the judge, and entered by the Clerk to all counsel appearing of record immediately upon entry. Rule 77(d), W. Va. R. Civ. P. Due process requires that the court and the parties follow the rules of pleading and service, so that all cases are decided on their merits. Accordingly, the failure to mail a copy of an Order to counsel for a party who has appeared, is a material clerical error, which the Circuit Court failed to correct in an abuse of discretion. Such abuse of discretion must be corrected so that this matter can be decided on its merits.

**B. The Circuit Court erred in application of the statutory and substantive law when it denied ORIC's "private carrier's" statutory right to subrogation provided by *West Virginia Code § 23-2A-1(b)(1)* against the proceeds of a third party settlement.**

Under the applicable standard of review, "[a] circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). When reviewing a lower court's summary judgment decision, this Court has applied the same standard required of the circuit court. See *Cottrill v. Ranson*, 200 W. Va. 691, 695, 490 S.E.2d 778, 782 (1997) ("We review a circuit court's decision to grant summary judgment *de novo* and apply the same standard for summary judgment that is to be followed by the circuit court." (citing *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995))). In this regard, this Court has long held that "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). Using this standard, it is apparent that the court below erred, failing to apply, rather than construe the unambiguous terms of the statute, ORIC's policy, and substantive law when it denied ORIC's statutory subrogation rights. The material facts are as follows.

On June 20, 2009, Mr. O'Neal sustained serious, catastrophic injuries while employed by Speed Mining at its American Eagle Mine in a shuttle car accident. Respondents brought an action against Speed Mining under *West Virginia Code* § 23-4-2(d)(2)(ii).<sup>5</sup> Plaintiffs also brought claims against the CAI Defendants alleging that their defective equipment also contributed to cause, Mr. O'Neal's work related injuries as permitted by *West Virginia Code* § 23-2A-1(a).<sup>6</sup>

ORIC provided workers' compensation insurance coverage to O'Neal's employer, Speed Mining, under ORIC's Insurance Policy No. OBC 1786302, issued to Magnum Coal Company ("Magnum"), as a named insured. [See App. 256, 266, 270, Old Republic Insurance Policy No. OBC 1786302; App. 325-328, Betsey Sellers' Affidavit; Sellers-Old Republic Rule 30(b)(7) Depo., pp. 67-68, App. 413]. ORIC's Workers' Compensation Insurance Policy provides first dollar coverage and has a standard deductible in the amount of \$2 million. Only ORIC has the right to settle the workers' compensation claim. [See App. 256, 258-60, Old Republic Insurance Policy No. OBC 1786302, Part One, A-C, p. 1 of 6; Part One, H-I; Part Two, A, p. 2 of 6; Part Two, B, p. 2 of 6; App. 325-328, Sellers-Old Republic Rule 30(b)(7) Depo; App. 403, pp. 26-28; App. 403; App. 413, pp. 65-68]. It also generally provides that only ORIC retains rights to subrogation as to amounts recovered from others.

As of April 19, 2012, the date of mediation, workers' compensation payments totaling \$1.84 million had been paid on Mr. O'Neal's claim through and pursuant to the terms

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<sup>5</sup> Respondents below, settled their civil action against Speed Mining for a substantial cash payment from Speed Mining, and its separate insurer, Commerce & Industry Insurance Company [App. 325-328, Speed Mining Release,]. That settlement is not subject to subrogation lien provided by *West Virginia Code* § 23-2A-1(b)(1).

<sup>6</sup> The settlement with the CAI Defendants is confidential and shall be maintained as confidential and disclosed only as necessary for the determination of this matter. [App. 992-996, Protective Order].

and conditions of ORIC's policy. [See App. 335-336, April 19, 2012 Letter, Avizent to Carriger]. The workers' compensation claim remains open, and payments continue to be made. To date, ORIC has paid benefits on this claim above the deductible totaling \$523,376.31, ORIC currently reports \$6,490,389.69 in projected, outstanding reserves for this claim at the time of the hearing, December 18, 2013, on the party's motions for summary judgment.

As of December 13, 2013, ORIC had paid \$239,454.65 in benefits over the deductible, and had reserve projection of \$6,565,914.35 for benefits payable on this claim. [App. 924-925, Sellers Affidavit, December 13, 2013]. ORIC's policy provides that ORIC retains all rights to subrogation, even as to payments made under the deductible as follows:

“We have your rights, and the rights of persons entitled to the benefits of this insurance to recover all advances and payments, including those within the Deductible Amount(s) from anyone liable for the injury. You will do everything necessary to protect those rights for us and to help us enforce them. If we recover any advance or payment made under this policy from anyone liable for the injury, the amount we recover will first be applied to any payments made by us on this injury in excess of the Deductible Amounts;...”

[App. 853-856, Old Republic Insurance Policy No. OBC 1786302, Workers' Compensation and Employers Liability Deductible Plan Endorsement With Optional Aggregate, Page 2 of 3]. This specific Liability Deductible Plan Endorsement, supplements the general subrogation rights set out in the standard policy provisions.

Based on the proper application of statute and insurance policy, and substantive law, ORIC, as the “private carrier” providing workers compensation insurance for Speed Mining, through whose policy benefits were paid for the benefit of Mr. O'Neal, was entitled to enforcement of the statutory subrogation lien provided by W. Va. Code 23-2A-1 against the

proceeds of the settlement paid by the non-employer defendants below. Under West Virginia law in a declaratory judgment action, the Court below, was required to apply the statute and enforce a contract, which provides the law of the case, to give it full effect, and to follow substantive law in their application. *Keefer v. Prudential Ins. Co. of America*, 153 W. Va. 813, 172 S.E.2d 714 Syl. (1970); *Creasy v. Tincher*, 154 W. Va. 18, 19, 173 S.E.2d 332, 333 (W. Va. 1970); *Cotiga Development Company v. United Fuel Gas Company*, Syl. pt. 4, 147 W. Va. 484 128 S.E.2d 626 (1963); *Bush v. Richardson*, 484 S.E.2d 490, 497 (W. Va. 1997); *Cart v. Gen. Elec. Co.*, 506 S.E.2d 96, 100 n. 8 (W. Va. 1998); *Soliva v. Shand, Moraham & Co.*, 176 W. Va. 430, 345 S.E.2d 33, Syl. pt. 1 (1986).

The lien in favor of ORIC, a “private carrier,” was provided by the plain language of the statute and its rights to subrogation of the amounts paid through the deductible provided by the insurance policy, which the court below refused to apply. Further, the Court below also misapplied or disregarded the plain language of ORIC’s Workers’ Compensation Policy No. OBC 1786302, providing coverage to Magnum/Speed Mining, which provides that ORIC holds the lien, and all rights to subrogation for all workers’ compensation payments made, including those payments “within the Deductible Amount(s) from anyone liable for the injury.” [App. pp. 256, 258-260, Old Republic Insurance Policy No. OBC 1786302, Part One, G, p. 2 of 6 and App. 853-856, Workers’ Compensation and Employers Liability Deductible Plan Endorsement With Optional Aggregate, Page 2, Para. 8]. The court below misapplied the terms of ORIC’s insurance policy covering Speed Mining to hold that ORIC has no right to subrogation for the deductible amounts and to hold that Speed Mining could waive ORIC’s contractual and statutory rights to subrogation. [See App 10-27, [Proposed] Order, paragraph 24-25].

ORIC is entitled to enforcement of its statutory subrogation lien provided by *West Virginia Code* § 23-2A-1(b)(1) by application of the statute and the Old Republic Workers' Compensation Insurance Policy, No. OBC 1786302 through proper adjudication and application of the statute and contract by the Court below, as required by law. See Rule 56 and Rule 57, W. Va. R. Civ. P.; *Arthur v. County Court*, 153 W. Va. 210, 167 S.E.2d 558 (1969). The court below must be reversed

- 1. The Circuit Court erred in the application of the statute, substantive law and contract when it held that ORIC was not entitled to enforcement of its workers compensation private carrier's statutory subrogation lien provided by *West Virginia Code* § 23-2A-1(b)(1); provided by statute and the ORIC Workers' Compensation Insurance Policy, No. OBC 1786302 through proper adjudication and application of the statute and contract by this Court, as required by law.**

ORIC's statutory subrogation rights are based on its status as a "private carrier"<sup>7</sup> pursuant to *West Virginia Code* § 23-2A-1(b)(1), which states: "(1) 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). Respondent's subrogation obligation arises pursuant to *West Virginia Code* § 23-2A-1(a), which provides that "an employee who sustains a work-related injury may bring a civil action or claim to recover compensation when the compensable injury . . . is caused, in whole or in part, by the act or omission of a third party,..." even if they are entitled to receive workers' compensation benefits. *W. Va. Code* § 23-2A-1(a). O'Neal received workers' compensation benefits through ORIC's Workers' Compensation Policy. [Sellers-Old

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<sup>7</sup> A "private carrier" is defined as any insurer, like ORIC, which is authorized by the Commissioner to provide workers' compensation insurance. See W. Va. Code § 85-2-3. ORIC workers' compensation insurance to other employers, in West Virginia. [App. 403, ORIC Rule 30(b)(7) Deposition].

Republic Rule 30(b)(7) Depo., pp. 13, App. 400; p. 19, App. 401; p. 26, App. 403; pp. 65-68, App. 413]. Thus, following *West Virginia Code* § 23-2A-1(b)(1), ORIC, a private carrier, is entitled to recover all workers' compensation payments made on Mr. O'Neal's claim, from the proceeds of any settlement paid by any third party who was alleged to have caused or contributed to cause the injury to the employee as by proper application of the statute and ORIC's policy a matter of law.

The Court below erred when it construed rather than applied *West Virginia Code* § 23-2A-1 to hold that ORIC had no rights to subrogation. [App. 10-27, [Proposed] Order Paragraph 17-20]. However, here was no basis for the Court below to construe or change the effect of the statute, or the insurance policy when the language of both is clear and unambiguous, because the "rule of construction can never be used to change the legal effect of clear and unambiguous language." *Keefer v. Prudential Ins. Co. of America*, 153 W. Va. 813, 172 S.E.2d 714 Syl. (1970); *Creasy v. Tincher*, 154 W. Va. 18, 19, 173 S.E.2d 332, 333 (W. Va. 1970); *Cotiga Development Company v. United Fuel Gas Company*, Syl. pt. 4, 147 W. Va. 484 128 S.E.2d 626 (1963); *Bush v. Richardson*, 484 S.E.2d 490, 497 (W. Va. 1997); *Cart v. Gen. Elec. Co.*, 506 S.E.2d 96, 100 n. 8 (W. Va. 1998); *Soliva v. Shand, Moraham & Co.*, 176 W. Va. 430, 345 S.E.2d 33, Syl. pt. 1 (1986). In its Order the Court below set out the text of the statute that applied:

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.

Nevertheless, the Court below erred when it sought to construe this statute to abrogate ORIC's rights, rather than apply it.

Specifically the Court below construed the language of the statute which defines the lien holder as "the private carrier or self-insured employer, whichever is applicable," to hold that ORIC had no rights to subrogation because the benefits were paid from the deductible by Speed Mining's parent company to declare it the applicable party holding statutory rights. Specifically, the Court below held:

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 recover." 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*.

The Circuit Court erred when it construed the plain language of *West Virginia Code 23-2A-1* to mean 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," to mean that the right of subrogation under the statute is premised on a party's payment of benefits to the injured worker," making it the "applicable" party with rights to subrogation. The Court below wrongly construed they plain language of the statute which expressly provides subrogation rights to the "private carrier" or "self-insured employer", whichever is applicable" based solely in their status as such, not based on the payment of the deductible. *W. Va. Code § 23-2A-1*.

Further, contrary to the court's ruling, the payment of a deductible does not make a party "self-insured" within the meaning of the subject statute. The court below also erred by ignoring the statutory definitions of "private carrier" and "self-insured employer" when it decided that the "applicable" party was the that paid the deductible. Specifically, *West Virginia Code* § 23-2A-1 provides the "private carrier or self-insured employer, whichever is applicable," with a statutory right to subrogation against third-party settlements. The right of subrogation is enforced in Section (d) by a statutory subrogation lien placed, in favor of the private carrier, upon all money received by the injured worker from the third party when the injured party brings the action. *W. Va. Code* § 23-2A-1(d). The court below further erred concluding that payment of the deductible by Speed Mining, or its parent company made Speed Mining *de-facto* "self-insured," in order to disqualify ORIC from its statutory rights. However, under West Virginia law, to qualify for "self-insured employer" status under the statute, requires certification that the injured employee's actual employer has funds deposited and held on reserve by the West Virginia Insurance Commission for payment of self-insured claims. *W. Va. Code* § 23-2-9. There is no evidence that Speed Mining met the standards *West Virginia Code* § 23-2-9.

The following analysis will show that the court's holding below, that Speed Mining was a *de facto* self-insured employer under the statute because its certified self-insured parent corporation paid the deductible amount is clear error in the application of *West Virginia Code* § 23-2A-1, *W. Va. Code* § 23-2-9, ORIC's Policy and the precedent of this Court, which must be reversed.

2. **The court below also erred refusing to apply the terms and conditions of ORIC's policy, which provided that ORIC held all subrogation rights, for benefits paid, including those paid through the deductible.**

Here, ORIC's Policy provides that it has the sole right to defend and settle the workers' compensation claims when the claim is made. [App. 256, 258-260, Old Republic Insurance Policy No. 1786302 Part One A-C, G and H, p. 4 of 6]. Under West Virginia's insurance and workers' compensation regulatory scheme, the carrier has all of the rights of the "insured employer" to settle a workers' compensation claim, unless the policy otherwise provides, and the right to reclaim the deductible paid by the insured. See *West Virginia Code* § 85-12-4. See *W. Va. Code R.* § 114-14-7. Here, ORIC's policy expressly provides that ORIC has all rights to subrogation, even to recover amounts paid under the deductible. [App. 256, 258-260; Old Republic Insurance Policy No. OBC 1786302, Part One G, p. 4 of 6, App. 258-263; Workers' Compensation and Employers Liability Deductible Plan Endorsement With Optional Aggregate, Page 2 of 3, Para. 8, pp. 853-856]. Thus, contrary to the ruling of the court below, ORIC has the right to recover the deductible amount, unilaterally, because the statutory right to subrogation belongs to "private carrier" not to the insured, when the policy, as here, provides that the insurer has the obligation to defend and the unilateral right to settle the workers' compensation claim as soon as the claim is filed, and expressly retains the rights to subrogate all benefits paid within the deductible amounts. [App. 260, App. 853-856].

There is little case law dealing with the application of *West Virginia Code* § 23-2A-1. However, other states, interpreting their own workers' compensation statutes, provide that the private insurer is entitled to recover all payments made under the insurance policy, including amounts paid as part of a deductible. For example, the Texas Supreme Court has determined that under Texas workers' compensation law the private carrier insurer has the right to

reimbursement of the total amount of claim benefits paid under or through an insurance policy, including those benefits payable from the deductible when the policy provides first dollar coverage provided. *Argonaut Ins. Co. v. Baker*, 87 S.W.3d 526, 530 (Tex. 2002) [App. 491-498]. This is because under the law, the insurer and insured are one entity whose rights, including that of the deductible, are held together under the insurance policy. *See Am. Home Assur. Co., Inc. v. Hermann's Warehouse Corp.*, 563 A.2d 444, 445 (N.J. 1989) [App. 518-522].

Further, ORIC's obligation to provide coverage and defend is triggered by the filing of the claim, not payment of the deductible by the insured. [App. 256, 258-260]. Further, ORIC insurance policy never mentions a "self-insured retention." Instead, the ORIC policy identifies payments on any claims made through the policy, by, or on behalf of, the insured, Speed Mining, as a "deductible." [App. 312, 310, Old Republic Insurance Policy No. OBC 1786302, Workers' Compensation and Employers Liability Coverage Endorsement WC 00 01 11 A (E), Named Insured – Large Deductible Endorsement, Magnum Coal Company; App. 315, Sellers-Old Republic Rule 30(b)(7) Depo., pp. 26-28, App. 403, 65-68, App. 412-413]. The policy specifically states that Old Republic has a duty to defend and a right to settle as soon as the claim is filed. [See App. 260, Old Republic's Insurance Policy No. OBC 1786302, Part One, D, p. 3 of 6]. Thus, the Old Republic policy does not require a payment of a \$2 million "self-insured retention" before Old Republic has the duty to defend or pay under the policy, which is the essence of an SIR policy according to the West Virginia Supreme Court of Appeals. *See, Camden-Clark Mem'l Hosp. Corp. v. St. Paul Fire and Marine Ins. Co.*, 717 F. Supp. 2d 529, 533 (S.D. W. Va. 2010). Therefore, based on its policy and the underlying statute, ORIC is entitled to recovery all payments made under the policy from the proceeds of Respondents' settlement with the non-employer defendants, below.

Contrary to the Court's Order below, payment of the deductible by the insured, or on behalf of the insured, does not create "self-insured" status under the workers' compensation statutes, including *West Virginia Code* § 23-2A-1. The Court's orders refer to payment of the benefits by Patriot Coal on behalf of its subsidiary, O'Neal's 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 under the terms of Mr. O'Neal's settlement of his "deliberate intent" claim against Speed Mining. [App. 3, December 5, 2014, Order on Rule 60 Motion, Para 4, page 3; App. 21-26, Proposed Order, para. 22-26]. Contrary to the holding of the court below, Speed Mining and its parent corporation have no statutory or policy-based rights of subrogation to waive.

However, Speed Mining or its parent corporation's direct payment of the deductible to the third party administrator as benefits payments came due does not confer "self-insured" status, or make Speed Mining "for all practical purposes, self-insured" with respect to Speed Mining's workers compensation obligations to Mr. O'Neal. The payment of an insurance policy deductible, even by the parent company of the employer, does not make the covered insured employer "self-insured." Under the workers' compensation statutes an employer is either "self-insured," a status defined by the statute, or it is insured by a private carrier, like ORIC, which the record shows provided insurance for Speed Mining.

Following West Virginia law, to be "self-insured," or to have any level of "self-insured retention," requires certified compliance with the self-insurance provisions and procedures set out in *West Virginia Code* § 23-2-9. There is no certification that Speed Mining complied with the requirements of Section 23-2-9. Speed Mining or Magnum, was never certified by the West Virginia Insurance Commissioner as "self-insured," under the workers'

compensation statutes. On the contrary, ORIC's evidence presented to the Court below show that Magnum Coal, Speed Mining's parent corporation, was not certified to be "self-insured." Therefore, Magnum Coal and Speed Mining obtained the subject insurance policy from Old Republic after Magnum and Speed Mining were acquired by Patriot Coal Company. [App. 403, Sellers-Old Republic Rule 30(b)(7) Depo., pp. 25-28]. The Court below simply ignored the evidence and the specific statutory requirements to become certified as a "self-insured" employer, to errantly hold that Speed Mining is a *de-facto* self-insured employer, by payment of benefits through the ORIC policy deductible. [App. 21, [Proposed] Order, para. 22]. Speed Mining had no workers' compensation subrogation rights to waive under the workers' compensation statutes because Speed Mining was not "self-insured," as defined by *West Virginia Code 23-2-9*. The fact that Patriot, Speed Mining's parent corporation, was "self-insured" and paid ORIC's policy deductible does not make Speed Mining "self-insured" under the statute.

The court's ruling below that direct payment of ORIC's insurance policy deductible through a third party administrator renders Speed Mining "de-facto self-insured" or "for practical purposes, self-insured" has no legal basis and cannot be used to void ORIC's statutory and contractual subrogation rights as a "private carrier." Thus, as a matter of law, based on the foregoing, Speed Mining and Magnum were not "self-insured," and ORIC was entitled to an Order declaring its private carrier status and an Order enforcing its subrogation lien to recover workers' compensation payments made on Mr. O'Neal's behalf as of the date of the final settlement payment by the CAI Defendants.

Also, contrary to the Court's Order, Speed Mining was not "self-insured" within the meaning of *West Virginia Code § 23-2A-1*, so that it had no authority to waive ORIC's

statutory subrogation rights to settlement amounts paid to Mr. O’Neal by the Baughan Group, even amounts paid on the “deductible,” was clear error and must be reversed.

The court below erred applying the plain language of *West Virginia Code* § 23-2A-1(b)(1) to mean that the payment of benefits through a deductible created “self-inured” status and eliminated the private carrier’s rights to subrogation. The subrogation rights of private carrier workers’ compensation insurers, like ORIC, are set out in *West Virginia Code* § 23-2A-1(b)(1), which states as follows: “(1)“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.” *West Virginia Code* § 23-2A-1(b)(1). The Circuit Court in paragraph 20 of the [Proposed] Order tortured the language out of context to determine that payment provided the party’s rights to subrogation, rather than their legal status as being a private carrier, or self-insured employer. [App. 20].

In summary, the [Proposed] January 24, 2014, Order errantly holds that ORIC had no subrogation rights, because the benefits paid to Mr. O’Neal were part of the deductible under Speed Mining LLC’s Workers’ Compensation insurance policy, misapplying the statute and the policy. Speed Mining was insured, not “self-insured,” as defined by the statute. Its workers’ compensation coverage was provided by a “private carrier.” ORIC’s policy expressly states, and Respondent was informed, that ORIC held the workers’ compensation subrogation rights against any settlement paid by the CAI Defendants. [App. 346-347, Corrected Avizent Letter 11/8/2011; App. 333-334, ORIC Letter 12/11/2011]. Further, the Court below erred, completely failing to apply the plain language of ORIC’s workers’ compensation insurance policy’s deductible endorsement. ORIC’s policy explicitly states that: “We [ORIC] have your [Speed Mining’s]

rights, and the rights of persons entitled to the benefits of this insurance to recover all advances and payments, including those within the Deductible Amount(s) from anyone liable for the injury.” [See App. 855-56, Old Republic Insurance Policy No. OBC 1786302, Workers’ Compensation and Employers Liability Deductible Plan Endorsement With Optional Aggregate, Page 2 of 3, Para. 8]. This language clearly shows that ORIC has the subrogation right, including all rights, even of the insured, to recover from a third party, all benefits payments made to a beneficiary of the policy, even if they are paid for by the deductible. In addition, ORIC has the right to apply funds recovered to pay any payment it makes in excess of the deductible amounts, and gives it the right to apply recovered amounts to pay benefits in excess of the deductible. [App. 855-856]. Based on the foregoing, the Circuit Court below erred when it held that Speed Mining’s waiver of subrogation in its settlement with O’Neal extinguished ORIC’s statutory private carrier’s rights to subrogation provided by *West Virginia Code* § 23-2A-1(b).

**C. The Circuit Court erred, when it applied principles of equitable subrogation to extinguish ORIC’s statutory workers compensation lien by failing to follow established precedents of this Court which have uniformly held that principles of equitable subrogation do not apply to modify statutory rights under the Workers’ Compensation system.**

The Circuit Court below erred when it denied and extinguished ORIC statutory rights to subrogation relying upon principles of equitable subrogation arising from payment of the deductible, by or on behalf of the insured, Speed Mining. ORIC’s subrogation rights as a “private carrier” against the proceeds of the non-employer’s settlement were provided by statute, namely *West Virginia Code* § 23-2A-1. This statute, which created and defined the private carrier’s subrogation rights, and the Respondent obligation to satisfy the subrogation lien, was required to be strictly followed and applied, by the court below without modification. *Bush v. Richardson*, 199 W. Va. 374, 377, 484 S.E.2d 490 493 (1997).

The Workers' Compensation Subrogation statute, *West Virginia Code* § 23-2A-1(b)(1) was enacted to provide the private insurer or self-insured employer with statutory subrogation rights to the proceeds of any settlement paid by a third-party who caused and contributed to cause an employee's injury. The Legislature created this statutory scheme in 1990 because this Court had "consistently held that in the absence of a subrogation statute, an employee is entitled to full amount of damages awarded to him against the third party without any reduction for Workers' Compensation benefits received by the Employee as a result of the injury." This Court would not recognize an "equitable subrogation" claim made by the workers' compensation carrier based on the premise that they "paid the medicals," without express statutory authorization because the Workers' Compensation system was a wholly statutory system, enacted to replace the common law courts to provide compensation for work related injuries. Thus, this Court always rejected claims of equitable subrogation made by the employer before the enactment of *West Virginia Code* § 23-2(a)-1. See *Bush v. Richardson*, 199 W. Va. 374, 377, 484 S.E.2d 490, 493.

Specifically, this Court had consistently held that "Workers' Compensation 'is entirely a statutory creature.' Thus . . . the right to subrogation and what form it will take are matters properly left for the legislature to determine." *Id.* at 376, 492. Accordingly, the West Virginia Legislature decided upon the form, and enacted *West Virginia Code* § 23-2(a)-1 to give the private carrier, like ORIC, or self-insured employer, whichever was applicable, the right to subrogation when a workers' compensation claimant, like O'Neal, recovers money from a third-party tortfeasor. See *Id.* at 376, 492.

Accordingly, the statute must simply be applied under its terms, to provide subrogation to the private carrier for benefits provided to the employer through its policy. .The

Court below errantly held that ORIC was not entitled to subrogation because O’Neal’s benefits payments were paid by Speed Mining’s parent company, Patriot Mining, as part of the insurance policy deductible. The Court errantly held that ORIC had no right to subrogation the third party settlement, as permitted by statute, because “subrogation 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) and that “[s]ubrogation 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.” The Court wrongly concluded that ORIC’s subrogation rights were based on the common law equitable principles, and that its statutory rights could be modified, because the policy proceeds were provided by the insured through the deductible, not from ORIC’s own funds. [App. 19-25, [Proposed] Order, paras. 18-29]

**1. Old Republic’s Subrogation Rights Are Provided By Statute, *West Virginia Code § 23-2A-1* and Are Not Subject to Modification By Any Principle of “Equitable Subrogation.”**

ORIC’s workers’ compensation private carrier’s subrogation rights against the proceeds of the settlement paid to Mr. O’Neil by non-employer defendants are provided by statute, namely *West Virginia Code § 23-2A-1*, and are not based on principles of “equitable subrogation.” The statute, not common law rules of equity, create and define ORIC’s rights, and O’Neal’s obligations, to satisfy the statutory subrogation lien obligation from the proceeds of a third party settlement. The statute must be strictly applied, without modification. *Bush v. Richardson*, 199 W. Va. 374, 377, 484 S.E.2d 490 493 (1997).

In *Bush*, this court held that the statutory subrogation rights provided could not be modified by following principles of equitable subrogation. See *Bush v. Richardson*, 199 W. Va. 374, 377, 484 S.E.2d 490 493 (1997).

Specifically, in *Bush*, the workers' compensation recipient compromised and settled an injury claim against a third party for less than the value of the claim. The workers' compensation provider sought to enforce its statutory subrogation lien under *West Virginia Code* § 23-2A-1, for all medical payments made as permitted by statutes. The claimant sought a reduction of the amount of the lien relying on the equitable "made whole" doctrine arguing that since the plaintiff settled for less than the value of the claim, the express statutory subrogation lien should also be reduced in value. This Court held that since the subrogation lien was statutory, principles of equity, like the "made whole" doctrine could not be used to reduce the value of the lien, or the claimant's obligation to satisfy the whole amount. *Id.* at 377, 484 S.E.2d at 493.

Following the holding in *Bush*, the principles of "equitable subrogation" relied upon by the Court below, that "[s]ubrogation is an equitable right which arises out of the facts and which entitles the subrogee to collect *that which he has advanced*," to hold that ORIC was not entitled to subrogation because the fully insured employer paid the benefits through the policy deductible, do not apply, because ORIC's subrogation rights are created by statute and application of its insurance policy. [App. 20-24, [Proposed] Order Paragraphs 18-29].

The court's reasoning below, that "Old Republic does not have an independent right to assert a subrogation lien because it did not pay a penny in Workers' Compensation benefits related to Jason O'Neil's claim" because benefits were paid directly through the third

party administrator by Patriot, on behalf of Speed Mining, and Magnum, is errant. The court below errantly held that ORIC had no right to assert a subrogation lien under *West Virginia Code* § 23-2(a)-1 because the benefits paid through ORIC's policy were part of the deductible to be paid, or on behalf of the insured, by the employer, because "the doctrine of subrogation applies to a debtor when that debt has in fact been paid when it should have been paid by another." [See App. 19-20. [Proposed] Order, paras. 18-19]. In its ruling, the Circuit Court errantly inserted principles of "equitable subrogation" into the statutory workers' compensation scheme which were rejected by the West Virginia Supreme Court in *Bush, infra.* in order to justify extinguishing ORIC's statutory rights.

In fact, the court below simply refused to follow this Court's holdings that West Virginia's "Workers' Compensation law is statutory in nature, and concluded that the parties shall follow their prioritization scheme expressly set forth by the legislature in *West Virginia Code* § 23-2(a)-1 holding "that by enactment of *West Virginia Code* § 23-2(a)-1 which provides that the private insurer or self-insured employer, [whichever is applicable], "shall be allowed subrogation" when a workers' compensation claimant collects money from a third-party, because the legislature expressly modified the usual and ordinary meaning of subrogation making such equitable doctrines inapplicable to modify the statutory rights of the private carrier or self-insured employer. See *Bush v. Richardson*, 199 W. Va. 374, 381, 484 S.E.2d 490, 497 (1997). Therefore, the circuit court's reliance upon any the application of principles of equitable subrogation to the fact that benefits paid through ORIC's policy were paid by the insured, or on behalf of the insured as part of the policy deductible to hold that ORIC was not entitled to statutory subrogation was clear error in the application of the law to the facts.

This court has repeatedly held that West Virginia workers' compensation law is statutory in nature and therefore deference must be given to the direct application and enforcement of *West Virginia Code* § 23-2A-1, the subrogation statute. *Bush v. Richardson*, 484 S.E.2d 490, 497 (W. Va. 1997). This court has also held that any modification, or expansion, of the terms of *West Virginia Code* § 23-2A-1 by the courts has been seen as particularly imprudent, even in the face of a purposefully silent legislature. *Cart v. Gen. Elec. Co.*, 506 S.E.2d 96, 100 n. 8 (W. Va. 1998). The court's ruling below errantly modified the terms of the statute to strip ORIC of its statutory rights using principles rejected by this court., Accordingly, this Court must correct the error, and reverse the court below and provide specific enforcement to protect ORIC's statutory rights, by reversing the Circuit Court below.

Further, the Court below, in paragraph 29 of the [Proposed] Order appears to hold that ORIC lacks standing to seek a recovery of the subrogation amount from the Respondent. The Court below apparently rationalizes that since the insured paid the benefits due under ORIC's policy through the deductible, that ORIC has not 'suffered particularized harm of injury' and lacks standing to assert a right to recovery for monies that it did not previously advance. [Proposed] Order, para 29, App. 25-26]. This is a clear error. ORIC has suffered harm, because its statutory rights have challenged by the Respondents, by their wrongful refusal to pay ORIC from the proceeds of the settlement paid by the non-employer defendants below to satisfy the lien. *West Virginia Code* 23-2A-1 provided the Respondents with the right to file an action against the non-employer defendants. By operation of the statute, the private carrier like ORIC receives a lien upon the proceeds of any recovery obtained. Further, ORIC is entitled to seek a declaration of its rights under the statute. Accordingly, ORIC has standing to bring collect the value of its subrogation lien from the Respondents.

## IX. CONCLUSION

As established through the entirety of the record and by this Petition, the Circuit Court erred and abused its discretion denying ORIC's Rule 60 Motion for Relief From Judgment Order, arbitrarily refusing to correct its own error in failing to serve a copy of the entered "[Proposed] Order Granting O'Neal's Motion for Summary Judgment" causing prejudice to ORIC by depriving it of its right to appeal the merits of that underlying Order. Further, Petitioner has demonstrated that the Circuit Court below erred by denying and extinguishing ORIC's statutory subrogation rights by failing to follow the precedent of this Court and by errantly refusing to properly and filly apply the terms of the applicable statutes and contract providing and governing ORIC's rights to subrogation.

Consequently, this Court must reverse the Circuit Court's abuse of discretion and arbitrary denial of ORIC's Rule 60 Motion; and also reverse the final order of the Circuit Court, entered as the "[Proposed] Order Granting O'Neal's Motion for Summary Judgment," and enter an Order granting and enforcing ORIC's statutory rights to subrogation against the proceeds of the settlement paid by the non-employer defendants below, as required by proper application of *West Virginia Code* § 23-2A-1.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0012

(Circuit Court of Wyoming County, Civil Action No. 10-C-20)

**OLD REPUBLIC INSURANCE COMPANY,  
a foreign corporation,**

**Appellant and Petitioner,**

v.

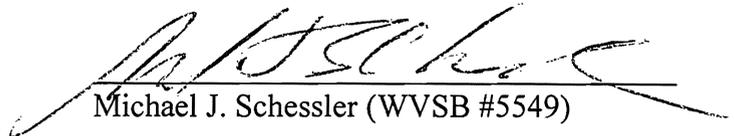
**JASON D. O'NEAL and ANDREA O'NEAL, his wife,  
Individually, and as parents and next friends of  
ANDREW SCOTT O'NEAL, ANNA LEIGH GRACE  
O'NEAL, and AUSTIN MATTHEW O'NEAL,  
Infants under the age of eighteen,**

**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 on this 20th day of April 2015, by forwarding a true and exact copy of the same by United States mail, postage pre-paid, to:

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Michael J. Schessler (WVSB #5549)