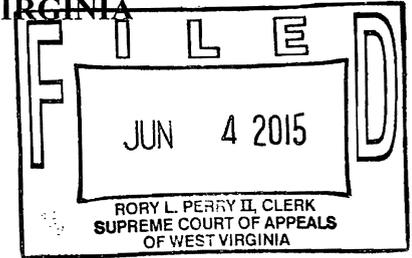


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-0012



**OLD REPUBLIC INSURANCE COMPANY,**

Appellant and Petitioner,

v.

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

**JASON D. O'NEAL, et al.,**

Appellees and Respondents.

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**RESPONDENTS' BRIEF IN OPPOSITION  
TO OLD REPUBLIC INSURANCE COMPANY'S PETITION FOR APPEAL**

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A handwritten signature in black ink, appearing to read "W. Stuart Calwell, Jr.", written over a horizontal line.

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### III. STATEMENT OF THE CASE

The Circuit Court's ruling below was narrowly tailored to a set of highly specific and, frankly, unusual facts. For this reason Respondent provides the following account of the procedural history of this case, including all the facts relevant to Petitioner's assignments of error:

Respondent, Jason D. O'Neal (both the original and third-party Plaintiff below), is a former underground coal miner. During work on June 20, 2009, Mr. O'Neal was struck and run over by a shuttle car operated by a co-worker, who was oblivious to Mr. O'Neal's presence around a blind corner near the face of the underground mine where they were working. [App. 01-03.]

Mr. O'Neal filed the instant case in the Circuit Court of Wyoming County on February 11, 2010.<sup>1</sup> [*Id.*] In his original suit, Mr. O'Neal asserted a so-called "deliberate intent" claim against his employer, Speed Mining, pursuant to *W.Va. Code* §23-4-2, and a common law negligence claim against Patriot Coal, the parent company of Speed Mining. [*Id.*] Mr. O'Neal also sued certain related companies and individuals collectively known as the "CAI defendants" (or simply "CAI") under a theory of products liability, alleging that the shuttle car that struck him was defective insofar as it was manufactured and sold without "proximity detection" technology. [*Id.*] Such technology can prevent mobile mining equipment from colliding with miners who wear a special electro-magnetic transmitter.

All Parties in this litigation have agreed that Mr. O'Neal was horrifically injured as a result of the collision. [*Id.*] Mr. O'Neal lost his leg, pelvis, anus and genitalia as a result of the collision. [*Id.*] Because of the catastrophic nature of Mr. O'Neal's workplace injuries, Mr.

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

O'Neal received a substantial sum of workers compensation benefits from his employer, Speed Mining. [*Id.*] Speed Mining through its parent, Patriot Coal, paid all of these worker's compensation benefits to Mr. O'Neal. [*Id.*; App. 411, *Depo. Transcript of Betsey Sellers*, July 30, 2013.]

Mr. O'Neal and his young family eventually settled their claims against the aforementioned original Defendants. In May 2012, following Mr. O'Neal's settlement with the aforementioned CAI defendants, Mr. O'Neal filed the pending declaratory judgment action against Appellant/Petitioner Old Republic Insurance Company ("Old Republic"), the workers compensation insurance carrier for Speed Mining. [App. 902-909, *Third Amended Complaint and Request for Declaratory Judgment*] Mr. O'Neal sought a ruling from this Court that Old Republic had no right to assert a subrogation lien pursuant to *W.Va. Code* §23-2A-1 against him for settlement monies he received from the CAI defendants in this case, because Old Republic never provided a penny in workers compensation benefits to him. [*Id.*] In support of his argument, Mr. O'Neal produced evidence that all of the workers compensation benefits he received had actually been paid by Patriot Coal on behalf of its subsidiary (and his employer) Speed Mining, in the manner of a self-insured retention, and that both Patriot Coal and Speed Mining had waived their right to be reimbursed workers compensation benefits paid by them by the terms of Mr. O'Neal's settlement of his "deliberate intent" claim against Speed Mining. [App. 411; App. 845-848, *Affidavit of Gary Kennedy*, June 3, 2010; App. 383-395, *Release and Settlement Agreement*, Oct. 13, 2011, at pp. 2, 4.]

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

compensation benefits to Mr. O’Neal. [App.910-920, *Old Republic Insurance Company Answer to Third-Party Complaint and Request for Declaratory Judgment and Cross-Claim for Declaratory Judgment.*]

On December 18, 2013, the Circuit Court held a hearing on Mr. O’Neal and ORIC’s competing motions for summary judgment as to whether a worker’s compensation lien could be asserted against Mr. O’Neal’s recovery. During the hearing, the parties requested the opportunity to revise their previously-submitted proposed orders to the Court. The Circuit Court agreed and directed the Parties to “submit” their revised proposed orders “on or before January 15, 2014, with service of same by mail ... upon opposing counsel.” [App. 231-234, *Order Permitting Submission of Revised Proposed Orders*, Jan. 3, 2014.]

Respondent’s Counsel complied with the Circuit Court’s order by submitting a “[Proposed] Order Granting Plaintiff Jason D. O’Neal’s Motion for Summary Judgment” to the trial judge by letter attachment on January 15, 2014, and by copying Petitioner’s Counsel with same. [App. 235-253, *Correspondence from Plaintiff’s Counsel*, Jan. 15, 2014.]

On January 24, 2014, the Circuit Court signed Respondent’s proposed order, thus ruling that Old Republic could not assert a worker’s compensation lien against benefits that it had never provided to Mr. O’Neal. [App. 10-27.] The order was entered by the Clerk on January 27, 2014.<sup>2</sup> [*Id.*] Old Republic then had a 30-day window to file a Notice of Appeal under Rule 5(b) of the *West Virginia Rules of Appellate Procedure*.

On or about January 29, 2014, Respondent’s Counsel received a copy of the signed order from the Clerk via U.S. Mail. [App. 04.] Old Republic has alleged its counsel never received a

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<sup>2</sup> As the Circuit Court did not strike the bracketed word “[Proposed]” from the title of the order when it was signed, the Clerk entered the title of the order exactly as it appeared when it was submitted by Respondent to the Circuit Court and Petitioner’s counsel: “[Proposed] Order Granting Plaintiff Jason D. O’Neal’s Motion for Summary Judgment.” [*Id.*]

copy of the order from the Clerk's office via U.S. Mail and that the Clerk failed to mail the order to its counsel as required by Rule 77 of the *West Virginia Rules of Civil Procedure*. [*Id.*] Respondent has not disputed this allegation, and the Circuit Court assumed it is true.<sup>3</sup> [*Id.*]

However, on February 25, 2014, prior to expiration of the 30-day window for filing any Notice of Appeal of the order, Petitioner's Counsel affirmatively checked the Circuit Court's docket utilizing "Circuit Express" – a third-party vendor that provides electronic docket information to lawyers in West Virginia via the Internet. [App. 203-207, *Affidavit of Tina M. Harrison*, Sept. 12, 2014.] At this time, Petitioner's Counsel saw that the "[Proposed] Order Granting Plaintiff Jason D. O'Neal's Motion for Summary Judgment" – the very same order submitted by Respondent's Counsel which Petitioner/Old Republic intended to appeal – had previously been entered on the docket by the Clerk. [*Id.*] There was no indication on the docket that any other order had been entered by the Circuit Court during this time period. [*Id.*] Petitioner's Counsel then attempted to view the "[Proposed] Order Granting Plaintiff Jason D. O'Neal's Motion for Summary Judgment" electronically, because Petitioner's Counsel admittedly knew they needed to "confirm the content" of this order with an eye toward Petitioner's potential appeal. [*Id.*] However, Petitioner's Counsel was unable to view the order electronically (for reasons that have not been explained) and, thus, could not view the order online. [*Id.*]

Petitioner's counsel then telephoned the office of the Clerk of the Court in Wyoming County. [*Id.*] At this time Petitioner's Counsel merely asked the Clerk's office whether the Circuit Court had entered a "final order" in this matter. [*Id.*] The official in the Clerk's office

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

responded that the only recently-entered order was the “[Proposed] Order Granting Plaintiff Jason D. O’Neal’s Motion for Summary Judgment.” [*Id.*] Inexplicably, Petitioner’s Counsel neither requested a hard copy of the docketed order from the Clerk’s office nor affirmatively asked the Clerk if the order in question had been signed by the Judge. Petitioner’s Counsel failed to do so despite the fact that they had previously not received a copy of the entered order from the Clerk, had failed at their efforts at viewing the document online, and assuredly intended to appeal the order submitted by Respondent. [*Id.*]

Petitioner’s Counsel continued to electronically monitor the docket in this case for the next six months but they were never able to “confirm the content” of the entered “[Proposed] Order Granting Plaintiff Jason D. O’Neal’s Motion for Summary Judgment” utilizing Circuit Express’s website. [*Id.*] There is no evidence that Petitioner’s Counsel ever contacted Circuit Express during this six-month period regarding their inability to view the order in question. Moreover, there is no evidence that, during this six-month period, Petitioner’s Counsel ever attempted to obtain a hard copy of the order in question from the Circuit Clerk, from Respondent’s counsel, from the Circuit Court, or from anyone else, nor did Petitioner’s Counsel simply ask the Clerk or the Circuit Court if the order in question had been signed by the trial judge. In the meantime, Respondent believed that his lengthy litigation was finally over.

Petitioner’s Counsel finally contacted the Circuit Court and Respondent’s counsel in late August 2014 regarding the status of the Circuit Court’s entry of a final order and Petitioner was provided with a copy of the entered order via facsimile. [App. 180, *Letter from Attorney Schessler to Circuit Court*, August 27, 2014.] On or about September 12, 2014, Petitioner filed a Rule 60 Motion for Relief from Judgment Order, requesting that the Court (1) vacate the order in question entered January 27, 2014, (2) re-name the order “Final Order,” and (3) re-enter the

order so that Petitioner might timely file a Notice of Appeal. [App. 088-105.] Thus, the Petitioner filed its Rule 60 Motion nearly eight months after the original judgment order was entered and seven months after the missed deadline for filing a Notice of Appeal.

Following oral argument, the Circuit Court denied Petitioner's Rule 60 Motion on December 18, 2014. [See, generally, App. 01-09.] The Circuit Court limited its ruling to the unusual facts in the case, in particular the fact that seven months had elapsed from the date when Petitioner's Counsel first affirmatively reviewed the electronic docket for the case (and saw the entry of order in question) until Petitioner filed its Rule 60 Motion. [Id.] The Circuit Court found that while Petitioner's Counsel's initial confusion may have been justified with respect to whether the judgment order they saw on the electronic docket had actually been endorsed, it simply should not have taken a total of seven months for Petitioner's Counsel to then obtain a copy of the order, review it, and file Petitioner's Rule 60 Motion. [Id.] The Circuit Court held that this seven month delay was a consequence of the lack of diligence of Petitioner's Counsel, and this lack of diligence over an extended period of many months rendered the Clerk's original failure to mail a copy of the judgment order to Petitioner's Counsel immaterial. [Id.]

Petitioner filed its *Notice of Appeal* with this Court on or about January 2, 2015.

#### IV. SUMMARY OF ARGUMENT

Petitioner claims that the Circuit Court erred when it denied Petitioner's Rule 60 Motion for Relief from Judgment. Specifically, Petitioner argues that it was an abuse of discretion for the Circuit Court to deny said Motion after the Circuit Clerk failed to mail a copy of the judgment order in question to Petitioner's counsel after the order had been entered by the Clerk. However, Petitioner's Brief simply ignores the undisputed evidence that Petitioner's Counsel actually knew that the Clerk had docketed the order in question – notwithstanding any failure by

the Clerk to mail it to him. Despite this knowledge, Petitioner delayed filing its Rule 60 Motion for a period of nearly seven (7) months, claiming its Counsel was unable to ascertain during this period whether the order they saw on the docket had actually been endorsed by the trial judge. Under these unusual circumstances, the Circuit Court found that the Clerk's original failure to mail the order to Petitioner's Counsel was immaterial. The Circuit Court found that Petitioner's extraordinary delay in filing its Rule 60 motion was primarily the result of its own Counsel's superseding, dilatory conduct. Given these facts, it was not an abuse of discretion for the Circuit Court to deny Petitioner's Rule 60 Motion for Relief from Judgment.

Petitioner further claims that the Circuit Court erred when it originally ruled on January 27, 2014, that Petitioner did not have a right of subrogation under *W.Va. Code §23-2A-1(b)(1)* against settlement monies that Respondent recovered from the CAI Defendants in the original litigation in this case. However, Petitioner's assignments of error related to the Circuit Court's order entered on January 27, 2014, are patently untimely. The sole reason Petitioner filed its Rule 60 Motion with the Circuit Court was because Petitioner admittedly missed its deadline for appealing the Court's January 27, 2014, judgment order. Unless and until the Circuit Court is directed to and re-enters the order it originally entered on January 27, 2014, Petitioner's assignments of error related to that order remain patently untimely. These assignments of error should be stricken from the instant appeal and Respondent so moves.

If this Court were inclined to review or examine the Circuit Court's ruling of January 27, 2014, for the purposes of gaining a better understanding of the posture and history of this litigation between Petitioner and Respondent, it would be clear that the Circuit Court did not err in ruling that Petitioner had no right of subrogation under *W.Va. Code §23-2A-1(b)(1)*, given the fact (1) that Patriot Coal, on behalf of its subsidiary (and Respondent's employer) Speed Mining,

was the sole entity who paid workers compensation benefits to the Respondent and (2) that both Patriot Coal and Speed Mining waived any claims to recover these benefits payments by the terms of a settlement agreement with Respondent in the underlying case. To rule otherwise would have been to provide an enormous windfall to Petitioner and gave it a right of subrogation with respect to workers compensation benefits that it never paid in the first place.

## V. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary pursuant to Rule 18, because the facts and arguments are adequately presented by the briefs and the record on appeal. The Court's decisional process will not be significantly aided by oral argument. *W.Va.R.App.P.* 18(a)(4).

## VI. ARGUMENT

It is well-settled that the appellate standard of review for a trial court's denial of a Rule 60 motion for relief from a judgment order is an abuse of discretion standard:

[A] motion to vacate a judgment made pursuant to Rule 60(b), West Virginia Rules of Civil Procedure, is addressed to the sound discretion of the court, and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion.

Syl. Pt. 5, *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974). This Court has further held that "[a]n appellate court should find an abuse of discretion only when the trial court has acted arbitrarily or irrationally." *State v. Beard*, 194 W.Va. 740, 750, 461 S.E.2d 486, 496 (1995).

### A. THE CIRCUIT COURT DID NOT ERR WHEN IT DENIED PETITIONER'S RULE 60 MOTION FOR RELIEF FROM JUDGMENT ORDER. THE CIRCUIT COURT'S RULING WAS REASONABLE AND FAIR GIVEN THE SPECIFIC, UNIQUE, AND UNDISPUTED FACTS BEFORE IT. [Assignment Nos. A, A-1, A-2, and A-3]

1. The Circuit Court did not abuse its discretion in finding Petitioner's Counsel dilatory for making a conscious decision not to request a copy of the judgment order in question from the

Clerk, or otherwise attempting to ascertain whether the trial judge had signed the order, for a period of six months after Counsel learned that the order had been docketed by the Circuit Clerk.

Petitioner virtually ignores the facts relevant to this issue. This is not surprising, considering that these facts support the Circuit Court's finding that Petitioner's Counsel was dilatory with respect to clarifying their confusion regarding the title of the order docketed by the Circuit Clerk and whether this docketed order was signed by the trial judge.

Petitioner's Counsel admitted they were alerted on February 25, 2014,<sup>4</sup> that the Circuit Clerk had entered the same order that Respondent's Counsel had previously sent to the Judge for entry. [App. 203-207, *Affidavit of Tina M. Harrison*, Sept. 12, 2014.] Petitioner's Counsel admitted that they knew at that time that they needed to obtain a copy of the order in order to "confirm its content." [*Id.*] Petitioner's Counsel admitted to trying view an electronic copy of the order by utilizing Circuit Express but was unable to do so. [*Id.*] After this failed effort to confirm the content of the order and clarify whether the order was indeed signed by the trial judge, Petitioner's Counsel inexplicably opted to make no further efforts to "confirm the content" of the order. [*Id.*] Petitioner's Counsel failed to request a copy from the Circuit Clerk or from anyone else. Defense Counsel never asked the Circuit Clerk, the judge's office, or Respondent's Counsel if the order entered on the docket had been signed by the trial judge. Furthermore, Petitioner's Counsel elected to continue to do nothing for a period of six additional months.

An attorney's "affirmative decision to remain in the dark" regarding the court's docket is has been referred to as "willful blindness." *Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 409 (4<sup>th</sup> Cir. 2010). Counsel who makes a calculated choice to take no action cannot later avail himself of discretionary relief from the consequences of that choice. *Id.*, at 411. Although

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<sup>4</sup> This date was *prior to* the deadline for filing a Notice of Appeal.

*Robinson* is a federal decision that is not controlling on this Court, it is nevertheless instructive, given the particular facts before the Circuit Court. In *Robinson*, the appellant was an attorney who failed to receive electronic service of a motion for summary judgment due to a computer malfunction of which he was aware. *Id.*, at 407-09. The attorney was also aware there was a pending deadline for the filing of such motions. *Id.* However, instead of trying to check the trial court's docket by other means or checking with opposing counsel, the attorney simply choose to do nothing to ascertain whether such a motion was filed. *Id.* As a consequence, he failed to respond to the pending summary judgment motion and his client's case was dismissed. *Id.* The appeals court in *Robinson* took a dim view of the attorney's "willful blindness" and refused to overrule the trial court's dismissal of his claim. *Id.*, at 410-11.

The conduct of Petitioner's Counsel in the instant case is analogous to the conduct at issue in *Robinson* – perhaps more dilatory. Petitioner's Counsel was admittedly aware of the existence of the order on the Court's docket and knew they needed to "confirm the content" of the order – after all, if the trial judge had endorsed the order submitted by Respondent's Counsel, then it would need to be appealed. Nevertheless Petitioner's Counsel elected to simply do nothing for six months to "confirm the content" of the judgment order, even after they failed, apparently on multiple occasions, to obtain an electronic copy from Circuit Express. Under these specific circumstances, it was both fair and reasonable for the Circuit Court to conclude that Petitioner's Counsel were not diligent in their efforts to obtain a copy of the judgment order or ascertain whether it bore the signature of the trial judge.

2. It was not an abuse of discretion for the Circuit Court to find that the Circuit Clerk's failure to mail a copy of the judgment order to Petitioner's Counsel was immaterial to Petitioner's extraordinary delay in filing its Rule 60 Motion, given the superseding, dilatory conduct of Petitioner's Counsel.

Petitioner attempts to deflect attention away from its own Counsel's aforementioned lack of diligence by placing all blame for its extremely delayed Rule 60 motion on the Circuit Clerk for not mailing Petitioner's Counsel a copy of the "[Proposed] Order Granting Jason D. O'Neal's Motion for Summary Judgment" that had been entered on the docket on January 27, 2014.<sup>5</sup> Petitioner's argument on this point would have merit if its Counsel had actually been relying on the U.S. Mail for notice that the Court had entered an order which Old Republic intended to appeal. But, as set forth above, this was simply not the case. Petitioner's Counsel was utilizing the third-party vendor Circuit Express to monitor filings electronically in this matter. [App. 203-207, *Affidavit of Tina M. Harrison*, Sept. 12, 2014.] By utilizing Circuit Express, Peitioner's Counsel already knew, *prior to the deadline for filing a Notice of Appeal*, that a "[Proposed] Order Granting Jason D. O'Neal's Motion for Summary Judgment" – the very order prepared and submitted by Respondent's Counsel – had been entered by the Clerk and, thus, knew that they needed to "confirm the content" of the order due to the need to appeal it. [Id.] Inexplicably, Petitioner's Counsel simply chose not to obtain a copy of the order after they tried and failed to do so electronically. [Id.] Petitioner's Counsel's failure to receive a copy of the order by U.S. Mail did not preclude them, prior to the deadline for filing an appeal, from knowing that the "[Proposed] Order Granting Jason D. O'Neal's Motion for Summary Judgment" had been entered on the docket and knowing that they needed a copy of it for Petitioner's appeal. Thus, the Circuit Clerk's initial failure to mail a copy of the order to Petitioner's Counsel did not preclude Petitioner's Counsel from obtaining a copy of the order – had Petitioner's Counsel merely acted with ordinary diligence after they were alerted to the presence of the order on the Clerk's docket.

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<sup>5</sup> Petitioner also blames the trial judge for failing to black-out the word "[proposed]" in the title of the order.

Under these specific facts, it was not an abuse of discretion for the Circuit Court to find that the Clerk's failure to mail the judgment order to Petitioner's Counsel was immaterial as it related to Petitioner's extraordinary delay in filing its Rule 60 Motion. It was reasonable for the Circuit Court to conclude that the primary cause of this extraordinary delay was the dilatory conduct of Petitioner's Counsel.<sup>6</sup>

3. The Circuit Court's ruling does not stand for the proposition that parties must "mine the docket" regarding the entry of orders.

Petitioner avers that the Circuit Court's ruling below is tantamount to a ruling that parties must "mine the docket" regarding the entry of orders. The Petitioner doth protest too much in making such an argument. As set forth above, Petitioner's Counsel did mine the docket (electronically) in this case.<sup>7</sup> Because they were doing so, Petitioner's Counsel were alerted to the entry of the judgment order and the need to immediately "confirm the content" of the order for an appeal. However, as the Circuit Court found, Petitioner's Counsel's lack of diligence in ascertaining the content of the order they knew had been entered resulted in a lengthy, unexcusable delay in filing Petitioner's Rule 60 Motion. If the Circuit Court's ruling can be said to "stand" for anything, given the unusual facts of this case, perhaps it stands for the proposition that counsel who elects to "mine the docket" must act with ordinary diligence with respect to the information it obtains when so doing. This is hardly a novel or controversial position.

4. It was not an abuse of discretion for the Circuit Court to effectively deny Petitioner's right to have its appeal heard on the merits, given the specific facts of this case.

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<sup>6</sup> For this reason, and contrary to Petitioner's assertion, the Circuit Court did not in any way "condone" the Circuit Clerk's failure to mail the judgment order when the Circuit Court ruled that this failure was immaterial.

<sup>7</sup> It is typical for counsel to make affirmative inquiries of trial courts and circuit clerks regarding the entry of orders that may be appealed, because the "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed." Rule 77(d), W.Va.R.Civ. P.

Petitioner essentially takes the position that it has an absolute right to have its case, including any appeal, heard on the merits. However, Petitioner cites no authority that supports this position. The Circuit Court was obligated to consider the specific facts before it when it ruled on Petitioner's Rule 60 Motion, and the Circuit Court made it clear that it narrowly tailored its ruling to fit the particular circumstances of this case, holding:

[T]he Court notes that it is expressing no opinion on certain hypothetical sets of facts that are not before it at this time, namely: (1) What if Old Republic's counsel had relied exclusively on the U.S. Mail for notice and had never received actual notice, by other means, that the order in question had been entered; or (2) What if Old Republic had filed its Rule 60 *Motion* significantly closer in time to the missed deadline for filing its Notice of Appeal. As set forth above, the Court's ruling herein is limited to the unusual and particular facts of this case.

[App. 8-9.]

It was not an abuse of discretion by the Circuit Court to rule that Petitioner's eight-month delay (from the date of entry of the judgment order) was inexcusable, given its Counsel's lack of diligence in obtaining a copy of an order they already knew had been entered on the docket. This is so even though the Circuit Court's ruling effectively prevents Petitioner from pursuing the merits of an appeal.

There is no absolute right to pursue the merits of an appeal. For example, Rule 60 explicitly limits the filing of Rule 60(b) motions, even in cases of alleged fraud, to a period within a year from the date the judgment order was entered. Rule 60(b) *W.Va.R.Civ.P.* Petitioner was beginning to approach this cutoff date when it filed its Rule 60 Motion.

Moreover, this Court has previously ruled that the lack of diligence of a party's counsel is a recognized basis for depriving that party of discretionary relief from the trial court. "It is

generally held that an attorney's negligence will not serve as the basis for setting aside a default judgment on grounds of 'excusable neglect.'" *White v. Berryman*, 187 W.Va. 323, 332, 418 S.E.2d 917, 926 (1992).

Petitioner argues that its circumstance is similar to that of the defendant in *Prima Marketing LLC v. Hensley*, 2015 WL 869265 (W.Va. 2015) (unpublished Memorandum Decision), who did not receive a summons and complaint for a lawsuit due to the fact that Secretary of State maintained an incorrect address for service of process for the defendant – as a result, a default judgment was taken against the defendant. (*Id.*, slip op. 2-4.) Petitioner's circumstance is quite different. Petitioner was already a party represented by counsel in the instant case, and its extraordinary delay in filing its Rule 60 Motion was due to its own Counsel's lack of diligence in obtaining the copy of the Court's judgment order that they actually knew had been docketed by the Clerk. Had the defendant in *Prima Marketing* had a lawyer that actually knew that a lawsuit had been filed against it, but that lawyer failed to further investigate why his client did not receive a copy of the summons from the Secretary of State or otherwise attempt to obtain it, it is likely that this Court would have ruled differently.

**B. PETITIONER'S ASSIGNMENTS OF ERROR RELATED TO THE CIRCUIT COURT'S ORDER ENTERED JANUARY 27, 2014, ARE PATENTLY UNTIMELY AND SHOULD BE STRICKEN FROM THE APPEAL.**

Petitioner devotes a full half of its Brief to arguing that the Circuit Court erred by ruling, on January 27, 2014, that Petitioner could not assert a subrogation lien under *W.Va. Code* § 23-2A-1 against monies recovered by Respondent from CAI Defendants in the original litigation. However, the sole reason Petitioner filed its Rule 60 Motion with the Circuit Court was because Petitioner admittedly missed its deadline for appealing the Court's January 27, 2014 ruling. Unless and until the Circuit Court re-enters the order it originally entered on January 27, 2014,

Petitioner's assignments of error related to that order remain patently untimely. These assignments of error should be stricken from the instant appeal. Petitioner does not get a free pass to argue patently untimely assignments of error by virtue of filing an appeal of a subsequent order denying a Rule 60(b) motion:

[A]n appeal of the denial of a Rule 60(b) motion brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order.

Syl. Pt. 3, *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974).

**C. THE CIRCUIT COURT DID NOT ERR IN ITS JANUARY 27, 2014, RULING BY HOLDING PETITIONER HAD NO RIGHT OF SUBROGATION UNDER W.VA. CODE §23-2A-1(b)(1). [Assignment Nos. B, B-1, and B-2]**

If this Court were inclined to review or examine the Circuit Court's ruling of January 27, 2014, for the purposes of gaining a better understanding of the posture and history of the litigation between Petitioner and Respondent, it would be clear that the Circuit Court did not err in ruling that Petitioner had no right of subrogation under *W.Va. Code* §23-2A-1(b)(1), given the fact that (1) Patriot Coal, on behalf of its subsidiary (and Respondent's employer) Speed Mining, was the sole entity who paid relevant workers compensation benefits to the Respondent and (2) both Patriot Coal and Speed Mining waived any claims to recover these benefits payments by the terms of a settlement agreement with Respondent in the underlying case. To rule otherwise would have been to provide an enormous windfall to Petitioner and gave it a right of subrogation with respect to workers compensation benefits that it never paid in the first place.

The following facts supplement Respondent's previous Statement of the Case, should this Court wish to review the Circuit Court's ruling of January 27, 2014:

Respondent Jason O'Neal's employer, Speed Mining, was a named insured on a workers' compensation insurance policy that had previously been issued to Magnum Coal Company by

Petitioner Old Republic. About one year prior to Mr. O’Neal’s workplace accident, Patriot Coal Corporation acquired Magnum Coal and all of its subsidiaries (including Speed Mining). (App. 840-844, *Affidavit of Lawrence Bell*, May 18, 2010, at pp. 2-3.] After this acquisition Patriot Coal immediately began to wind up the affairs of Magnum Coal while continuing to operate its newly acquired mining subsidiaries, including Speed Mining. [*Id.*]

Following Mr. O’Neal’s workplace accident, Speed Mining was obligated to provide WV Workers’ Compensation benefits to him. Speed Mining did so with through its parent corporation, Patriot Coal. Because of the catastrophic nature of Mr. O’Neal’s injuries, the dollar amount of the workers compensation benefits provided to him rapidly escalated. An affidavit from a Patriot Coal administrator that was previously filed in this litigation in 2010, describes, in detail, how Mr. O’Neal’s workers compensation benefits were provided. The affidavit makes it clear that Patriot Coal, not any insurance company, paid workers compensation benefits to Respondent on behalf of his employer (and its subsidiary) Speed Mining, that these costs were then borne by Speed Mining, and that Patriot Coal utilized the services of a third-party administrator, then known as Avizent, to facilitate cutting benefits checks to Mr. O’Neal:

3. Patriot Coal Corporation utilizes the services of certain companies, including Avizent, an Ohio risk-management company, to provide workers’ compensation third-party administration (“TPA”) services to Patriot Coal Corporation and its subsidiary entities.

4. Avizent maintains an account, funded solely by Patriot Coal Corporation, from which workers’ compensation payments are drawn for claims filed by employees of Patriot Coal Corporation and its subsidiaries.

5. Avizent is responsible for the issuance of Patriot Coal Corporation and certain subsidiary entities’ workers’ compensation checks.

6. Patriot Coal Corporation is the *only entity* funding the Avizent maintained workers' compensation account.
7. Patriot Coal Corporation funds the Avizent account on a weekly basis via wire transfer.
8. Patriot Coal Corporation allocates the cost of funding the Avizent account to the applicable employer subsidiaries.
9. Speed Mining LLC bears the costs of all workers' compensation payments made to its employees by Avizent.
10. Speed Mining LLC bears the costs of all workers' compensation payments made to Jason O'Neal.

[App. 845-848, *Affidavit of Gary Kennedy*, June 3, 2010, at p. 2, emphasis added.] Petitioner Old Republic had no role whatsoever in this process.

The aforesaid affidavit supports statements made by Speed Mining and Patriot Coal during this litigation that they were, for all practical purposes, "self-insured" with respect to Speed Mining's workers' compensation obligations to Respondent O'Neal, at least until such date as the benefits paid to him would exceed \$2 million:

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

[App. 849-852, *Letter from Christopher A. Brumley, Esq.*, counsel for Speed Mining and Patriot Coal, dated June 17, 2010.] These same facts were later echoed by the third-party administrator, Avizent:

Currently the claimant has had monies paid on his behalf or directly to him \$1,678,346.57 from the underlying Workers' Compensation claim. Speed Mining is self insured up to its \$2 million self-insured retention on the policy applicable to Mr.

O'Neal. Old republic is the carrier after that \$2 million, so any subrogation rights after that amount will be the statutory right of Old republic.

[App. 329-330, *Letter from Michelle Craft*, claims adjuster for Avizent, November 22, 2011]

On or about October 13, 2011, Respondent O'Neal and his family settled their claims against his employer, Speed Mining, and entered into a written settlement agreement. The plain terms of the *Release and Settlement Agreement* make it clear that the settlement reached was a settlement of all rights and claims that might exist between the parties as a result of Respondent's catastrophic workplace accident:

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

[App. 382-395, *Release and Settlement Agreement*, October 13, 2011, at p. 4.] The terms of the settlement expressly preserved Respondent's right to continue to receive future workers compensation medical benefits from Speed Mining. [*Id.*, at p. 2.] However, the terms of the settlement *did not* preserve Speed Mining's right to assert a subrogation lien against Respondent pursuant to W.Va. Code 23-2A-1.<sup>8</sup>

Following Respondent and his family's settlement with Speed Mining,<sup>9</sup> they continued to litigate their third-party product liability claims against the CAI-defendants. During this period, Respondent received the above-referenced letter from Avizent's claim representative regarding

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<sup>8</sup>Under the terms of the Release and Settlement Agreement, the "Releasee" is defined to include the "parent companies" of Speed Mining, which would, of course, include Patriot Coal. Therefore Patriot Coal likewise failed to preserve any right it might claim to have to assert a lien against Respondent Mr. O'Neal pursuant to W.Va. Code 23-2A-1. (*Id.*)

<sup>9</sup> Plaintiffs also agreed to dismiss their claims against Patriot Coal at the time of their settlement with Speed Mining.

Petitioner Old Republic's purported lien on any monies received from these defendants. [App. 329-330] On March 21, 2012, Respondent subsequently moved the Court for permission to amend his complaint to add a count for declaratory relief against Old Republic with respect to any lien it might attempt assert under W.Va. Code 23-2A-1.

Upon hearing Respondent O'Neal's motion, the Court, *sua sponte*, ruled from the bench that Old Republic would not have a lien on any recovery from the CAI defendants, based on the information contained in the above-referenced letter (*Id.*) and the apparent fact that Old Republic had not actually paid any workers' compensation benefits to Respondent. [App. 837-839, *Order* dated May 1, 2012, at p. 2.] However, given the fact that Old Republic had not yet been added as a party at the time of the Court's ruling, Respondent later amended his complaint to add Old Republic and the count for declaratory relief. Respondents settled their claims against the CAI defendants on or about April 26, 2012. On the date of this settlement, the total dollar amount of workers compensation benefits provided to Jason O'Neal by Patriot Coal did not exceed the \$2 million limit referenced in the aforementioned correspondence from Speed Mining and Avizent. [App. 019.]

1. The Circuit Court did not err in ruling that Petitioner did not have an independent right to assert a subrogation lien pursuant to *W.Va. Code* §23-2A-1, when Petitioner never paid a penny in worker compensation benefits related to Jason O'Neal's claim, and that it did not have a derivative right based on the rights of Speed Mining or Patriot Coal that had been waived during settlement.

It is uncontroverted that Petitioner did not provide workers compensation benefits to Respondent O'Neal. As indicated above, Respondent's workers compensation benefits were paid by Patriot Coal on behalf of its' subsidiary, Speed Mining (Respondent's employer). [App. 845-848, *Affidavit of Gary Kennedy*, June 3, 2010.] ("Patriot Coal Corporation is the *only* entity funding the Avizent maintained workers' compensation account [used to provide workers'

compensation benefits to Mr. O’Neal.”) (Emphasis added.) This fact was confirmed by Petitioner’s corporate designee, Betsey Sellers, who testified:

Q: Okay. To your knowledge, sitting here today, it would be your understanding that the ultimate funding for every single amount on here would have been Patriot Coal?

A: These payments would have been paid out of the fund that was established by Avizent for the Magnum workers’ compensation policy that was funded by Patriot.

Q: So, Patriot would have been the ultimate source of the funding for every single amount on here, to your knowledge?

A: Until the [\$2 million] deductible would have been met.

[App. 396-482, *Deposition of Old Republic/Betsey Sellers*, July 30, 2013, at p. 58.] Ms. Sellers went on to testify in this litigation that that, given the fact that Petitioner Old Republic, was not attempting to recover monies that it had previously paid, if Petitioner *was* successful in asserting its purported subrogation lien against Respondent, then Petitioner would simply turn around and give the monies to Patriot Coal:

Q: And with respect to ... a recovery of a lien amount that you’ve asserted in this case, a recovery by Old Republic on that, would that then be paid [by Old Republic] directly to Patriot rather than to Avizent, to your knowledge?

A: ... I believe the reimbursement goes directly to Patriot.

[*Id.*, at p. 60.]

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

With respect to any claim arising from a right of action that arose or accrued, in whole or in part, on or after January 1, 2006, the

private carrier or self-insured employer, whichever is applicable, shall be allowed statutory subrogation *with regard to indemnity and medical benefits paid* as of the date of the recovery.

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

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

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

*Bush v. Richardson*, 199 W.Va. 374, 377, 484 S.E.2d 490, 493 (1997) (emphasis added), citing Syl. Pt. 4, *Ray v. Donohew*, 177 W.Va. 441, 352 S.E.2d 729 (1986). See also, *Travelers Indem. Co. v. Rader*, 152 W.Va. 699, 703, 166 S.E.2d 157, 160 (1969) (“[S]ubrogation is an equitable right which arises out of the facts and which entitles the subrogee to collect *that which he has advanced.*”) (emphasis added); *Kittle v. Icard*, 185 W.Va. 126, 130, 405 S.E.2d 456, 460 (1991) (“[Subrogation provides a remedy to] one secondarily liable *who has paid the debt of another* and to whom in good conscience should be assigned the rights and remedies of the original creditor.”) (emphasis added).

The Circuit Court’s ruling that Petitioner had no independent right of subrogation because it never paid any of Respondent’s workers compensation benefits is supported by the text of the statute. The statute provides that the “applicable” insurance carrier or self-insured employer is entitled to subrogation “with regard to indemnity and medical benefits *paid* as of the date of the recovery.” W.Va. Code 23-2A-1(a)(1). In other words, the right of subrogation under the statute is premised on a party’s payment of benefits to the injured worker. This is

consistent with the ordinary meaning of the term “subrogation,” whereby a subrogee is entitled “to collect that which he has advanced.” *Travelers Indem. Co. v. Rader, supra*.

Petitioner’s argument that it is entitled to subrogation, under *Bush v. Richardson*, 199 W.Va. 374, 377, 484 S.E.2d 490, 493 (1997), irrespective of the fact that it never actually paid or provided workers compensation benefits to Respondent O’Neal, is not persuasive. In *Bush v. Richardson*, this Court held that the common law “made whole” rule had been explicitly written out of W.Va. Code 23-2A-1. *Id.*, at Syl. Pt. 4. However, this Court did not rule in *Bush v. Richardson* that the fundamental ordinary definition of “subrogation” had been written out of W.Va. Code 23-2A-1. On the contrary, the West Virginia Supreme Court reiterated this fundamental definition of “subrogation” in its ruling:

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

199 W.Va. at 377, 484 S.E.2d at 493 (1997) (emphasis added), citing Syl. Pt. 4, *Ray v. Donohew*, 177 W.Va. 441, 352 S.E.2d 729 (1986).

Petitioner’s argument that its status as the private workers compensation carrier for Speed Mining under the Magnum Coal policy makes it the “applicable” party entitled to subrogation under W.Va. Code 23-2A-1(b)(1) ignores the manner by which Patriot Coal actually provided workers compensation benefits to Respondent on behalf of Speed Mining, following Patriot Coal’s acquisition of Magnum Coal. Patriot Coal was self-insured for its workers compensation claims in West Virginia and directly funded Respondent’s workers compensation benefits on behalf of its subsidiary. It was not error for the Circuit Court to characterize Speed Mining a de-facto self-insured employer under the statute, given the fact that its injured employee’s workers

compensation benefits were actually paid by its parent corporation, Patriot Coal, who was self-insured.

Petitioner's reliance to Argonaut Ins. Co. v. Baker, 87 S.W.3d 526 (Tex. 2002), does not support its argument that it has a right to subrogation. In *Argonaut*, the Texas Supreme Court ruled that a private workers compensation insurer was entitled to recover all of the benefits it had paid, including a deductible. The court held that basic principles of subrogation dictated that the insurer ought to be able to recover those monies that it had actually paid. *Id.* at 529-30. (“[The statutory right to subrogation] applies equally to all subrogation claims to allow the carrier to be *reimbursed* from a third-party recovery for all benefits *it has paid*, regardless of whether a deductible is involved.”) (Emphasis added.) This concept of subrogation as a tool to permit the reimbursement of monies actually paid is consistent with the black letter definition of subrogation under West Virginia law, as stated in *Bush v. Richardson*, *supra*. Given this fact, the *Argonaut* decision actually supports the Circuit Court's ruling. Unlike the insurer in *Argonaut*, Petitioner did not pay any workers' compensation benefits to Respondent. Petitioner cannot be reimbursed for that which it never previously paid.

Petitioner's argument that Speed Mining lacked authority to waive Petitioner's subrogation rights under W.Va. Code 23-2A-1(b)(1) is also not persuasive. The insurance contract itself indicates that Petitioner merely stands in the shoes of its insured (Speed Mining) with respect to its right of subrogation, and, thusly, instructs its insured to protect whatever rights its insured may have:

1. Recovery from Others

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 injury. You will do everything necessary to protect those rights for us and help us enforce them.

[App. 853-856, *Workers Compensation and Employers Liability Deductible Plan Endorsement with Optional Aggregate*, at p. 2.] This language did not preclude Speed Mining (nor Patriot Coal) from waiving its right to be reimbursed for the workers compensation benefits to Respondent at the time it reached a settlement agreement with him. It is undisputed that this, in fact occurred. Given the events that have transpired, Petitioner may have a claim against Speed Mining for failing to protect Petitioner's rights, but Petitioner cannot now assert rights which its insured contracted away in a settlement agreement.

Adopting Petitioner's arguments and its interpretation of *W.Va. Code 23-2A-1(b)(1)* would result in an extraordinary windfall for the Petitioner. As the Circuit Court noted in its ruling, there is nothing to prevent Petitioner from simply pocketing any money that it recovered from Respondent, despite the fact it never paid a penny of Respondent's workers compensation benefits:

Although Old Republic, through its corporate representative, has testified that it will provide any recovery it obtains from Mr. O'Neal to Patriot Coal, there is no evidence before the Court that Patriot Coal believes it is owed a reimbursement by Mr. O'Neal. On the contrary, in its pending bankruptcy proceedings, Patriot Coal identified Mr. O'Neal as a creditor to whom it owes workers compensation medical benefits. Old Republic has identified no filings in Patriot Coal's bankruptcy which would indicate that Patriot Coal or its subsidiaries considered Old Republic to be a debtor in the bankruptcy proceedings with respect to the purported lien against Mr. O'Neal. These facts call into question Old Republic's stated intent to "pass-through" any money obtained from Mr. O'Neal to Patriot Coal. Instead, these facts raise the possibility that Old Republic, should it be permitted to be "reimbursed" for a debt it never incurred, will either simply pocket the money or otherwise receive some other type of financial windfall from Patriot Coal, all at the expense of Mr. O'Neal.

[App. 24-25, internal citations omitted.] Petitioner has not proffered any explanation why *W.Va. Code* 23-2A-1(b)(1) should be read to require such an arcane and manifestly unjust result.

## VII. CONCLUSION

For all of the forgoing reasons, Petitioner's appeal should be denied, Petitioner's assignments of error related to the Circuit Court's judgment order entered January 27, 2013, should be stricken, and the Circuit Court's denial of Petitioner's Rule 60 Motion should be affirmed.

**Respectfully Submitted,  
Jason O'Neal, et al., by Counsel,**



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-0012

OLD REPUBLIC INSURANCE COMPANY,

Appellant and Petitioner,

v.

Civil Action No.: 10-C-20

Judge Warren A. McGraw

Circuit Court of Wyoming County, West Virginia

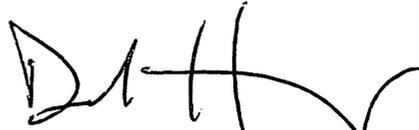
JASON D. O'NEAL, *et al.*,

Appellees and Respondents.

**CERTIFICATE OF SERVICE**

I, David Carriger, do hereby certify that service of the foregoing "***Respondents' Brief in Opposition to Old Republic Insurance Company's Petition for Appeal,***" has been made upon counsel of record by United States mail, postage pre-paid to the following on this 4<sup>th</sup> day of June, 2015:

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