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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE

SUPREME COURT OF APPEALS OF WEST VIRGINIA

RECORD NO. 12-0522

(Kanawha County Circuit Court No. 10-C-592)

HARTFORD FIRE INSURANCE COMPANY,

Defendant Below/Petitioner,

v.

JERRY LEE RHODES

and

BONNIE M. COCHRAN,

Plaintiffs Below/Respondents.

REPLY BRIEF OF PETITIONER

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INTRODUCTION

In their brief, the plaintiffs below/respondents, Jerry Lee Rhodes and Bonnie M. Cochran ("Plaintiffs"), argue that the Kanawha County Circuit Court properly granted their motion for summary judgment, and that the judgment of the trial court should be affirmed. This result would permit Plaintiffs to immediately recover against defendant below/petitioner Hartford Fire Insurance Company ("Hartford") based on the default judgment obtained against Equity South Mortgage, LLC ("Equity South"), Hartford's principal, despite the fact that Plaintiffs have never been put to their burden of proof and Hartford has had no opportunity to present any defenses on the merits of the case. Additionally, the result reached by the trial court would award Plaintiffs more than one full recovery by entitling them to damages despite having been fully compensated for their alleged loss. For the sake of brevity and to avoid repetition, Hartford will refrain from comprehensively addressing every argument of Plaintiffs' brief and will instead focus on several contentions and omissions therein. For the reasons set forth below, and for those stated in its opening brief, Hartford respectfully submits that the trial court's ruling should be reversed, and these proceedings remanded to the Kanawha County Circuit Court for trial on the merits. In the alternative, if the judgment against Hartford is upheld, Hartford asks that a setoff be applied for the reasons and in the amount set forth in § VI below.

ARGUMENT

I. The Mortgage Broker Bond at Issue is Not a Judgment Bond Because it Does Not Contain Any Agreement to be Summarily Liable for or Pay a Judgment Rendered Against the Principal.

Hartford does not contest the validity of this Court's decision in State v. Myers, 74 W.Va. 488, 82 S.E. 270 (1914). There, the Court held that under limited circumstances, a surety bond is not subject to the general surety rule stated in W.Va. Code § 45-1-3, which provides that a judgment against a principal shall not be binding on a surety in an action where the surety "was not a party regularly served with process."[1] The question to be decided with regard to Assignment of Error No. 1 is whether a mortgage broker bond issued in the language required by the West Virginia Commissioner of Banking (the "Commissioner") is of the type found in Myers. If it is, then the Myers exception applies and the bond is not covered by W.Va. Code § 45-1-3. On the other hand, if the Myers exception does not apply, § 45-1-3 precludes Hartford from being held liable for the judgment against Equity South.

Bonds of the type found in Myers are sometimes referred to as "judgment bonds," although that term was never used in Myers. In fact, this Court has only used the term "judgment bond" three times and has never defined it.[2] While Plaintiffs concern themselves

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[1] W. Va. Code § 45-1-3 states in relevant part:

> no judgment, decree or recovery rendered, entered, or had in any suit, action, prosecution or proceeding, to which the surety ... was not a party regularly served with process, shall be in any wise binding on such surety ... and, notwithstanding such decree, judgment or recovery, the surety ... shall be allowed to make any such defense in any action, suit or proceeding instituted against him, as could have been made in the suit in which such decree, judgment or recovery was had.

[2] The cases in which the term "judgment bond" appears are Bennett v. Adkins, 194 W.Va. 372, 377, 460 S.E.2d 507, 512 (1995) (noting the forfeiture of a judgment bond purchased by one of the parties); Farquhar & Co. v. Dehaven, 70 W.Va. 738, 740, 75 S.E. 65, 66 (1912) (reference to "judgment bonds" in discussion of validity of confessed judgments in West Virginia); and Davis v. Demming, 12 W.Va.

primarily with categorizing the bond as a "judgment bond," this process of labeling has never been utilized by the Court. Rather, the Court has looked to the language of the bond to determine the surety's agreements, obligations, and potential liabilities.

In Myers, the Court described the conditions necessary to find that the predecessor to W.Va. Code § 45-1-3[3] did not apply to a particular bond. The Court stressed that the "express undertaking of the surety" must be preserved. Myers, 74 W.Va. at 491, 82 S.E. at 271. According to Myers, the statute does not apply to a bond "conditioned to pay any judgment that might be recovered against [the] principal." Id. Similarly, the Court ruled that a surety is required to pay on a judgment obtained against its principal where "the surety has *expressly undertaken* to satisfy any judgment that may be rendered against his principal in any pending or contemplated suit or proceeding." Id. at 491, 82 S.E. at 272 (emphasis added). Continuing, the Court reasoned:

> If a surety *has obligated himself to pay a judgment* or fine that may be imposed on his principal, why should not such judgment or fine determine his liability? He has *expressly stipulated* that it shall be the condition of his bond; it is the very thing which he has agreed to pay. Our conclusion is, that in all such cases the surety is estopped, in the absence of fraud or collusion, to controvert the judgment recovered against his principal[.]

Id. (emphasis added).

A more recent, albeit unpublished, opinion by the Honorable John T. Copenhaver, Jr., of the United States District Court for the Southern District of West Virginia, Rashid v. United States Fid. & Guar. Co., No. 2:91-0141, 1992 U.S. Dist. LEXIS 22914 (S.D.W. Va. Sept. 28, 1992), elaborated on the principles discussed in Myers and its predecessors. Examining the early

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[2 cont'd] 246, 261 (1877) (citation to an 1822 Virginia case mentioning "new fangled judgment bonds"). None of these cases contains the criteria for what constitutes a judgment bond, nor do they discuss these bonds in any detail.

[3] At the time Myers was decided, the language now contained in W.Va. Code § 45-1-3 appeared, more or less, in former Code Ch. 37, Acts 1907. See Myers, 74 W.Va. at 491, 82 S.E. at 271. The parties agree that the language has not materially changed.

West Virginia cases on the issue, the Rashid Court observed that "an exception to the general rule applied when the bond itself provided for the payment of a judgment against the principal." Rashid, 1992 U.S. Dist. LEXIS 22914 at *14 (citing State v. Nutter, 44 W.Va. 385, 30 S.E. 67, 69 (1898)). "On the other hand, where the surety's obligation involved only the principal's faithful performance of duties, the surety was not conclusively bound by a judgment against the principal." Rashid, 1992 U.S. Dist. LEXIS 22914 at *15 (citing State v. Abbott, 63 W.Va. 189, 61 S.E. 369, 371 (1907)). The Court noted that the enactment of the precursor to § 45-1-3 "did not change prior law in those instances where the surety expressly agrees to pay a judgment recovered against its principal." Rashid, 1992 U.S. Dist. LEXIS 22914 at *15 (citing Myers, 74 W.Va. at 491-92, 82 S.E. at 272). It further explained that this Court in Myers "concluded that the legislature had not intended to impair the right to contract" when it created the language found in § 45-1-3. Rashid, 1992 U.S. Dist. LEXIS 22914 at *15. "[T]he holding in Myers is dependent on the court's description of the bond as one containing a provision that the surety would *pay any judgment* or fine imposed on its principal." Id. at *16 (citing Myers, 74 W.Va. at 491-92, 82 S.E. at 272) (emphasis added).

In contrast, where the surety is not a party served with process, "and there is no contractual agreement to pay a judgment, the statute allows the surety of a principal who fails to present his own defenses to 'interpose the defenses its principal might have interposed in the suit in which the decree or recovery was had.'" Rashid, 1992 U.S. Dist. LEXIS 22914 at *17 (quoting State v. Duggan, 102 W.Va. 312, 315, 135 S.E. 270, 271 (1926)). Interestingly, the Rashid Court rejected the stark dichotomy advocated by Plaintiffs, who suggest that the most important part of the Myers analysis is to label a bond either a "judgment bond" or a "performance bond." The Court reasoned in a footnote that the "deciding factor" in Myers was

not a label but "an analysis of the surety's contractual obligation under the bond." Rashid, 1992 U.S. Dist. LEXIS 22914 at *18 n.6. Consequently, because the surety in Rashid was not a party regularly served with process and because there was no "express statement that [the surety] will pay any judgment obtained against [the principal]", the bond language did not satisfy the Myers exception.[4] Id.

The controlling principle in Myers, then, is that W.Va. Code § 45-1-3 does not override an *express contractual obligation* to pay a judgment against the principal. To trigger the Myers exception, there must be a clear statement that the surety agrees to "pay any judgment" against its principal. Or, like in Myers, the bond must say that the surety "shall be liable" for any such judgment. The plain language of the mortgage broker bond at issue here contains no such explicit agreement. Hartford did not agree to "pay any judgment," as Plaintiffs repeatedly claim, and therefore the Myers exception is not triggered.

Plaintiffs engage in a lengthy interpretive exercise in an attempt to explain, by implication or rules of construction, that the bond actually does contain an agreement to "pay any judgment" rendered against Equity South. Resp'ts' Br. 12. But there is no reason to believe that the bond means anything other than what it says: that a person aggrieved by the conduct of the principal "may upon recovering judgement against such principal issue execution of such judgement and *maintain an action* upon the bond of the principal[.]" (App. 15) (emphasis added). In other words, once the obligation under the bond[5] is triggered and an allegedly

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[4] Ultimately, the Rashid Court ruled that the surety was bound by an arbitration award achieved by the plaintiff against its principal, but only because the bond in that case explicitly incorporated an arbitration agreement between the plaintiff and the principal. Rashid, 1992 U.S. Dist. LEXIS 22914 at *18, *27-28. The bond at issue in this case does not incorporate any other documents by reference.

[5] Plaintiffs misidentify the bonded obligation in a mortgage broker bond. See Resp'ts' Br., 11. The obligation bonded is the principal's agreement to "conform to and abide by the provisions of said Act and of all rules and orders lawfully made or issued by the Commissioner of Banking thereunder, and shall pay to the State and shall pay to any such person or persons properly designated by the State any and all

aggrieved homeowner obtains a judgment against a mortgage broker, he or she has two options: direct execution on the judgment against the mortgage broker, or the initiation of an "action" against the bond.

The use of the word "action" in this context is highly significant. Had the Commissioner of Banking intended to permit an allegedly aggrieved homeowner to immediately execute on a mortgage broker bond, she could have easily included such language. But in crafting the bond, the Commissioner only provided for an "action." As this Court has already guaranteed a surety's right to set up its defenses in an "action" against it, the plain language of the bond is clear: a third party right of action against a mortgage broker bond is cognizable, but subject to the same defenses as a surety would have against a claim on any other type of surety bond. See Wellington Power Corp. v. CNA Sur. Corp., 217 W.Va. 33, 40, 614 S.E.2d 680, 687 (2005) ("a surety may set up in defense to an action against him any matter or any act of the creditor that operates as a discharge of the principal from liability").

According to Plaintiffs, it is "nonsensical" that the right to "maintain an action" against a bond would mean anything but an instantaneous right to execute on the bond. They argue that a plain-language reading of the bond would only "inform the judgment holder of a self-evident fact[,] that to recover upon the bond he must sue upon the bond." Resp'ts' Br., 14. But what Plaintiffs miss is that without the language allowing them to "maintain an action" against the bond, they would have *no rights against the bond at all.* They are third-party beneficiaries, not named obligees, and they have rights against the bond only insofar as its plain language provides. The fact that the bond gives Plaintiffs only a third-party right of action against the

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[5 cont'd] moneys that may become due or owing to the State or to such person or persons from said obligor in a suit brought by the Commissioner on their behalf under and by virtue of the provisions of said Act." (App. 15). The following sentence of the bond, beginning "If any person ..." sets forth an additional third party remedy, and does not extend the surety's obligation in any way.

bond is not redundant or absurd, but entirely consistent with W.Va. Code § 45-1-3. In the absence of language firmly establishing that Hartford "shall be liable" for a judgment against its principal, or a clear agreement to pay any such judgment, there is simply no agreement that would trigger the Myers exception and remove the protections of the Code.

II. This Court's Decision in Walker Machinery Does Not Dictate that the Language of the Bond Should be Construed Strictly Against Hartford.

Hartford maintains that there is no need to resort to rules of construction in this case because the plain language of the bond contains (1) a condition precedent for the assertion of a third party action against a mortgage broker bond (a judgment against the principal); and (2) a mechanism for asserting that right (an action against the bond). Pet'r's Br. 17-18. A bond containing "plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Wellington Power Corp., 217 W.Va. at 37, 614 S.E.2d at 684. There is no reason to search for hidden meaning when the bond can be easily interpreted as written.

Nevertheless, should this Court find that the bond language is ambiguous, the decision in Cecil I. Walker Mach. Co. v. Stauben, Inc., 159 W.Va. 563, 230 S.E.2d 818 (1976) (hereinafter Walker Machinery), does not require strict construction against Hartford. There, the Court interpreted a statutory contract performance bond. Walker Machinery, 159 W.Va. at 565, 230 S.E.2d at 819. In footnote 1 to the opinion, the Court set forth the relevant provisions of the bond, and immediately followed with a quotation of W.Va. Code § 17-4-20, the statute requiring the bond. Id. at 565, 230 S.E.2d at 819. The language of the Walker Machinery bond did not track the language of the statute requiring its existence. Thus, even though the bond there was statutory, it was clearly drafted by the surety. Walker Machinery does not discuss and has no application to statutory bonds that are written solely by government officials or agencies.

Because the mortgage broker bond at issue in this case was written by the Commissioner of Banking, and not by Hartford, Walker Machinery does not require that it be construed strictly against Hartford.

An additional quote from Walker Machinery cited by Plaintiffs – "the courts have endeavored to extend the protection afforded by the statutory bond as far as reason and logic will permit" -- is taken out of context and likewise inapplicable. See Walker Machinery, 159 W.Va. at 568, 230 S.E.2d at 820; Resp'ts' Br., 17-18. The Court was discussing "protection" in terms of the types of claims that could be brought against a construction payment bond. Id. at 568, 230 S.E.2d at 820-21. Here there is no question of whether the claim asserted by Plaintiffs is a proper one to be brought against a mortgage lender bond; the question is whether they should be permitted to recover against the bond without being required to prove their claim. Enforcement of the bonded obligation is at issue, not the protection provided by the bond.

III. The Trial Court in Stayer Recognized that a Judgment Against the Principal Would Not Be Binding on the Surety.

Plaintiffs suggest that Hartford has misunderstood the rationale of the trial court in Stayer v. Litton Loan Servicing, et al., No. 08-C-3157, Circuit Court of Kanawha County, West Virginia. Pet'r's Br., Ex. A; Resp'ts' Br., 19. They imply that the Stayer court did not contemplate the possibility that the plaintiff there would obtain a judgment against the principal and then attempt to execute. Resp'ts' Br. 20 ("However, because there was no judgment against the broker Hartford would have the right to appear and assert any defenses it might have"). But the Stayer court certainly understood the possibility that the plaintiff would obtain a judgment against the principal. It found that "Plaintiff should not be required to sit idle and await the conclusion of the [principal's] bankruptcy[.]" Pet'r's Br., Ex. A. Why would the plaintiff have to "sit idle" and wait for the Maryland bankruptcy proceedings to end? The answer is that the

plaintiff would presumably obtain a judgment against the principal after it was no longer subject to the automatic bankruptcy stay. Then, as the Stayer court recognized, after a hypothetical judgment was obtained, "Hartford would then be permitted to assert all defenses [the principal] could have asserted." Pet'r's Br., Ex. A. It is true that the Stayer court also considered the possibility of a bankruptcy court's permitting the stay to be lifted to permit an action against the bond without a judgment, but it understood the extent to which a *judgment* against the principal would affect Hartford.

IV. The Authority Delegated to the Commissioner of Banking by W.Va. Code § 31-17-4(f)(3) is Not Boundless.

Plaintiffs concede that for the mortgage broker bond at issue to be considered a judgment bond, the Commissioner must have been granted the authority to require a judgment bond by the Legislature. Resp'ts' Br., 21. They argue that W.Va. Code § 31-17-4(f)(3), which requires a mortgage lender to maintain a bond "in a form and with conditions as the commissioner may prescribe," gives the Commissioner the authority to require a judgment bond even though the statute does not expressly require or allow the bond to be a judgment bond. According to Plaintiffs, the "procedural rights" granted by W.Va. Code § 45-1-3 "do not come into play." Resp'ts' Br., 21.

This is circular reasoning. W.Va. Code § 45-1-3 applies to all surety bonds and does not merely provide "procedural rights" as to "performance bonds." It guarantees that *every* surety will be entitled to assert its rights in a court of law, and permits a surety to assert any defense that its principal would have been allowed to make. There can be no more substantive right than the right to defend oneself in court. While this Court has recognized an exception to § 45-1-3 under Myers, there is no indication that the Legislature intended for that exception to become the rule in the case of mortgage broker bonds. To the extent that the bond is considered a judgment

bond, it was required by the Commissioner without authority and is in conflict with the general surety provisions of the Code.

V. Plaintiffs Have Never Been Called on to Prove Their Claims Against Equity South.

In order for a claim against a surety bond to be valid, the obligation under the bond must be triggered. In the case of a mortgage broker bond, the obligation is to conform to and abide by the West Virginia Residential Mortgage Lender, Broker and Servicer Act (the "Act"). If the principal violates the Act, the surety may, under the proper conditions, be required to pay under the bond. Despite the fact that Plaintiffs have never been held to their burden of proof as to whether Equity South in fact violated the Act, they claim that they have "tried their case" because they engaged in some litigation in another case against other entities, such as the servicer and holder of the mortgage note, and because they took the necessary steps to secure a default judgment against Equity South. (Resp'ts' Br. 23-24). These arguments are unavailing.

First, Plaintiffs' litigation against other defendants is completely irrelevant to whether the bond should be immediately payable. Hartford did not bond the servicer or holder of Plaintiffs' mortgage note. Whether these other defendants contributed to Plaintiffs' injury is not Hartford's or Equity South's concern, other than operating as a possible setoff. As Equity South's surety, Hartford's potential liability flows from Equity South only. Plaintiffs cannot satisfy their burden of proof against Equity South or Hartford by litigating against other defendants, especially when that litigation resulted only in a settlement rather than a trial on the merits.

Second, a default judgment is not the same as proving one's case on the merits or satisfying one's burden of proof. Indeed, "default judgments have been a disfavored mechanism for case resolution" in West Virginia because of this Court's "stated policy of preferring that cases be resolved on their merits." The Hardwood Group v. LaRocco, 219 W.Va. 56, 66, 631

S.E.2d 614, 624 (2006) (Albright, J., concurring); see also, e.g., id. at 62, 631 S.E.2d at 620 (acknowledging that the presence of a material issue of fact or a meritorious defense is one of the factors favoring the vacation of a default judgment). It bears repeating that Plaintiffs have never had to prove their allegations in a court of law. If they are not held to their burden of proof, how is Hartford ever to know whether Plaintiffs in fact suffered a loss or whether Equity South caused that loss? If Plaintiffs prevail here, how is any court ever to know whether a default judgment in favor of an allegedly aggrieved homeowner is based on a valid, meritorious claim against the principal or merely a successful attempt at scoring a quick judgment against the surety?

If the safeguards of W.Va. Code § 45-1-3 are ignored, the answer to these questions is that sureties and courts will never know. Regrettably, Plaintiffs attempt to deflect attention from this obvious policy concern by accusing Hartford of "bully[ing] the court" and "attack[ing] the integrity of the West Virginia bar by suggesting that lawyers would engage in unethical conduct in pursuing their claims." Resp'ts' Br., 24. No attacks were intended, and Hartford has the utmost respect for the dignity and authority of this Court. It is entirely appropriate for this Court to consider the consequences if the trial court's decision is permitted to stand. The potential for prejudice to sureties is quite high if Plaintiffs prevail in this appeal; however, if Hartford prevails there will be no prejudice to Plaintiffs here and other plaintiffs because they will always have the opportunity to prove their claims in a court of law.

The simple truth is that if default judgments against defunct principals are allowed to be executed against mortgage broker bonds without holding plaintiffs to their burden of proof, specious claims *will* be pursued and windfalls *will* be realized. The hallmark of our adversarial legal system is that each side to a controversy is given the opportunity to zealously advocate his

position within the bounds of ethical requirements and professionalism. If one side to a controversy is systematically removed from the equation, the opportunity to abuse the system is clear. It would be naïve to suggest that no plaintiff or lawyer would advance a questionable claim if they knew that they would be able to obtain a judgment against a national surety company without ever being required to prove their case.[6] This is precisely why the safeguards of W.Va. Code § 45-1-3 exist and why they should not be removed absent a clear, explicit declaration that the surety will be liable for or pay any judgment against its principal. Hartford made no such agreement, and should not have its right to defend itself confiscated.

VI. If No Setoff is Recognized, a Windfall to Plaintiffs is Clear and Unavoidable.

Plaintiffs' arguments against recognizing a setoff to any judgment ultimately rendered against Hartford can be summarized in two basic points: (1) Plaintiffs have not in fact gotten a full recovery for their unspecified, unproven damages; and (2) no setoff can be applied where there has not been a "determination of the total amount of damages due."[7] Neither argument is supported by the record or the applicable law.

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[6] Plaintiffs seem to suggest that a surety's right to have a judgment stricken for "fraud or collusion" is sufficient to protect a surety's rights. Resp'ts' Br., 25. Relying solely on this exception would reduce sureties to either engaging in scattershot attempts to vacate judgments simply to see if the plaintiff had a viable claim, or to simply acquiesce in paying because no evidence of fraud is apparent from the face of a default judgment order. In effect, the burden of proof would be completely reversed under Plaintiffs' interpretation of the law and it would be incumbent on the surety to prove that it is *not* liable. Of course, there may also be cases which are not fraudulent or the result of collusion, but are supported only by flimsy or questionable evidence. Default judgments obtained in such cases would not seem to be subject to attack if the trial court's ruling is left undisturbed.

[7] Plaintiffs purport to assert a third argument, that "setoff is only available for settlements previously received in the past," (Resp'ts' Br., 27), but this argument is dependent and cumulative upon the false proposition that a "determination of the total damages due" must be made by the fact-finder for a setoff to be recognized. Moreover, the argument is irrelevant – Hartford is seeking a setoff against any judgment awarded against it, and there was no judgment against Hartford at the time Plaintiffs settled their case against Nationstar Mortgage LLC ("Nationstar") and the Bank of New York Mellon (the "Bank of New York"). If a settlement credit is appropriate to avoid a double recovery and encourage out-of-court resolutions, it should be applied regardless of the fact that the judgment against Hartford's principal was obtained before Plaintiffs settled with Nationstar and the Bank of New York.

In response to the first point, Plaintiffs completely misapprehend Hartford's basis for arguing that there has been one full recovery. Hartford has never argued that Plaintiffs "fully recovered" by virtue of the default judgment obtained against Equity South. Resp'ts' Br., 27. The recovery enjoyed by Plaintiffs came from Nationstar and the Bank of New York as a result of the August 4, 2010 Release and Settlement Agreement. (App. 64-70). Pursuant to that settlement, the loan which was the subject of the case against Equity South is now void, there is no deed of trust outstanding on Mr. Rhodes' property, and Plaintiffs have suffered no harmful effects to their credit. Nevertheless, according to Plaintiffs, they are entitled to "liquidated damages" in the form of the principal amount of the note and statutory penalties, as well as unspecified "remaining liquidated damages," and "unliquidated damaged for annoyance, aggravation, inconvenience, damage to credit, etc." Resp'ts' Br., 27. To the extent that they attempt to recover from the bond for all of these alleged damages, they overreach. As Plaintiffs later acknowledge, the default judgment order in the underlying litigation against Equity South (App. 291-292) was based *only* on the amount of the mortgage note and various statutory penalties. Resp'ts' Br., 27. Any complaint that Plaintiffs have not received compensation for other damages, including annoyance, aggravation, or inconvenience, is irrelevant. They have not received a judgment for these items and they cannot recover against the bond for them. Moreover, Plaintiffs can hardly complain that they have not received compensation for "damage to credit" because, as a result of the settlement, there *is* no damage to their credit.

As for the damages based on the existence of the note, the record is clear that Plaintiffs have recovered in full and have no outstanding damages. The effect of the settlement with

Nationstar and the Bank of New York is that Plaintiffs received $46,089.72[8] without any obligation to pay this sum back or any encumbrance to real or personal property. Therefore the only item of actual damages covered by the default judgment against Equity South has been comprehensively ameliorated by other parties. Any further award to Plaintiffs from Hartford based on the existence of the mortgage note would be a windfall.

Plaintiffs do not seriously argue the point that the August 4, 2010 settlement granted them a significant benefit which should be considered part of their overall recovery. Nor do Plaintiffs contest the fact that their injury is indivisible with respect to Equity South's alleged joint tortfeasors Nationstar and the Bank of New York. They also have apparently abandoned their argument that the settlement discussions with Nationstar and the Bank of New York – discussions which Hartford was not given notice of – allegedly included talk of the existence of the default judgment against Equity South and the bond.

Instead, Plaintiffs attempt to add a procedural roadblock to setoff which has never been recognized by the Court. While ostensibly acknowledging that a plaintiff may receive "no more than full compensation for his loss," Burgess v. Porterfield, 196 W.Va. 178, 183, 469 S.E.2d 114, 119 (1996), they argue that a plaintiff *can* enjoy more than one full recovery, as long as there has not been a determination by the fact-finder of "the total amount of damages due to the plaintiffs." Resp'ts' Br., 27. The irony of Plaintiffs' position is manifest: the reason there has been no such determination is because they have intentionally avoided posturing this case for trial despite Hartford's efforts to present its defenses and put Plaintiffs to their burden of proof. They can have no complaint that the case has not been submitted to a fact-finder for

[8] The HUD-1 Settlement Statement from the mortgage transaction at issue reflects that a prior loan in the amount of $24,272.60 was paid back in full, and that Plaintiffs received cash back from the lender in the amount of $21,817.12. (App. 232).

determination of the full amount of damages when they have evaded that determination for the four years since the underlying suit was filed.

Plaintiffs' procedural argument is not only disingenuous, it is baseless in law. "It is generally recognized that there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury." Harless v. First Nat'l Bank, 169 W.Va. 673, 696, 289 S.E.2d 692, 705 (1982). The setoff credit exists at the time the settlement occurs; it does not vest retroactively if a jury verdict is reached. See syl. pt. 2, Hardin v. The New York Cent. R.R. Co., 145 W.Va. 676, 116 S.E.2d 697 (1960) ("Where a payment is made, and release obtained, by one joint tort-feasor, the other joint tort-feasors shall be given credit for the amount of such payment in the satisfaction of the wrong").

Plaintiffs do not cite any case law suggesting that a setoff is inappropriate simply because a case has not reached a jury verdict. Rather, Plaintiffs seem to argue that because Bd. of Educ. of McDowell County v. Zando, Martin & Milstead, Inc., 182 W. Va. 597, 390 S.E.2d 796 (1990) (hereinafter "Zando") involved a jury trial, that a jury verdict is an essential component of any setoff, even when a surety is called to answer for a judgment against its principal. Resp'ts' Br., 28-29. But Zando does not contain any language limiting its scope to cases involving jury verdicts. Nor does any of the decisions from which it draws authority suggest that "if there is no verdict then no right to a setoff exists." Resp'ts' Br., 29.

As previously argued, the rationale for recognizing a settlement credit in Zando is just as applicable here. The Zando Court was primarily concerned with "favoring out-of-court resolutions of disputes," and "ensur[ing] against double recovery by the plaintiff." Zando, 182 W.Va. at 604-05, 390 S.E.2d at 803-04. Plaintiffs misread Zando when they suggest that a

second settling defendant is not entitled to a settlement credit against a first settling defendant "because there has been no determination of the plaintiff's total damages." Resp'ts' Br., 29. The basis for the settlement credit is, according to Zando, the loss of the inchoate right of contribution that a non-settling defendant would ordinarily enjoy against the settling defendant. See Zando, 182 W.Va. at 604, 390 S.E.2d at 803. The *pro tanto* settlement credit is afforded to non-settling defendants as a benefit in exchange for losing the right to sue settling defendants for contribution. See Zando, 182 W.Va. at 605, 390 S.E.2d at 804 ("the reduction of the verdict to reflect partial settlements counterbalances the loss of the right of contribution, since the remaining defendants, who would otherwise have been entitled to such right, obtain the benefit of the settlement"). As opposed to a non-settling defendant, however, a second settling defendant does not need to receive the benefit of a settlement credit because it has bargained away its right of contribution in exchange for the certainty and finality of an out-of-court settlement.

Hartford has made no such bargain. It has not contracted away its right of contribution against Nationstar and the Bank of New York. In return for this right that it would otherwise enjoy, Hartford is entitled to a credit for the August 4, 2010 settlement. Because the settlement eliminated the sole source of actual damages on which the default judgment against Equity South was based, the credit should offset any obligation under the bond in its entirety. In the alternative, the credit should be set at $46,089.72, the amount actually received by Plaintiffs as a result of entering into the settlement with Nationstar and the Bank of New York.

CONCLUSION

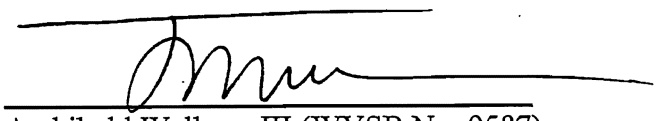
In conclusion, Hartford respectfully asks that the trial court's award of summary judgment to Plaintiffs be reversed, and these proceedings remanded to the Kanawha County

Circuit Court for trial on the merits. In the alternative, Hartford requests that a settlement credit be applied to the judgment, either in full or in such partial amount as the Court should deem appropriate from its review of the record. To the extent that Hartford has not responded herein to any argument advanced by Plaintiffs, Hartford will rely on its initial brief and on its statements made during oral argument, should this Court deem it appropriate.

Respectfully submitted,

HARTFORD FIRE INSURANCE COMPANY

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HARTFORD FIRE INSURANCE COMPANY,

Defendant Below/Petitioner,

v. **Record No. 12-0522**

JERRY LEE RHODES and
BONNIE M. COCHRAN,

Plaintiffs Below/Respondents.

CERTIFICATE OF SERVICE

I, Thomas J. Moran, counsel for the Petitioner, Hartford Fire Insurance Company, do hereby certify that I have served a true and exact copy of the foregoing **REPLY BRIEF OF PETITIONER** upon counsel for the Respondents via U.S. Mail, this 26th day of September, 2012, as follows:

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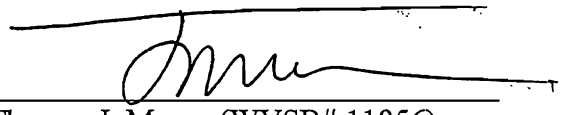

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