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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**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**
**REPLY TO APPELLEE'S RESPONSE TO PETITION FOR APPEAL**

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## OLD REPUBLIC INSURANCE COMPANY'S
## REPLY TO APPELLEE'S RESPONSE TO PETITION FOR APPEAL

**I. The Circuit Court Below abused its discretion, erring when it held that it had no obligation to serve the entered "[Proposed] Order Granting Jason O'Neal's Motion for Summary Judgment" upon ORIC's counsel of record, and that its failure to immediately serve said order was a "relatively immaterial" error.**

Notwithstanding Appellee's Response, it was an abuse of discretion for the Circuit Court below to deny Old Republic's Rule 60(b) Motion for Relief from Judgment Order [App. 1-9], which requested only that the court below re-enter its "final" order granting Appellee's Motion for Summary Judgment below holding that ORIC was not entitled to statutory subrogation, to correct the prejudice caused by the failure of the court, and the clerk, to immediately serve a copy of said order upon entry, as mandated by Rule 77(d) and Rule 5 of the West Virginia Rules of Civil Procedure. Nothing set out in court's order denying ORIC's Rule 60 Motion, modifies or changes the court and clerk's mandatory obligation to immediately send copies of all entered orders to all counsel of record, to provide notice to the parties. *Rule 5*, W. Va. R. Civ. P.; *Rule 77(d)*, W. Va. R. Civ. P. The court below has no discretion whatsoever regarding the immediate service of any order upon counsel and parties appearing of record and must correct the prejudice arising from its admitted error.

To sustain its ruling in favor of the Appellee, the court below arbitrarily and capriciously held that its, and the clerk's, failure to serve a copy of the "[Proposed] Order Granting O'Neal's Motion for Summary Judgment, entered January 27, 2014, by mail, upon ORIC, through its counsel, immediately upon entry as a "final" order, was a "relatively immaterial" error. [App. 6]. The court below ignored Rule 77(d) which requires that the court and the clerk, immediately upon entry of an order of judgment, **shall** serve by mail a notice of the entry of an order in the manner provided for in Rule 5. Rather, it arbitrarily held that its mandatory obligation to serve an order upon a party appearing of record was extinguished

because counsel for ORIC saw a listing of the "[Proposed] Order," submitted by Appellee listed on Circuit Express. However, both parties were required to submit and serve "proposed orders" upon the court, which ORIC submitted by letter to the clerk [App. 929-970]. ORIC already received a copy of the "[Proposed] Order, from Appellee's counsel [App. 971-989]. The court contacted Appellee's counsel, telling him that his draft of the [Proposed] Order would be entered. ORIC received no call, or any notice from the court that it planned to enter, or had entered, the draft "[Proposed] Order," as a final order. Thus, ORIC had no reason to suspect that the Court entered the final order, which remained styled: "[Proposed] Order, without serving a copy on counsel of record as mandated. Since ORIC had already received a copy of the Appellee's draft order, its appearance on the electronic docket as a "[Proposed] Order, did not provide actual notice of entry of the final order. ORIC's reliance upon the court below to follow the rules requiring service is not unreasonable, because the obligation to serve entered orders is mandatory. Nevertheless, the Court below refused to correct its failure to follow the rules, admitting that it erred in failing to serve the entered "[Proposed] Order," holding that it was a "relatively immaterial" error, while blaming ORIC's counsel for not noticing the stealth entry of its final order. [App. 6-9].

Rule 5 of the West Virginia Rules of Civil Procedure requires that all orders and pleadings subsequent to the original complaint **"shall"** be served on each of the parties. *See Rule 5(a)* W. Va. R. Civ. P. Further, Rule 5(b), (Service) how made, goes on to state: "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service **shall** be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party **shall** be made by delivering a copy to the attorney or party; or by mailing it to the attorney or party at the attorney's or party's last-known

address...or by facsimile transmission to the attorney or party...." *Rule 5(b)*, W. Va. R. Civ. P. Further, Rule 77(d) creates a mandatory obligation upon the court itself, and the clerk to serve all orders, to appearing parties or counsel, immediately upon entry. 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.

There is no discretion for the court to serve or not to serve, or to excuse its or the clerk's failure to serve copies of orders immediately upon entry to parties appearing before the court when a party shows it has been prejudiced by the error. *Crusenberry v. Norfolk & W. Ry.*, 155 W. Va. 155, 180 S.E.2d 219 (1971); overruled on other grounds, *Talkington v. Barnhart,* 164 W. Va. 219 (1980). Further, the rules of civil procedure, adopted by the Supreme Court of Appeals, have the same force and effect as a West Virginia statute. *Crusenberry v. Norfolk & W. Ry.*, 155 W. Va. 155, 180 S.E.2d 219 (1971); overruled on other grounds, *Talkington v. Barnhart,* 164 W. Va. 219 (1980); *State v. Mason*, 157 W. Va. 923, 205 S.E.2d 819 (1974). Accordingly, the word "shall," appearing in these rules, is afforded a mandatory connotation, as if it appeared in any statute because the rules statutory construction apply to the rules of civil procedure. *State v. Mason*, 157 W. Va. 923, 205 S.E.2d 819 (1974); *State, ex rel. Mylan, Inc. v. Zakaib*, 227 W. Va. 641 (2011) Syllabus Point 1; *Nelson v. West Virginia Public Employees Insurance Board,* 171 W. Va. 445, 300 S.E.2d 86 (1982); Syllabus point 1, *E.H. v. Matin,* 201 W. Va. 463, 498 S.E.2d 35 (1997); Syl. Pt. 6; *Foster Found. v. Gainer,* 228 W. Va. 99, 717 S.E.2d 883 (2011). A statute or rule, which is clear and unambiguous and plainly expresses its

intent is not to be interpreted by the court, but must simply be applied and given full force and effect. Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951); Syl. Pt. 1, *State v. Jarvis*, 199 W. Va. 635, 487 S.E.2d 293 (1997).

These rules of civil procedure provide the mandatory procedural means by which the court must provide notice to parties appearing before the court of the entry orders affecting their interests. Here, the Court's failure to send a copy of the entered "[Proposed] Order" immediately after entry, as required, resulted in the inadvertent waiver of ORIC's right to appeal said order. When such "substantial rights" of a party, like the right to appeal, are adversely affected and prejudice arises from the failure of the court to follow the mandatory requirements of the rules, such failure to serve an entered order upon a party of record, cannot be considered harmless or "relatively immaterial" error. *Crusenberry v. Norfolk & W. Ry.*, 155 W. Va. 155, 180 S.E.2d 219 (1971); overruled on other grounds, *Talkington v. Barnhart,* 164 W. Va. 219 (1980).

The court below arbitrarily held that its failure to serve ORIC with a copy of the entered order was a "relatively immaterial" error, while admitting that the clerk failed to send copy of the entered order to ORIC's counsel. ORIC's counsel, previously received service of orders by mail from the clerk, so the error cannot be attributed to lack of appearance, current address, e-mail or other contact information [App. 231-234; 990-991; 10-27]. Appellee's counsel received a copy of entered "[Proposed] Order," extinguishing ORIC's statutory subrogation lien, by mail, shortly after entry [App. 182-183].

The plain language of Rule 77(d) mandates that the clerk and the court **shall** serve a copy of an Order immediately, on all parties appearing of record to provide notice required by Rule 5 of the West Virginia Rules of Civil Procedure. The clerk and the court's obligation to

serve entered orders is not supplanted by the existence of services like Circuit Express, which is not an agreed-upon e-filing notice system for pleadings or orders.

ORIC, as a party of represented by counsel of record, is entitled to rely on the court below to comply with the rules governing the procedures by which the court provides notice to a party of any order entered by the court. When the failure to provide a party with affirmative notice of entry of an order adverse to its interests causes unfair prejudice to a party by precluding its opportunity to appeal, it must be corrected to permit adjudication on the merits. *Toler v. Shelton,* 157 W. Va. 778 (1973). A party appearing on the record, should not have to "mine" the docket to discern that the court entered a final judgment order, when the third party docket entry simply lists a "[Proposed] Order Granting Plaintiff Jason D. O'Neal's Motion for Summary Judgment," which the Court below acknowledged that it failed to send the order, or list it as a "final order," or cross out the word "[Proposed]" [App. 4]. The court below has no discretion to hold that its error, which caused prejudice to ORIC, was 'relatively immaterial' and to find that ORIC's counsel was dilatory in failing to discover that the court entered an order without serving it to ORIC's counsel, after providing *ex parte* notice to the Appellees of the entry. *Id.*; see also, *Crusenberry v. Norfolk & W. Ry.*, 155 W. Va. 155, 180 S.E.2d 219 (1971); overruled on other grounds, *Talkington v. Barnhart,* 164 W. Va. 219 (1980).

ORIC finally received a copy of the "[Proposed] Order" entered on January 27, 2014, on September 4, 2014 by facsimile from the Court, [See App. 10-27], in response to counsel's letter to the Court dated August 27, 2014, inquiring whether the Court needed additional information to enter any of the proposed orders submitted by the parties. [See App. 180]. Within days, ORIC filed a Rule 60 Motion for Relief from entry of the judgment order because it had not been served with the order immediately after it was entered by the court. The

court below arbitrarily refused to simply re-enter the "[Proposed] Order" to correct its own admitted error. Rather, in an abuse of discretion, it sustained its own error, to the benefit of Appellee, attributing "dilatory" conduct to counsel for ORIC, for not discerning the court's failure to serve the order upon ORIC. ORIC's conduct was not dilatory. Rather, counsel for ORIC simply relied, apparently errantly, on the integrity of the court to follow the mandated procedure to serve notice to a party of entry of an order, and to correct its error, when the same caused prejudice to a party of record.

## II. The court below abused its discretion, imputing its error to ORIC and its counsel for failing to discern the court's failure to serve an entered order.

The court below improperly imputed its error, failing to immediately serve a copy of an entered order upon a party of record, when it denied ORIC's Rule 60 Motion. In each case relied upon to attribute its error to ORIC or its counsel, evidence showed that the party was actually served with a copy of the Complaint, or motion. Those parties affirmatively chose to ignore the served notice, or failed to receive it because their e-mail address went uncorrected.

First, the court relied on the case of *White v. Berryman*, 187 W. Va. 323, 332, 418 S.E.2d 917, 926 (1992), to sustain its ruling that ORIC's counsel negligently ignored notice of entry of the "[Proposed] Order." In *White*, the Court held that an "[a]n attorney's negligence will not serve as the basis for setting aside a default judgment," when the attorney advised the client to ignore the summons and complaint served upon him. There, appellant, Berryman, was served with Complaint and Summons. Default judgment was entered because he failed to appear. He tried to set aside the default, arguing that his counsel advised him to ignore the complaint because he was employed by the target entity. This court refused to set aside the default because Berryman actually received service of the summons and complaint, holding that the attorney's

advice to disregard the served complaint, was not excusable neglect. *Id.* at 187 W. Va. 333-34, 418 S.E.2d at 926-27.

By contrast here, Old Republic counsel, who appeared, filed multiple pleadings, and is listed in the clerk's and the court's records, was not immediately sent, a copy of the entered order styled in the docket as "[Proposed] Order Granting Plaintiff Jason D. O'Neal's Motion for Summary Judgment." The fact that defense counsel was "alerted" that the "[Proposed] Order" submitted by Appellee's counsel was listed on the docket of the Court, did not obligate counsel to "confirm its content" because the parties exchanged copies of their proposed orders sent to the clerk and the court. [App. 113-132]. The court below admitted that the "[Proposed] Order" was sent only to Appellee's counsel, and that the word "[Proposed]" was not stricken. However, the court held, arbitrarily, that the "[Proposed] Order," listed on the electronic Circuit Express docket provided actual notice to ORIC that a "final" order had been entered, to extinguish its mandatory obligation to serve a copy of the same to all counsel of record. [App. 4-6].

The rules of civil procedure, statutory application, or due process, do not permit the court to "waive" or modify its mandatory obligation that "[i]mmediately 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. There is no notice in the record that ORIC was served with the January 27, 2014 Order, or given notice by the court by other means [i.e. facsimile, or courtesy call] of its entry by the court either before or after its entry.

Due process requires that the court and the parties follow the rules of pleading and service, to avoid inadvertent waiver, so that all cases are decided on their merits. *Toler v.*

*Shelton,* Syl. Pt. 6 157 W. Va. 778 (1973). Accordingly, the failure to mail a copy of the Order to counsel for a party who has appeared, is a clerical error, at best, which must be corrected to cure prejudice to ORIC, so that this matter can be decided on its merits.

Also, the case of *Robinson v. Wix Filtration Corp.* 599 F.3d 430, 409 (4th Cir. 2010), involving an attorneys' contention that his failure to receive electronic service of a motion for summary judgment through the Federal EMCF filing system excused his failure to respond to a motion for summary judgment has no bearing. In *Robinson*, the EMCF system showed that the motion for summary judgment was sent to the party's e-mail address on file. However, counsel failed to correct his email address after it lapsed. *Id.* In *Robinson,* the Court held that the party's failure to receive the motion, caused by the party's failure to provide a viable e-mail address to receive filed pleadings, was insufficient grounds to modify an order granting summary judgment when the party failed to respond.

By contrast here, the signed "[Proposed] Order" was not sent, by any means, to ORIC's counsel, as required by Rule 77(d) and Rule 5 to provide notice. The court below admits that the "[Proposed] Order" was sent only to Appellee's counsel, after entry, as a result of an error. The court and clerk sent orders previously entered to ORIC's counsel, whose address had not changed. It is apparent that the court below, which used counsel's facsimile number to send the ["Proposed] Order" in September had all necessary contact information to advise counsel of its intent to enter the order, and to send it to ORIC's counsel immediately after entry. There is no basis to attribute the court's failure to serve the "[Proposed] Order" upon ORIC's counsel, to ORIC or its counsel, as there was in *Robinson*, above.

ORIC and its counsel are entitled to rely upon the court to comply with its mandatory obligations to serve a copy of an entered order to all counsel appearing before the

court, to provide the notice required and due process. *Rules 5* and *77(d),* W. Va. R. Civ. P. Thus, to cure the prejudice arising from the court's admitted failure below, and to preserve ORIC's rights to appeal the adverse ruling of the court below, ORIC respectfully requests that this Court find that the court below abused its discretion when it denied ORIC's Rule 60(b) Motion for Relief from Judgment Order; reverse the ruling below as inconsistent with the remedial purposes of Rule 60 (a) and (b), and vacate the prior order, deem the same to be entered, to consider the merits of the appeal.

## III. Petitioner included its assignments of error regarding the "[Proposed] Order Granting Jason O'Neal's Motion for Summary Judgment" to demonstrate the colorable merits of ORIC's appeal of the underlying "[Proposed] Order," and because resolving it would promote judicial economy and avoid unnecessary delay.

ORIC included its assignments of error regarding the underlying "[Proposed] Order" to demonstrate the colorable merits of its appeal of the court's ruling below which erroneously construed, rather than applied the unambiguous plain language of West Virginia Code § 23-2A-1(b)(1), to extinguish ORIC's statutory rights to subrogation against the proceeds of Appellee's settlement with the non-employer defendants below. ORIC also included those assignments of error to expedite the process. Reversing the Rule 60 ruling of the Court below, and simply requiring re-entry of the January 27, 2014 "[Proposed] Order," as a final order, would bring the parties right back before this Court, delaying a final ruling for another year. Appellee's primary objection to ORIC's Rule 60 Motion was that re-entry of the order below would subject them to further protracted litigation, and disturb the finality of the "[Proposed] Order" upon which appellee relied [App. 5]. Resolving all of the appealable issues now, would bring finality, and save resources of the parties and the courts. Accordingly, ORIC respectfully requests that the Court consider the colorable merits of its appeal of the underlying order, deny Appellee's

motion to strike those assignments of error, and review the merits of the underlying "[Proposed] Order," to provide finality for the parties.

**IV. When it denied ORIC's statutory right to subrogation, the court below erred as a matter of law, by interpreting and construing, rather than simply applying the unambiguous statute which provided that ORIC, a "private carrier," shall be entitled to subrogation from a third party settlement.**

The court below erred, as a matter of law, and abused its discretion, when it torturously construed and interpreted, rather than simply applied, the unambiguous statute which controlled the rights and obligations of these parties to extinguish ORIC's "private carrier" rights to subrogation from the third party settlement paid to the Appellee.[1] *W. Va. Code* § 23-2A-1(b)(1). It was not the prerogative of the court below to arbitrarily disregard the plain meaning of clearly written statutes. In *State v. Richards*, 206 W. Va. 573, 577, 526 S.E.2d 539, 543 (1999), this Court observed that "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there ... [i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled or rewritten ... [and][i]f the language of an enactment is clear and within the constitutional authority of the lawmaking body which passed it, courts must read the relevant law according to its unvarnished meaning, without any judicial embroidery." *State v. Richards*, 206 W. Va. 573, 577, 526 S.E.2d 539, 543 (1999).

ORIC's statutory subrogation rights are based on its status as a "private carrier" 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

[1] The interpretation of a statute involves a question of law for which this Court applies a de novo standard of review. *McVey v. Pritt*, 218 W. Va. 537 625 S.E.2d 299 (2005).

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].

The word "shall," appearing in this statute must be afforded a mandatory connotation, leaving no discretion to the court below as to its application. *State v. Mason*, 157 W. Va. 923, 205 S.E.2d 819 (1974); *State, ex rel. Mylan, Inc. v. Zakaib*, 227 W. Va. 641 (2011) Syllabus Point 1; Syl. Pt. 6; *Foster Found. v. Gainer,* 228 W. Va. 99, 717 S.E.2d 883 (2011). A statute or rule, which is clear and unambiguous and plainly expresses the legislative intent is not to be interpreted by the court, but must simply be applied and given full force and effect. Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951); Syl. Pt. 1, *State v. Jarvis*, 199 W. Va. 635, 487 S.E.2d 293 (1997). Accordingly, once it was shown that ORIC was a "private carrier," providing workers' compensation insurance to Speed Mining, and that Speed Mining was not certified as a "self-insured employer," the only proper application of West Virginia Code § 23-2A-1(b)(1) required the court below to enforce ORIC's statutory lien against the proceeds of the CAI Defendants' settlement with Appellees.

The court's ruling below was based on the false premise that payment of the insurance deductible, by, or on behalf of, Appellee's employer imputed or conferred "self-insured employer" status upon Speed Mining. In its predisposed zeal to extinguish ORIC's statutory subrogation rights,[2] the court below simply ignored the plain language of the statute and evidence showing conclusively that Speed Mining was not certified to as a "self-insured employer," but was a named insured on ORIC's policy. [App. 256, 258-60, 266, 270, Old Republic Insurance Policy No. OBC 1786302, Part One, G, p. 2 of 6; App. 853-856 Workers'

[2] Even before ORIC was added as a party, perhaps disclosing an agenda and bias, the court below concluded that ORIC had no subrogation rights in its May 1, 2012 Order granting Appellee's Motion to Amend Complaint [App. 837-839].

Compensation and Employers Liability Deductible Plan Endorsement With Optional Aggregate, Page 2 of 3, Para. 8]. "Self-insured employer" status under West Virginia Code § 23-2A-1(b)(1) must be certified by the West Virginia Insurance Commissioner. *W. Va. Code* § 23-2-9.

**V. The court below erred because payment of the deductible by the insured, or on behalf of the insured, does not limit ORIC's subrogation rights or create "self-insured" status under the workers' compensation statutes, including *West Virginia Code* § 23-2A-1.**

The court below errantly held, and Appellee's response argues, that Speed Mining or its parent corporation's direct payment of the deductible through the third party administrator as workers compensation benefits payments came due rendered Speed Mining, "for all practical purposes, self-insured" for its workers' compensation obligations to Mr. O'Neal. The court below also errantly held, based on evidence of payments and affidavits, that Speed Mining was "*de-facto* self-insured" because of the direct payment of the deductible to the third party administrator by its allegedly self-insured parent corporation, Patriot Coal Company. [App. 10-27].

By its ruling below, the court arbitrarily chose to ignore the statutory requirements and definition of "self-insured employer" status. Under the workers' compensation statutes, "self-insured employer" status under West Virginia Code § 23-2A-1(b)(1) must be certified by the West Virginia Insurance Commissioner. *W. Va. Code* § 23-2-9. The record below showed that Magnum Coal and Speed Mining obtained the subject insurance policy from ORIC after being acquired by Patriot Coal Company, because it was not certified as self-insured [App. 403, Sellers-Old Republic Rule 30(b)(7) Depo., pp. 25-28].

None of the "evidence" relating to payment of the insurance policy deductible, by, or on behalf of, Speed Mining, referenced in Appellee's response, and relied upon by the court below, confer "self-insured employer" status upon Speed Mining. Further, there is no

"deductible" exception to the subrogation rights created by the statute which provides that "the **private carrier . . . 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).

The legislature was certainly aware that insurance policies often have deductible amounts which must be paid by the insured, and of its ability to limit subrogation rights created by statute. In fact, prior enactments of West Virginia Code § 23-2A-1(b) limited subrogation recovery to medical benefits paid, not to exceed 50% of the third party recovery, West Virginia Code § 23-2A-1(b) (1990); subrogation limited only to medical benefits paid, West Virginia Code § 23-2A-1(b) (2004). In the current statute, the legislature made no exception from the private carrier's subrogation rights for payment of benefits through the policy deductible.

Workers' compensation subrogation is, and always was, a policy matter within the province of the legislature, and the legislature, not the courts, decide the parameters of subrogation. *Bush v. Richardson*, 199 W. Va. 374, 377, 484 S.E.2d 490, 493 (1997). A court "cannot rewrite [a] statute so as to provide relief ... nor can [it] interpret the statute in a manner inconsistent with the plain meaning of the words." *McVey v. Pritt,* 218 W. Va. 537, 541, 625 S.E.2d 299, 303; *VanKirk v. Young*, 180 W. Va. 18, 20, 375 S.E.2d 196, 198 (1988). Since there is no ambiguity in the statute, which unequivocally states that the private carrier **shall** be entitled to subrogation, and which also defines the requirements for "self-insured employer" status, the court below had no discretion other than to enforce ORIC's subrogation rights consistent with the legislative intention manifested by the plain language of the statute. *Id.*

Thus, the court below erred, and abused its discretion when it engrafted a non-statutory exception to the private carrier's subrogation rights because the benefits paid were within the insurance policy deductible paid by or on behalf of the insured employer. The court

below also erred by improperly engrafting an extra-statutory category of "*de-facto* self-insured employer" status into the plain language of West Virginia Code § 23-2A-1(b)(1) to void ORIC's statutory and contractual subrogation rights as a "private carrier."

## VI. The Court below erred by not giving the statute its mandatory effect, as required by all rules of statutory application, when it held that ORIC's was not entitled to subrogation applying principles of equitable subrogation.

The plain reading of the statute shows that the court below had no discretion to apply principles of "equitable subrogation" to extinguish ORIC's statutory rights. First, ORIC's subrogation rights are provided by statute, not through "equitable subrogation." *Bush v. Richardson*, 199 W. Va. 374, 377, 484 S.E.2d 490, 493 (1997). *West Virginia Code* § 23-2A-1 *et seq.* There are no exceptions to subrogation listed in the statute, even if benefits are funded by through payment of the policy deductible. The Court below cannot engraft equitable subrogation principles on to a statute absent an express statutory exception.[3] *Id.* This Court has previously held that the Legislature eliminated ordinary equity based subrogation principles in creating the statutory right to subrogation when this Court rejected the equitable "made-whole" rule invoked by a claimant to diminish the subrogation amount owed from a third party settlement. *Cart v. General Electric*, 203 W.Va. 59, 506 S.E.2d 96 (1998). Thus, the attempt by the court below to carve out an exception to the Appellee's obligation to satisfy the subrogation lien from the proceeds of the third party settlement based on the contention that the benefits due through the policy were paid by the employer as part of the deductible, is a clear error in the application of the statute which provides no such exception.

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[3]The West Virginia Legislature created ORIC's statutory private carrier's rights to workers' compensation subrogation after this Court held that an employer, carrier or workers' compensation provider had no "equitable subrogation rights" to recover workers' compensation benefits paid on behalf of an injured employee from a settlement paid to the covered employee by a third party because the previous workers' compensation statutes did not permit equitable subrogation." *See Bush v. Richardson*, 199 W. Va. 374, 377, 484 S.E.2d 490 493 (1997).

Based on Appellee's catastrophic injuries, there will be ongoing workers' compensation benefits and expenses paid by ORIC which have already exceeded the involved deductible and will far exceed the subrogation lien value asserted. The large deductible endorsement makes it very clear that no money, if any, would ever be returned to Speed Mining until it is first applied to benefits expenses paid exceeding the deductible amount which ORIC has paid, and will continue to pay. It is also well settled that amounts paid within any deductible are in fact part of the proceeds of the policy. *See W. Va. Code R.* § 114-14-7; See, Insurance Coverage of Construction Disputes § 4:6. Securing these express subrogation rights to the workers' compensation insurer is the very reason why the language extending ORIC's subrogation rights to include amounts paid within the deductible amounts is inserted into ORIC's policy endorsement previously referenced [App. 853-857]. Further, the Legislature enacted statutory subrogation to control the loss and costs and to preclude a "double recovery" type situation, to provide a sustainable, workers compensation system. *See* Robin Jean Davis & Louis J. Palmer, Jr., *Workers' Compensation Litigation in West Virginia: Assessing the Impact of the Rule of Liberality and the Need for Fiscal Reform*, 107 W. Va. L. Rev. 43, 78-79 (2004). Part of that system necessarily includes the availability of large deductible coverage in the workers' compensation insurance market. As stated previously, the legislature provided no exception from subrogation for amounts paid within the insurance policy deductible. Any recovery will not enrich ORIC as contended by Appellee, and the court below. Rather, the subrogation recovery will be used to fund future benefits payable in this catastrophic injury case, as intended when the legislature created the statutory framework for workers' compensation subrogation.

## VII. The court below erred, finding that ORIC's statutory private carrier workers' compensation subrogation rights provided by *West Virginia Code* § 23-2A-1 were waived or extinguished by Appellees settlement with Speed Mining.

It is well established that a contract of insurance is a personal contract between the insurer and the named insured in the policy. *Mazon v. Camden Fire Ins. Ass'n,* 182 W. Va. 532, 389 S.E.2d 743, 745 (1990). The express terms and conditions of ORIC's workers' compensation insurance contract between ORIC and Magnum Coal Company, and Speed Mining, LLC, the named insured, show that ORIC held the subrogation rights, even to the recovery of any amounts paid under the deductible. Contractual provisions or rights may be waived only by an agreement of the parties to the contract, among themselves. Specifically, ORIC's policy contains subrogation terms in the "Workers' Compensation and Employers Liability Deductible Plan Endorsement With Optional Aggregate" entitled: "Recovery from Others." This provision states:

> "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."

[See 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, Para. 8]. To establish a waiver of a known right, the party seeking to establish the waiver must produce evidence to demonstrate that the party holding a particular right "has intentionally relinquished a known right," and that ORIC has full knowledge of the waiver. *Potesta v. U.S.F. & G.*, 202 W. Va. 308, 504 S.E.2d 135, 142, 150 (1991); *Executive Risk Indemnity, Inc. v. Charleston Area Medical Center,* 681 F. Supp. 2d 694, 723 (S.D. W. Va. 2009). However, according to the policy, ORIC alone held all subrogation rights, even to the deductible. As a private carrier, ORIC also has all subrogation rights under the statute. *West Virginia Code* § 23-

2A-1. ORIC was not a party to the settlement agreement between Speed Mining and Appellee. [App. 382-395, O'Neal-Speed Mining Settlement Agreement]. Further, any subrogation waiver by Speed Mining and its separate insurer, Commerce & Industry Insurance Company, is not binding upon ORIC because Speed Mining held neither contractual nor statutory rights to workers' compensation subrogation rights, under its insurance contract or by statute. So any conclusion that ORIC waived its rights to subrogation, by contract or agreement is clearly errant.

**VIII. The Court below erred by failing to require Appellee below to protect and satisfy the private carrier workers' compensation subrogation lien as required by statute *W. Va. Code* § 23-2A-1(b)(3)(e).**

Appellee's below had an affirmative duty to inform the private carrier of the settlement and to protect the private carrier subrogation interest is imposed by statute. *W. Va. Code* § 23-2A-1(b)(3)(e). Specifically, the workers' compensation statute provides: ". . .[i]t is the duty of the injured worker . . . or his or her attorney to give reasonable notice to the . . . private carrier . . . after a claim is filed against the third party and prior to the disbursement of any third-party recovery." *W. Va. Code* § 23-2A-1(b)(3)(e). Appellee and his counsel refused to satisfy the lien despite actual knowledge of the subrogation lien and ORIC's rights. Appellee's refused to honor it and filed a declaratory judgment seeking to void or alter their statutory obligation.

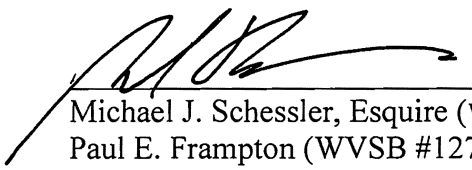
Further, ordinarily, Appellee's counsel would receive a reasonable attorneys' fee deducted from the subrogation amount based on their affirmative duty to satisfy the private carrier's subrogation lien. *W. Va. Code* § 23-2A-1 (b)(3)(e). Since Appellee and his counsel have refused to satisfy the lien, and required ORIC to litigate the issue, in the event this Court holds that ORIC is entitled to recovery of the subrogation amount, Appellee counsel should not be permitted to receive any fees or expenses.

Thus, the court below erred, and abused its discretion when denied ORIC's Rule 60 motion for relief from judgment order, refusing to correct the unfair prejudice to ORIC caused by the court and the clerk's failure to serve a copy of the entered "[Proposed] Order Granting O'Neal's Motion for Summary Judgment, as required by Rule 5 and Rule 77(d); and also erred and abused its discretion when it refused to enforce ORIC's statutory subrogation rights to recover worker compensation payments from the proceeds of the third party settlement paid to Appellee, as required by *W. Va. Code* § 23-2A-1(b)(1) and *W. Va. Code* § 23-2A-1(b)(3)(e).

## IX. Conclusion

For the foregoing reasons, and those set out in ORIC Brief, Old Republic Insurance Company respectfully requests that this Court reverse the ruling of the Court below which denied its Rule 60 Motion for Relief from the entry of the [Proposed] Order Granting O'Neal's Motion for Summary Judgment, and further, to promote judicial economy and resolution of the merits of its subrogation claim, grant such further relief as may be required to enforce Old Republic Insurance Company's rights to subrogation provided by West Virginia Code § 23-2A-1(b).

**OLD REPUBLIC INSURANCE COMPANY**
By Counsel



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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, Old Republic Insurance Company, do hereby certify service of that true and exact copy of the foregoing **OLD REPUBLIC INSURANCE COMPANY'S REPLY TO APPELLEE'S RESPONSE TO PETITION FOR APPEAL** has been made this 24 day of June 2015, on counsel via facsimile, e-mail and first class mail, postage prepaid and addressed as follows:

David H. Carriger, Esquire
The Calwell Practice
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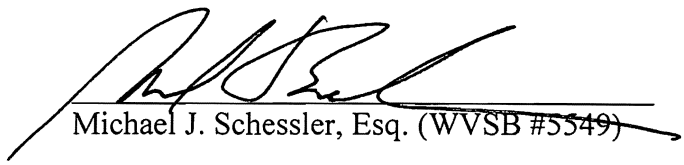

Michael J. Schessler, Esq. (WVSB #5549)