

**IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA**

**Brian Frye,**

Plaintiff,

v.

Civil Action No. 19-C-52  
Jason A. Cuomo, Judge

**Erie Insurance Property and  
Casualty Company,**

Defendant.

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**ORDER GRANTING DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

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This matter comes before the Court on Defendant Erie's *Motion for Summary Judgment* filed on **February 10, 2022**, Plaintiff's *Response* filed on **February 22, 2022**, and the Defendant's *Reply* filed on **February 25, 2022**. The Court also conducted an in-person pre-trial conference on **February 28, 2022**, at which the parties more fully discussed and presented their arguments to the Court.

Having thoroughly considered the parties' briefings and attachments, as well as the relevant record, the Court finds the facts and legal arguments to have been adequately presented, and that the decisional process would not be significantly aided by oral further argument. The issue is mature for consideration.

## **I. RELEVANT FACTS AND/OR PROCEDURAL HISTORY**

1. Plaintiff, Brian Frye, owns a home located at 10123 National Road, Valley Grove, West Virginia 26060. (*Complaint*, ¶ 2)

2. At all times relevant, Plaintiff had a homeowner's insurance policy through Defendant Erie (No. Q60 8100279 (the "Policy")), which included a mine subsidence endorsement. (*Id.*, ¶ 6)

3. Plaintiff discovered property damage to his home and submitted a claim to Erie on **November 21, 2017**, which was assigned claim number #A00000628722. (*Id.*, ¶¶ 9 and 10)

4. Plaintiff expected that the claim presented would be paid under either the mine subsidence endorsement or some other coverage provision of the Policy. (*Id.*, ¶ 21)

5. On **December 12, 2017**, Defendant informed Plaintiff that a mine subsidence investigation would be conducted by the WV Board of Risk Management ("BRIM"). (*Id.*, ¶ 12)

6. Defendant Erie retained an engineer to conduct a mine subsidence inspection of Plaintiff's property and on **January 19, 2018**, engineer Al Bragg of Romauldi, Davidson & Associates conducted said inspection. (*Id.*, ¶¶ 13, 15)

7. On **February 13, 2018**, Mr. Bragg completed his report and opined therein that the damage to Plaintiff's home was not caused by mine subsidence. (*Id.*, and Bragg's February 13, 2018 report)

8. Plaintiff acknowledges that during the pendency of Plaintiff's claim, Defendant Erie sent delay letters on at least a monthly basis, sometimes more frequently, advising the Plaintiff that BRIM's investigation of the mine subsidence claim was still pending. (*Frye Depo.*, pp. 65-66)

9. On **October 15, 2018**, BRIM received a report prepared by an engineer firm it retained to conduct an additional mine subsidence inspection, Bloomberg Consulting. Bloomberg also concluded and stated in its report that the damage to the Plaintiff's residence was **not** caused by mine subsidence. (October 12, 2018 Bloomberg Consulting Engineer report)

10. On **October 19, 2018**, Defendant Erie sent a denial of Plaintiff's claim to the Plaintiff and indicated that his property was **not** caused by mine subsidence. Defendant Erie attached both the Bragg report and the Bloomberg report to this letter. (October 19, 2018 denial letter)

11. On **February 21, 2019**, Plaintiff filed the instant suit asserting that the Defendant Erie breached the parties' contract of insurance by refusing to pay the mine subsidence claim. Plaintiff also alleged in his Complaint claims for common law and statutory bad faith pursuant to subsections (a)- (h) of W. Va. Code § 33-11-4(9) – including allegations that Defendant Erie failed to conduct a reasonable investigation of all claims arising under the Policy and improperly delegated to BRIM the obligations it owed to its insured. (*Id.*, generally; and ¶¶ 16-36)

12. At some point, Defendant Erie filed a *Motion for Judgment on the Pleadings* and, pursuant to an Order dated July 8, 2021, this Court denied the same on the basis that the Plaintiff's *Complaint* was sufficiently broad to include allegations of **more than** just mine subsidence claims issues:

While BRIM retains statutory authority to investigate and deny claims related to mine subsidence endorsements pursuant to W. Va. Code, § 33-30-1 *et seq.*, BRIM's role does not nullify Erie's obligation to its insured to reasonably investigate all claims arising under its homeowners insurance policies such that would render any breach of contract claim legally inoperative. Plaintiff has adequately set forth factual allegations supporting viable claims for breach of contract as well as common law and statutory bad faith.

(Order dated July 8, 2021, p. 6)

13. With discovery now closed, and in an attempt to test whether the Plaintiff has now provided evidence to the Court to support his broader claims (i.e., claims beyond the alleged mishandling or wrongful denial of his **mine subsidence** claim), the Defendant has filed a *Motion for Summary Judgment*.

The Court now turns to the appropriate standards of review for *Motions for Summary Judgment*.

## **II. STANDARDS OF REVIEW**

1. Rule 56(c) of the West Virginia Rules of Civil Procedure provides that the Court should grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." WVRCP 56(c)

2. Rule 56 is "designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial, if in essence there is no real dispute as to salient facts or if only a question of law is involved." Painter v. Peavy, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994).

3. "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. pt. 2, Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995).

4. "If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is

necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure." Id., at syl. pt. 3

5. Questions regarding the truthfulness or credibility of a witness — expert or otherwise — are questions for a jury. See syl. pt. 3, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994) ("The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."); see also, Williams v. Precision Coil, Inc., 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995) ("credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge").

### III. DISCUSSION & ORDER

Once an insured notifies an insurer of a policy claim for mine subsidence damage and the insurer transfers the claim to BRIM for its handling (pursuant to W. Va. Code § 33-30-1, *et seq.* and the regulations enacted pursuant thereto), may an insured maintain a valid breach of contract action against the insurer for BRIM's denial of the mine subsidence claim and/or for valid "bad faith" claims against the insurer (i.e., violations of UTPA, substantially prevailed, etc.)?

This Court answers in the negative. Absent (1) fraud, (2) any wrongful conduct occurring between the time of receiving notice of a mine subsidence claim and transferring the claim to BRIM (e.g., delay in transferring the case to BRIM), and/or (3) any wrongful handling of claims **other than** mine subsidence, an action for breach of contract may not be maintained against insurer per W. Va. Code § 33-30-1, *et seq.* and the regulations enacted pursuant thereto. In



this case, because the Plaintiff has presented insufficient evidence which would create genuine issues of material fact for a jury to decide on any of the above three scenarios, Plaintiff's breach of contract claims, as well as his extra contractual claims (as discussed further below) must be dismissed.

West Virginia Code § 33-30-1 *et seq.* and West Virginia Code of State Rules § 115-1-4 set forth the statutory authority by which BRIM is directed to investigate and determine mine subsidence claims submitted under homeowner's policies in the State of West Virginia. West Virginia Code § 33-30-8, entitled "Reinsurance agreements," directs that mine subsidence claims are ultimately paid by BRIM out of a finite fund set up by the State of West Virginia for that precise purpose:

All companies authorized to write fire insurance in this state shall enter into a reinsurance agreement with the board in which each insurer agrees to cede to the board one hundred percent, up to \$200,000, of any subsidence insurance coverage issued and, in consideration of the ceding commission retained by the insurer, agree to absorb all expenses of the insurer necessary for sale of policies and any administration duties of the mine subsidence insurance program imposed upon it pursuant to the terms of the reinsurance agreement. ***The board is authorized to undertake adjustment of losses and administer the fund, or it may provide in a reinsurance agreement that the insurer do so.*** The board shall agree to reimburse the insurer from the fund for all amounts paid policyholders for claims resulting from mine subsidence and shall pay from the fund all costs of administration incurred by the board but an insurer is not required to pay any claim for any loss insured under this article except to the extent that the amount available in the mine subsidence insurance fund, as maintained pursuant to sections four and five of this article, is sufficient to reimburse the insurer for such claim under the section and without moral obligation.

(emphasis by this Court)

This Court must now analyze the validity of Plaintiff's claims against his insurer, Defendant Erie, who turned over the handling of the Plaintiff's mine subsidence claims to BRIM pursuant to said statutory scheme.

**A. BREACH OF CONTRACT CLAIM FOR MINE SUBSIDENCE COVERAGE**

Plaintiff argues that BRIM does not exclusively investigate, adjust, or otherwise handle the entirety of Plaintiff's claim. Instead, as Plaintiff's argument continues, it is Defendant Erie who investigates, adjusts, and otherwise handles the claim, at least in part, and Defendant Erie should be held to account for its faulty denials of coverage, adjustment and settlement of any such claims. In support of this argument, the Plaintiff points to a letter dated November 28, 2017 written by BRIM in which BRIM indicated that "it is not a direct insurer of Mr. Frye's property" and that it "basically services as a reinsurer for ERIE," the Plaintiff has provided this Court with no reinsurance agreement in which BRIM authorized Defendant ERIE to "undertake adjustment of losses."

This Court must reject Plaintiff's argument. In 1993, the Supreme Court of Appeals of West Virginia in Higginbotham v. Clark, 189 W. Va. 504, 432 S.E.2d 774 (1993) explained BRIM's role in mine subsidence claims as follows:

[T]he Board of Risk's jurisdiction extends to settlement questions and the adjustment of claims. Pursuant to regulations promulgated by the Board of Risk, claims are administered in the following manner:

4.1 Administration of claims. All mine subsidence claims shall be reported to the Board for assignment to qualified independent adjusting firms in accordance with claim procedures as outlined on Appendix D. The selected adjusting firm will send all reports simultaneously to the insurer and the Board with **all settlement authority, coverage questions and related matters being resolved by the Board**. The Board will reimburse the insurer for all sums



expended in accordance with the provisions of the reinsurance agreement.

115 W.V.C.S.R. 1-4.1.

***This regulation makes it clear that the insurer acts merely as an agent of the State and is bound by the Board's decisions, because 'all settlement authority, coverage questions and related matters' are to be resolved by the Board.***

(emphasis by this Court) *Id.* at 509-10, 432 S.E.2d 774, 779-80 (1993)

This issue was also recently addressed by the federal northern district court of West Virginia in a factually similar case in 2021. Although this Court is not bound by decisions of the federal courts on this issue, this Court finds compelling a January 29, 2021 Order in the case of *Patterson v. Westfield Ins. Co.*, 5:19-cv-17 at p. 10-12 (N.D. W.Va. Jan. 29, 2021) (Bailey, J.), in which the district court, in granting summary judgment to the insurer, held:

West Virginia law mandates that only BRIM investigates and ultimately decides whether or not to pay mine subsidence claims in West Virginia. . . . As such, while [a carrier] is required by statute to include the mine subsidence endorsement in its insurance policies, it has no authority to decide whether or not such claims are paid.

. . .

[the carrier] cannot be found to have breached its contract with [the policyholder] for an adverse decision rendered exclusively by BRIM as required by applicable statute.

*Patterson v. Westfield Ins. Co.*, 5:19-cv-17 at p. 10-12 (N.D. W.Va. Jan. 29, 2021) (Bailey, J.)

In the case at bar, it appears clear to this Court that Plaintiff's breach of contract claims for **mine subsidence** coverage against Defendant Erie cannot be maintained. Only BRIM had the authority to investigate and approve Plaintiff's

claim for mine subsidence coverage. BRIM concluded that there was no evidence of mine subsidence and denied Plaintiff's claim for mine subsidence coverage. Defendant Erie had no authority to approve and pay Plaintiff's claim for mine subsidence, even if determined to be valid, and as such, there can be no breach of contract by Defendant Erie. For as unfair as that may seem, this is the statutory scheme developed by the West Virginia Legislature and our Supreme Court of Appeals, at least in Higgenbotham, appears to have gone along with such a scheme.

The Plaintiff's reference to a 2014 federal northern district court of West Virginia opinion from the case of Bettinazzi v. State Farm Fire and Cas. Co., 5:13-cv-166 (N.D. W.Va. Janu 22, 2014) is misplaced. In Bettinazzi, the issue before the district court was similar to that presented to this Court in its July 8, 2021 Order. In other words, the Bettinazzi Court had to determine whether the Plaintiff's Complaint was sufficiently broad enough to include **generalized** breach of contract claims, beyond mine subsidence, in order to survive a 12(b)(6) motion. Just like in Bettinazzi, this Court likewise found Plaintiff's allegations in his Complaint to be sufficiently broad to potentially include breach of contract claims **beyond those** involving mine subsidence and survive a motion to dismiss.

#### **B. BREACH OF CONTRACT CLAIMS FOR "OTHER" COVERAGE**

Has the Plaintiff produced evidence, now that discovery is closed, to establish that genuine issues of fact exist regarding breach of contract claims on coverage **other than** mine subsidence coverage? This Court **FINDS** that he has not.

The Plaintiff has undertaken no discovery or depositions, and has produced no interrogatory answers, requests for admissions, or affidavits which would aid in establishing questions of fact for a jury to resolve on the issue of a wrongful denial of coverage on coverage other than on mine subsidence coverage.

As such any alleged claims by Plaintiff for breach of contract claims on coverage other than mine subsidence cannot be maintained.

**C. BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING**

“An alleged breach of the covenant of good faith and fair dealing is not a separate cause of action from a breach of contract claim.” State ex rel. Nationwide Mut. Ins. Co. v. Wilson, 236 W. Va. 228, 231, 778 S.E.2d 677, 680 (2015); *see also* Sizemore v. Allstate Vehicle & Prop. Ins. Co., No. 2:19-CV-00704, 2020 WL 4805448, at \*3 (S.D.W. Va. Aug. 18, 2020) (citations omitted) (dismissing the insured’s breach of covenant claim and noting that “[t]he West Virginia Supreme Court of Appeals has declined to recognize an independent claim for a breach of the common law duty of good faith and has instead held that such a claim sounds in breach of contract.”). “Absent a contract obligation to pay a claim, no bad faith cause of action exists, either at common law or by statute.” *See Hawkins v. Ford Motor Co.*, 211 W. Va. 487, 492, 566 S.E.2d 624, 629 (2002)

Given that this Court has found that the Plaintiff cannot present his breach of contract claims on mine subsidence coverage, nor breach of contract claims on other coverage, Plaintiff likewise cannot present a standalone claim for breach of the implied covenant of good faith and fair dealing. In other words,

because Plaintiff's breach of contract claims have failed, so too must his claims for breach of the implied covenant of good faith and fair dealing.

#### **D. STATUTORY BAD FAITH**

Plaintiff can prevail on his remaining claim for statutory bad faith under the West Virginia Unfair Trade Practices Act ("UTPA") only upon a showing that: (1) Erie violated the UTPA, (2) there were multiple, discrete violations indicative of a general business practice, and (3) Plaintiff suffered actual injury as a result of the violations. *See* W. Va. 33-11-1, et seq. In the case at bar, Plaintiff has presented insufficient evidence of potential violations of the UTPA by Defendant Erie. While it is true that Erie waited several months between receiving Mr. Bragg's engineering report and producing a copy of the report to the Plaintiff, the only evidence presented to this Court was that it was BRIM, not Defendant Erie, who controlled the investigation and coverage decision.

The evidence reflects that Defendant Erie waited for the results of BRIM's investigation before providing Mr. Bragg's report. The Plaintiff has not pointed this Court to any authority that Defendant Erie was required to produce a copy of its independent engineer's report to the insured while the investigation was still pending. Similarly, the fact that Defendant Erie asked its engineer to elaborate upon the potential "other causes" of the complained of damage is not indicative of bad faith. The engineer had already opined that the damage was not caused by mine subsidence. It was reasonable for the carrier to further investigate what did cause the damage if not mine subsidence. The other bases upon which the Plaintiff alleges bad faith all relate back to Plaintiff's premise

that his claim for mine subsidence should have been paid. As noted above, only BRIM could approve and pay Plaintiff's claim for mine subsidence. There is no evidence that Defendant Erie violated any provisions of the UTPA in its handling of the claim while waiting for the results of BRIM's investigation and claim determination.

#### **IV. CONCLUSION**

Based upon the foregoing, this Court does hereby **GRANT** Defendant Erie's *Motion for Summary Judgment*.

The Court directs the Clerk to provide attested copies of this Order to all counsel of record.

*Jason A. Cuomo*

J



Brenda L. Miller

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

BRIAN FRYE,

Plaintiff,

v.

Civil Action No. 19-C-52

Judge Jason A. Cuomo

ERIE INSURANCE PROPERTY  
AND CASUALTY COMPANY,

Defendant.

**FINAL JUDGMENT ORDER**

This Court having granted summary judgment in favor of Defendant Erie Insurance Property and Casualty Company by Order filed on March 3, 2022, hereby **ORDERS** and **DIRECTS** pursuant to W.Va.R.Civ.P. 54, 58, and 79 that **FINAL JUDGMENT** be **ENTERED** in favor of said Defendant.

The Clerk is directed to send a certified copy of this Final Judgment Order to all counsel of record.

So **ENTERED** this 29th day of March, 2022.

Jason A. Cuomo  
Honorable Jason A. Cuomo

Case No. CC-35-2019-C-52

2. February 10, 2022 -- Erie filed its Motion for Summary Judgment under West Virginia Rule of Civil Procedure 56(b) arguing that there was no genuine issue of material fact and Erie was entitled to summary judgment as a matter of law.

3. Erie's Motion for Summary Judgment was fully briefed by the parties pursuant to this Court's briefing schedule, and limited arguments of counsel were presented to the Court by counsel at the pretrial conference held before this Court on February 28, 2022.

4. March 3, 2022 -- this Court entered its Order Granting Defendant's *Motion for Summary Judgment* ("Order"), and on March 29, 2022 entered its *Final Judgment Order*.

5. March 30, 2022 -- Plaintiff filed the instant Motion to Alter or Amend Judgment pursuant to West Virginia Rule of Civil Procedure 59(e). Plaintiff argues the Court's *Order* was based upon clear errors of law.

## II. STANDARDS OF REVIEW

1. There are four grounds for altering or amending a judgment pursuant to West Virginia Rule of Civil Procedure 59(e): 1) to accommodate an intervening change in controlling law; 2) to account for new evidence not available at trial; 3) to correct a clear error of law; or 4) to prevent manifest injustice. *Mey v. Pep Boys — Manny, Moe & Jack*, 228 W. Va. 48, 56–57, 717 S.E.2d 235, 243–44 (2011) (quoting Franklin D. Cleckley, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 59(e) at 1178–79 (3d ed. 2008)). However, West Virginia law provides that "[a] motion under Rule 59(e) is not appropriate for presenting new legal arguments, factual contentions, or claims that could have previously been argued." *Mey*, 228 W. Va. at 56, 717 S.E.2d at 243 (citing *Freeman v. Busch*, 349 F.3d 582 (8th Cir. 2003)).

2. A Rule 59(e) motion may not be used to re-litigate old matters and is an extraordinary remedy that should be used sparingly. See *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 57 (2011); *Am. Reliable Ins. Co. v. Stillwell*, 212 F. Supp. 2d 621, 632 (N.D. W. Va. 2002).

## III. DISCUSSION

Plaintiff advances two separate arguments of "clear error." First, Plaintiff asserts, for the first time, that the statutory scheme of W. Va. Code §§ 33-30-1 et seq. is unconstitutional

“because it leaves plaintiffs without a remedy.” (Plaintiff’s *Motion to Alter or Amend Judgment*, p. 2) This argument was not plead in Plaintiff’s *Complaint* nor argued in Plaintiff’s *Motion for Summary Judgment* briefings. Regardless, as this Court found in its Order, Plaintiff presented no genuine issues of material fact for a jury to resolve, and no reasonable jury could have concluded based upon those facts, that Plaintiff’s home sustained damage from mine subsidence.

Secondly, Plaintiff argues that this Court erred in concluding that the relevant statutory scheme prevents an insured from filing suit against its insurer arising out of a mine subsidence claim. This is simply an incorrect interpretation of this Court’s Order. (Plaintiff’s *Motion to Alter or Amend Judgment*, p. 10) To the contrary, this Court’s Order noted specific circumstances under which suit would be permissible, while noting that no such circumstances were present in this case.

The remainder of Plaintiff’s *Motion* is further attempt to re-litigate old matters already decided by this Court. Plaintiff has failed to demonstrate an intervening change in controlling law, new evidence, a clear error of law, or manifest injustice. As such, Plaintiff cannot establish entitlement to relief under Rule 59(e) of the West Virginia Rules of Civil Procedure.

**ACCORDINGLY**, this Court **DENIES** Plaintiff’s *Motion to Alter or Amend the Judgment* and affirms its Order Granting Eric’s *Motion for Summary Judgment*, entered March 3, 2022.

It is so **ORDERED**. The Court **DIRECTS** the Clerk to send a certified copy of this Order to all parties and counsel of record.

/s/ Jason A. Cuomo  
Circuit Court Judge  
1st Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit [www.courtswv.gov/e-file/](http://www.courtswv.gov/e-file/) for more details.