BRIEF FILED
WITH MOTION

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Docket No. 11-1651

RICHARD LINDSAY and PAMELA LINDSAY D/B/A TABOR LINDSAY & ASSOCIATES,

Defendants/Third-Party Plaintiffs Below, Petitioner,

v.

ATTORNEYS LIABILITY PROTECTION SOCIETY, INC., et al.

Third-Party Defendant Below, Respondent.

RESPONDENT'S SUR-REPLY BRIEF

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ARGUMENT

Respondent Attorneys Liability Protection Society, Inc., A Risk Retention Group ("ALPS"), submits the following sur-reply brief to address new arguments raised by Petitioners Pamela Tabor Lindsay and Richard D. Lindsay d/b/a Tabor Lindsay & Associates ("TL&A") in their reply brief. TL&A argues, for the very first time, that it is entitled to coverage under the claims-made-and-reported policy at issue by virtue of policy provisions relative to the issuance of an extended reporting endorsement ("ERE"). As discussed in greater detail below, TL&A has waived this argument by failing to raise it in the Circuit Court. Moreover, the authority cited upon by TL&A in its effort to secure coverage under the ERE provisions is a minority approach which has been rejected by the overwhelming majority of jurisdictions to consider the issue and which is premised upon language that is different from that in the ALPS ERE. Lastly, the alleged failure to include a provision expressly addressing amendments to complaints in the ALPS Policy does not create ambiguity or otherwise confer coverage for Mr. Smith's Second Amended Complaint, which was clearly a continuation of his original claim that was not timely reported.

A. TL&A Has Waived Any Argument That The Extended Reporting Endorsement Provisions Confer Coverage For Mr. Smith's Claim By Failing To Raise It In The Circuit Court.

This Court has repeatedly declined to consider arguments which were not considered and decided by the court from which the case has been appealed. *See, e.g.,* Syllabus Point 1, *Wang-Yu Lin v. Shin Yi Lin*, 224 W. Va. 620, 624, 687 S.E.2d 403, 407 (2009) (finding that appellant's failure to argue that statute barred coverage in the trial court proceedings precluded consideration of argument on appeal, even though the appellant had cited the statute for a different reason);

Boury v. Hamm, 156 W. Va. 44, 47, 190 S.E.2d 13, 15-16 (1972) (declining to consider issue that was not raised or considered by the circuit court).

In this case, TL&A failed to raise any argument based upon the ERE provisions of the ALPS Policy form in the Circuit Court or in its opening brief to this Court. The very first time that TL&A advanced any argument premised upon the ERE provisions was in its reply brief, which is not permitted under long-standing precedent of this Court. *See Wang-Yu Lin*, 224 W. Va. at 624, 687 S.E.2d at 407; *Boury*, 156 W. Va. at 47, 190 S.E.2d at 15-16. Accordingly, the Court should find that TL&A has waived this argument.

B. The ERE Provisions Of The ALPS Policy Form Do Not Evince An Intent Permit Reporting Of Claims In Subsequent Policy Periods.

There is no merit to TL&A's new argument that the ERE provisions in the ALPS Policy somehow confer coverage for Mr. Smith's claim. Preliminarily, the ALPS Policy form afforded the insured the opportunity to purchase an ERE under certain specified circumstances. (R.A. 292-93 at ¶ 4.4) Here, it is undisputed that TL&A renewed its coverage in March of 2008 and did not purchase an ERE then or at any later time. Thus, according to the plain language of the ALPS Policy, TL&A has no ERE and cannot secure coverage for the *Smith* claim under an ERE.

Despite this undisputed fact, TL&A invites this Court to find that coverage exists under an *implied* ERE based largely upon an out-of-state decision, *Helberg v. National Union Fire Ins. Co.*, 657 N.E. 2d 832 (Ohio App. 1995), in which an Ohio Court found that an insured who had failed to comply with his policy's claims-made reporting requirements was nevertheless entitled to coverage under that policy's "unlimited" ERE. But, as discussed below, this Court should eschew TL&A's invitation to follow *Helberg's* minority approach—one rejected by the overwhelming majority of courts as fundamentally inconsistent with both the express language and underlying purpose of EREs and claims-made-and-reported policies. Moreover, even if this

Court were to adopt the minority view, the ALPS ERE would not provide coverage for the *Smith* claim: unlike the ERE in *Helberg*, which allowed late reporting of claims first made during an earlier policy period, the ALPS ERE would extend coverage only for claims *both first made and first reported during the ERE period itself.*

1. Helberg Ignores Unambiguous Policy Language And Represents A Minority Approach.

This Court should reject TL&A's invitation to adopt the minority approach utilized by the *Helberg* court because it inexplicably disregards policy language relative to the issuance of an ERE and provides the insured with the benefit of an extended reporting period that was never purchased. The policy in *Helberg* offered the insured the option of purchasing an ERE "in case of cancellation or non-renewal [of the policy] by either the insured or the company." 675 N.E.2d at 834-35. In finding that the insured was entitled to the benefit of the ERE, the court turned this language on its head, reading it as setting forth the only two circumstances where "purchase" of the ERE was required. *See id.* at 835. From this faulty premise, the Court further reasoned that the insured, who had renewed his policy, was automatically entitled to the ERE, even though he had never requested or paid for it, because there had been no cancellation or non-renewal. Such a strained and unsupportable reading of unambiguous policy language is not permitted under West Virginia law. *See Payne v. Weston*, 195 W.Va. 502, 506-07, 466 S.E.2d 161, 165-66 (1995).

In addition to impermissibly expanding the unambiguous language of the insurance policy, the *Helberg* court's approach also disregards the fundamental reason that EREs are offered to insureds in the event of cancellation or non-renewal. As the Federal District Court in Pennsylvania recognized, in a well-reasoned opinion rejecting the *Helberg* approach, the purpose

of an ERE is not to enable insureds to delay the reporting of claims, but to avoid gaps in coverage for insureds who switch carriers or switch to an occurrence-based policy:

> An optional extended reporting period for those who cancel or fail to renew a policy protects those insureds against the gaps in coverage that can result from switching to an occurrence policy or to another claims-made policy. As explained above, occurrence policies do not cover acts that occur before the policy period. Thus, an insured who shifts from claims-made to occurrence coverage loses coverage for those claims based on acts that happened during the claims-made policy period, thereby creating a gap in his coverage while his premium obligations remain continuous. This insured can only protect himself against the possibility of such claims by extending the period in which to report claims arising out of the claims-made policy period. An insured who changes claims-made policy carriers may also face a similar problem, in the event that the subsequent carrier places a retroactive date that limits coverage for prior acts.
>
> *By contrast, insureds who renew their policies face no such problem.*

Ehrgood v. Coregis Ins. Co., 59 F. Supp.2d 438, 447 (M.D. Pa. 1998) (emphasis supplied).

It is scarcely surprising, therefore, that the majority of courts considering the issue have rejected *Helberg* and, more broadly, the notion that the renewal of claims-made insurance with the same carrier can in any way operate to extend the time for reporting a claim. *See Ehrgood*, 59 F. Supp.2d at 447 (rejecting insured lawyer's claim under *Helberg* that renewal of claims-made policy with same insurer operated as an "extended reporting period;" extended reporting period was available only for cancellation or non-renewal, and failure to make it available for renewals did not violate public policy or the insured's reasonable expectations); *Checkrite Ltd, Inc. v. Illinois Nat. Ins. Co.,* 95 F. Supp.2d 180, 193-94 (S.D.N.Y. 2000) (rejecting insured's claim that it was entitled to extended reporting period based upon renewal of claims-made insurance policy); *accord National Union Fire Ins. Co. v. Talcott*, 931 F.2d 166, 168 (1st Cir. 1991) (Massachusetts) (holding that insured's failure to timely report claim under policy in

which it was first made barred coverage, and the fact that the insured had in force a subsequent claims-made policy issued by the same insurer when the claim was reported did not alter this result).[1] This Court should likewise reject the *Helberg* court's approach.

So too, this Court should reject TL&A's related contention that it "reasonably" expected that the mere act of renewing a policy would extend the time for reporting a claim. The ALPS Policy clearly states that "[i]n the event an Insured fails to give written notice to the Company of a Claim, prior to the end of the Policy Period in which the Claim is made . . . then no coverage for any such claim shall be afforded to the Insured under any future policy issued by the Company." (R.A. 294 at ¶ 4.6.4). In light of this clear provision, and the unambiguous requirement repeatedly stated in the ALPS Policies and Declarations that claims must be reported during the policy period when they are first made, TL&A could have had no "reasonable expectation" that renewal of any ALPS policy would extend the time for reporting a claim.

2. *The ALPS ERE Requires That A Claim Be First-Made During The Extended Reporting Period To Qualify For Coverage.*

Even if the Court were to adopt the approach of *Helberg* and were to hold that the mere act of renewing coverage entitled TL&A to the benefit of an ERE, such a holding would not create coverage for the *Smith* claim. What TL&A fails to tell the Court is that the ERE in *Helberg* differs in a crucial respect from the ERE in the ALPS Policy: the *Helberg* ERE extended coverage to claims reported during the ERE period even if such claims were "first

[1] *See also National Union Fire Ins. Co. of Pittsburgh, PA v. Bauman*, 1992 WL 1738, *10 (N.D. Ill. Jan. 2, 1992) (rejecting argument that renewal of claims-made insurance policy extended reporting period for claims made against insured during prior policy period), *aff'd sub nom., National Union Fire Ins. Co. of Pittsburgh v. Baker & McKenzie*, 997 F.2d 305 (7th Cir. 1993); *Insite-Properties, Inc. v. Jay Phillips, Inc.*, 638 A.2d 909 (N.J. App. 1994); *Sletten v. St. Paul Fire & Marine Ins. Co.*, 780 P.2d 428 (Ariz. 1989); *Rodriguez Quinones v. Jimiez & Ruiz*, 261 F. Supp.2d 87 (D. P.R. 2003); *Petersen v. TIG Ins. Co.*, 2002 WL 31413808 (D. Neb. Oct. 28, 2002); *Napalitano v. Coregis Ins. Co.*, 2002 34159094 (D. Conn. Aug. 27, 2002), *aff'd*, 67 F. App'x 74 (2d Cir. 2003); *Goings & Goings v. U.S. Risk, Inc.*, 2005 WL 3320863, *5 (Cal App. Dec. 8, 2005).

made" during the prior policy,[2] while the ALPS ERE—if purchased—would have afforded coverage only for claims that were *both first made* and *first reported during the extended reporting period.* Specifically, the ALPS policy provides that:

> The extended reporting endorsement shall provide coverage for claims that (A) would otherwise be covered by this policy, (b) arise from an act, error, or omission . . . that occurred after the loss inclusion date . . . and before the end of the policy, and (c) *are first made against the Insured, and first reported to the Company, after the end of the policy period and during the extended reporting period.* (R.A. 292 at ¶ 4.4.2) (emphasis added).

Thus, unlike the ERE provision in *Helberg* that provided additional time in which to report claims that were made during the prior policy period, the ALPS ERE does not. Therefore, even assuming that this Court were to adopt the minority view and conclude that TL&A is entitled to the benefit of an ERE—without evidence that TL&A ever requested or paid for an ERE—Mr. Smith's claim would still not qualify for coverage, because it was not "*first made after the end of the policy period and during the extended reporting period.*" Instead, the undisputed evidence demonstrates that Mr. Smith's claim was first made during the 2007 Policy period, and TL&A's failure to timely report the *Smith* claim before the expiration of that policy period precludes a finding of coverage for the claim under the ALPS Policy as well as under any hypothetical ERE.

C. The Fact That The ALPS Policy Form Does Not Expressly Address Amended Complaints Does Not Create Coverage For Mr. Smith's Second Amended Complaint, Which Is Clearly Part Of A Single Claim That Was First Made In The 2007 Policy Period But Not Reported During That Policy Period.

In its reply, TL&A also argues—again for the first time—that the absence of a policy provision defining amendments of complaints to be "related claims" which are "deemed" to be

[2] In particular, the ERE in *Helberg*, which expressly stated that it was "unlimited," provided coverage for all "*claims first reported during the extended reporting period* [sic] acts or omissions occurring prior to the end of the policy period and otherwise covered by the policy." 657 N.E.2d at 834 (emphasis supplied).

first made when the original complaint was filed supports its contention that the Second Amended Complaint filed by Mr. Smith (at the behest of TL&A's counsel) in September 2010 was a "new claim." Whether or not the ALPS Policy contains such a specific provision, however, is irrelevant to the coverage issue before this Court since it is clear that, as a matter of both law and undisputed fact, Mr. Smith's Second Amended Complaint was not a "new" or "separate" claim for reporting purposes.

Preliminarily, as TL&A recognizes, the ALPS Policy does contain a "related professional services" provision, which appears under the section labeled "Limits of Liability." TL&A correctly cites to the language of the 2010 Policy (which differs from the language of the 2007-09 Policies) and argues that the language restricts the scope of the "related professional services" provision to determining the "limit of liability."[3] But regardless of whether this is true or not, the result in this case is the same: the Second Amended Complaint, which is based on virtually identical conduct as that first alleged by Mr. Smith in 2008, is part of a single lawsuit and is merely a continuation of the "claim" first made by Mr. Smith when he served his complaint in February 2008.[4]

A claim is defined under all of the ALPS policies as "a demand for money or services, including but not limited to *the service of suit* or institution of arbitration proceedings against the Insured." (R.A. 160) (emphasis supplied). It is undisputed that the amendment of Mr. Smith's prior complaint merely continued his pending suit against TL&A, and, as such, it was not a new "claim" that could be reported separately for coverage. *See Community Found. For Jewish*

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[3] ALPS previously indicated that the 2010 Policy language contained in Form PLP002a was identical to that utilized in the 2007 through 2009 Policies. In fact, the policy forms from those years differed slightly, including at ¶4.2.5. The relevant provision applicable to the 2010 Policy is found at R.A. 292. The policy provision applicable to the 2007, 2008 and 2009 Policies is found at R.A. 166.

[4] The policy in effect when Mr. Smith served his complaint upon TL&A was the 2007 Policy, which had a policy period from March 24, 2007 through March 24, 2008. (R.A. 65-68, 76, 80).

Educ. v. Fed. Ins. Co., 16 Fed. App'x. 462, 465-66, 2001 WL 664205 (7th Cir. 2001) (finding that amendment to complaint was not a new claim and noting that such a holding would result in possibility of triggering different insurance policies every time a complaint is amended); *Apro Mgmt., Inc. v. Royal Surplus Lines Ins. Co.*, 2007 WL 1238574, *3-*5 (N.J. App. Apr. 30, 2007) (finding that mortgage provider could not obtain coverage by reporting amendment to complaint adding negligence count; prior failure to report service of complaint, which fell squarely within policy definition of "claim," barred coverage for entire suit);[5] *Farm Bureau Life Ins. Co. v. Chubb Custom Ins. Co.*, 780 N.W.2d 735, 741 (Iowa 2010) (similar). Thus, regardless of the presence or absence of a specific policy condition addressing how "related acts" or "related claims" shall be treated, Mr. Smith's Second Amended Complaint was, in fact, part of the original *Smith* "claim" which was undisputedly first made in 2008.

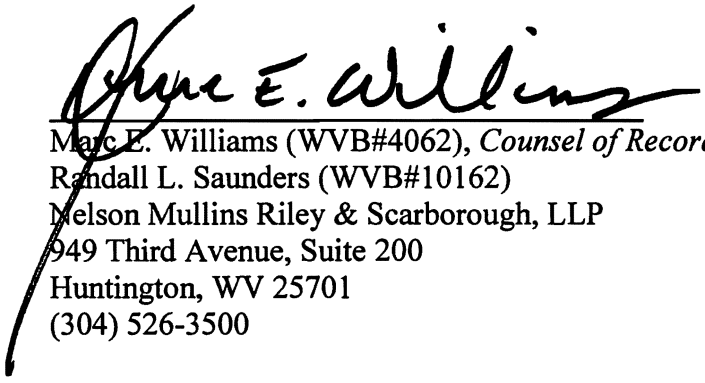
Moreover, TL&A's argument that the Second Amended Complaint was a "new" claim because prior thereto Mr. Smith had not included a count expressly labeled "negligence" continues to ignore the undisputed fact that TL&A reported the *Smith* lawsuit to ALPS as a "claim" for "negligence" in May 2010, many months before the Second Amended Complaint was ever filed. Thus, even if one could posit circumstances where an amendment to an original complaint might constitute a new claim, this matter is not one of them, and TL&A's voluntary and knowing decision not to report the matter to ALPS for over two years bars coverage.

[5] The *Apro Mgmt.* court alternatively noted that even if the insured was not required to report the initial complaint as a "claim," it was still required to report this complaint as circumstances likely to give rise to claim. *See* 2007 WL 1238574 at *4 (observing that it was reasonably foreseeable that allegations of intentional conduct would result in claim for negligence). For this separate reason, the failure to timely report the initial complaint barred coverage under subsequent policies. The ALPS Policies, like the one in *Apro*, required the report of "an act error or omission . . . that could reasonably be expected to be the basis of a claim." (R.A. 167 at ¶ 4.6.1; 293 at ¶ 4.61)

CONCLUSION

For the reasons discussed above, ALPS respectfully requests that the Court affirm the October 26, 2011 Order of the Circuit Court entering summary judgment in its favor and dismissing TL&A's third-party complaint against ALPS.

ATTORNEYS LIABILITY PROTECTION SOCIETY, INC., A Risk Retention Group



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v.

ATTORNEYS LIABILITY PROTECTION
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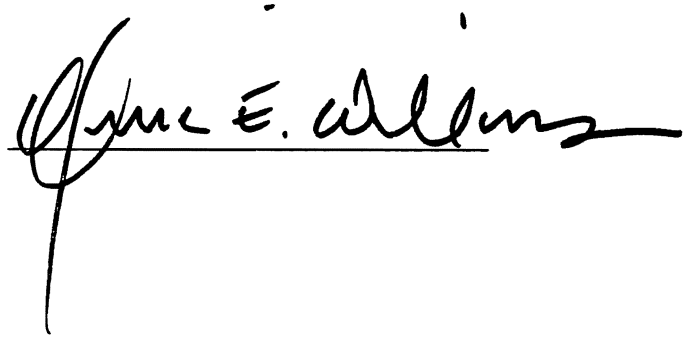
Third-Party Defendant
Below, Respondent,

v.

RONNIE SMITH, Administrator of the
Estate of Nancy Smith, deceased and
RONNIE SMITH, individually,

Plaintiffs Below, Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served the foregoing "***Respondent's Sur-Reply Brief***" upon the following individual by depositing a true copy thereof in the regular manner in the United States Mail, postage prepaid, at Huntington, West Virginia, on the 22nd day of June, 2012:

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